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CIRCUIT COURTS OF APPEALS AND
DISTRICT COURTS OF THE
UNITED STATES

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
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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

WALKER v. ARKANSAS NAT. BANK OF HOT SPRINGS.

(Circuit Court of Appeals, Eighth Circuit. February 18, 1919.)

No. 5178.

1. HUSBAND AND WIFE ⚡56—NOTE BY WIFE—WHAT LAW GOVERNS.
In an action on a married woman's note executed and payable in the state of Arkansas, the laws of that state control.
2. HUSBAND AND WIFE ⚡87(3)—SURETY ON NOTE FOR HUSBAND.
Prior to Act Ark. March 19, 1915 (Acts 1915, p. 684), a married woman would not be liable as a surety on a note for her husband, but since its passage all restrictions have been removed, and a married woman may sue and be sued, contract and be contracted with, as though she were a feme sole.
3. HUSBAND AND WIFE ⚡171(1)—MORTGAGES—SURETY FOR HUSBAND.
It is the settled law of Arkansas that a married woman may mortgage her separate estate as surety for her husband without any consideration passing to her, the consideration to her husband supporting the mortgage.
4. HUSBAND AND WIFE ⚡85(6)—NOTE FOR HUSBAND'S DEBT—VALIDITY—RENEWAL NOTES.
As prior to Act Ark. March 19, 1915 (Acts 1915, p. 684), a note executed by a married woman as surety for her husband was merely voidable, a renewal note given after the passage of such act, which allowed a married woman to become surety for her husband, is not void under the rule that a contract absolutely void for illegality will not be validated by a renewal note.
5. HUSBAND AND WIFE ⚡85(6)—SURETY FOR HUSBAND.
Prior to Act Ark. March 19, 1915 (Acts 1915, p. 684), a note executed by a married woman as surety for her husband was not wholly void, but merely voidable; there being no statute prohibiting a married woman from becoming a surety.
6. HUSBAND AND WIFE ⚡85(6)—SURETY FOR HUSBAND—RENEWAL NOTES.
Where a married woman who had before Act Ark. March 19, 1915 (Acts 1915, p. 684), signed a note as surety for her husband, and after the passage of such act, with knowledge that part of the consideration was the note so signed, executed a renewal note, *held*, that she is estopped from setting up the failure of consideration in an action on the renewal note.

7. INFANTS ⇨57(1)—NEW CONTRACT AFTER MATURITY.

While infants are not liable on contracts not for necessities, yet if, after coming of age, they execute new contracts in writing, they are liable thereon.

8. INFANTS ⇨57(1)—CONTRACTS—ACQUIESCENCE.

An infant may be estopped by acquiescence after he comes of age to disclaim liability under a contract executed during infancy not for necessities.

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

Action by the Arkansas National Bank of Hot Springs against Margaret F. Walker. Judgment for plaintiff, and defendant brings error. Affirmed.

This is an action on a promissory note for \$3,800, executed by the defendant at Hot Springs, Ark., on January 8, 1916, which sum she promised to pay 60 days after date, at the Arkansas National Bank, in Hot Springs, Ark. The note was indorsed by F. P. Walker. Having failed to pay the note, this action was instituted.

The answer of the defendant pleaded: That, at the time she executed the note sued on, and for several years before that time, she was a resident of the state of Arkansas, and a married woman, the wife of Frank P. Walker. That, long prior to the execution of the note, her said husband was indebted to the plaintiff bank in the sum of \$2,500, which indebtedness was originally incurred by him prior to the year 1915, and that, prior to that year, her husband and the plaintiff prevailed upon her to sign her husband's promissory note for the sum, as surety. That this practice of her signing as surety continued prior to and through the year 1915. That on or about November, 1915, she again signed a promissory note for \$3,800, which included the sum of \$2,500, and the sum of \$1,300, borrowed on her own note, which last note was to fall due January 8, 1916; she being herself ignorant at all times of business affairs. That of the \$3,800, included in the note which she signed, she had borrowed, prior to the year 1915, from the plaintiff, the sum of \$1,300, which she had offered to pay, although not legally bound to do so. That the note sued on is, as to her, wholly without consideration, except possibly as to the said sum of \$1,300. That, so far as the \$2,500 is concerned, she only signed as surety for her husband—all of which was well known to the plaintiff. That prior to the 19th day of March, 1915, she being a married woman, she was not liable under the laws of the state of Arkansas for any debts not made for the benefit of her own separate estate and her sole and separate use and benefit, and no contract or promise of a married woman could bind her, except such as she made in and about her sole and separate estate. That no part of the \$2,500 was for the benefit of her separate estate, and that she received no benefit whatever from it. That the \$1,300, which she did receive was not for her personal estate, but for personal expenses, which should have been provided for by her husband, and that under the laws of the state of Arkansas, in force at that time, she was not liable for that sum. She therefore prays judgment to go hence without day.

The plaintiff filed a motion for judgment on the pleadings, which was by the court sustained and judgment entered against the defendant for the face of the note, and interest.

To reverse this judgment this writ of error is prosecuted.

Cyrus Crane, of Kansas City, Mo. (Lathrop, Morrow, Fox & Moore, of Kansas City, Mo., on the brief), for plaintiff in error.

Hale H. Cook, of Kansas City, Mo. (Roy K. Dietrich and Ellis, Cook & Dietrich, all of Kansas City, Mo., on the brief), for defendant in error.

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

TRIEBER, District Judge (after stating the facts as above). [1, 2] As the cause of action is based on a promissory note, executed and payable in the state of Arkansas, the laws of that state control. What the law of that state was prior to the enactment of Act of March 19, 1915 (Acts 1915, p. 684), and what it is since the enactment of that act, is stated in the late decision of the Supreme Court of that state in *Holland v. Bond*, 125 Ark. 526, 189 S. W. 165, as follows:

"Prior to the passage of this act a married woman would not be liable as surety on a promissory note for her husband because contracts could only be made by a married woman in reference to her separate property or business. [Citing authorities.] But the act of 1915, just referred to, has removed that restriction, and in the broadest terms enables a married woman to sue and be sued, to contract and be contracted with, and in law and equity to enjoy all rights and be subjected to all the laws of this state as though she were a feme sole. * * * This construction also results from the reasoning of the court in *Fitzpatrick v. Owens*, 124 Ark. 167, 186 S. W. 832 [187 S. W. 460, L. R. A. 1917B, 774, Ann. Cas. 1918C, 772], where we held that the statute meant to give the wife the right to maintain an action against her husband either upon contract or for tort."

Applying this rule to the instant case, the note sued on having been executed by the defendant after the act of 1915 had gone into effect, she is *prima facie* liable.

[3-5] But it is urged that, as this note is but a renewal of former notes, executed while, under the laws of the state of Arkansas, a married woman could not be held liable on a contract of suretyship on a promissory note, she is not liable on a renewal note executed after her disabilities had been removed, as the validity of the note must be determined by the law in force at the time the original contract was made.

An examination of the authorities relied on on behalf of the plaintiff in error fails to sustain this contention. What they hold is the well-established rule that, a contract absolutely void for illegality, either prohibited by statute, or *malum in se*, or being against public policy, will not be validated by a renewal note. But there never was a statute of the state prohibiting a married woman to become a surety, nor is such an act *malum in se* or against public policy, and therefore her contract is not absolutely void, but merely voidable, although courts frequently use the word "void" in speaking of such a contract when meaning "voidable." *Ramsey v. Crevlin*, 254 Fed. 813, — C. C. A. —, decided by this court December 4, 1918, and authorities there cited.

It is the settled law of Arkansas that a married woman may mortgage her separate estate, as surety for her husband, without any consideration passing to her. The consideration to her husband will support her mortgage. *Collins v. Wassell*, 34 Ark. 17; *Scott v. Ward*, 35 Ark. 480; *Petty v. Grisard*, 45 Ark. 117; *Goldsmith v. Lewine*, 70 Ark. 516, 69 S. W. 308; *Johnson v. Graham Bros.*, 98 Ark. 274, 135 S. W. 853; *Harper v. McGoogan*, 107 Ark. 10, 154 S. W. 187.

In *Vance v. Wells*, 8 Ala. 399, it was held that—

“A note executed by a married woman as surety for her husband creates a moral obligation, which will support an action at law on her promise to pay after discovery.”

To the same effect are *Spitz v. Fourth National Bank*, 8 Lea. (Tenn.) 641; *Bank of Hanover v. Bridges*, 98 N. C. 67, 3 S. E. 826, 2 Am. St. Rep. 317.

In *Viser v. Bertrand*, 14 Ark. 267, 273, Chief Justice Watkins speaking for the court said:

“I am clearly of opinion that, if the jury believed the facts which I suppose the evidence conduced to prove, * * * the plaintiff below was entitled to recover upon the express promise of the defendant after she became discovert, without any new or further consideration for the promise being made to appear.”

Mr. Justice Walker in a concurring opinion said (page 280):

“In the case now under consideration, although no legal obligation existed under which the defendant could have been compelled to pay for the professional services, still such services were a legal consideration which, but for the rule of law that makes void the contract of a feme covert, a recovery might have been had upon an implied assumpsit, and consequently furnished a sufficient consideration to uphold an express promise made after the divorce to pay for them.”

In *Woodruff v. Scruggs*, 27 Ark. 26, 11 Am. Rep. 777, the question before the court was whether a note which under the statutes, in force at the time of its execution, was void for usury, was enforceable after the repeal of that statute, and it was held that it was. This was reaffirmed in *Birnie v. Main*, 29 Ark. 591, 596; *Nicholls v. Gee*, 30 Ark. 135, 141. To the same effect is *Ewell v. Daggs*, 108 U. S. 143, 150, 2 Sup. Ct. 408, 27 L. Ed. 682.

In *Chollar v. Temple*, 39 Ark. 238, 243, it was held that although no judgment could be rendered against a married woman, if she had appeared and set up her coverture, a judgment by default against her, although erroneous, is neither void nor erroneous, but may be enforced against her separate estate by execution, as if she were a feme sole.

[6] The next contention is that the renewal of the former notes and consequent extension of time is not a sufficient consideration for the execution of the note sued on, and as she was not liable, by reason of her coverture, on the notes executed prior to 1915, this note is without consideration. But the law of the state, as settled by the decisions of its highest court, is that—

“One who gives a note in renewal of another note, with knowledge at the time of a partial failure of the consideration for the original note, is estopped from setting up the defense of failure of consideration, in an action on the renewal note.” *Stewart v. Simon*, 111 Ark. 358, 163 S. W. 1135, Ann. Cas. 1916A, 825, where the authorities are fully considered.

This case has been reaffirmed in *Haglin v. Friedman*, 118 Ark. 465, 177 S. W. 429. Other cases decided by the Supreme Court of that state, to the same effect, are *Tabor v. Merchants' National Bank*, 48 Ark. 454, 3 S. W. 805, 3 Am. St. Rep. 241; *Hamiter v. Brown*, 88

Ark. 97, 113 S. W. 1014; *White-Wilson-Drew Co. v. Egelhoff*, 96 Ark. 105, 131 S. W. 208.

[7, 8] Infants are not liable on contracts not for necessities, but it has been uniformly held that, if, after becoming of age, they execute a new contract in writing, they will be liable on it. *Watkins v. Waswell*, 15 Ark. 73; *Barnaby v. Barnaby*, 1 Pick (Mass.) 221; *American Mortgage Co. v. Wright*, 101 Ala. 658, 14 South. 399; *Ward v. Anderson*, 111 N. C. 115, 15 S. E. 933; *Houlton v. Manteuffel*, 51 Minn. 185, 53 N. W. 541. An infant may be estopped by acquiescence after he becomes of age. *Brazeo v. Schofield*, 124 U. S. 495, 504, 8 Sup. Ct. 604, 31 L. Ed. 484.

The judgment is right, and is affirmed.

LA MOTTE et al. v. UNITED STATES.

UNITED STATES v. LA MOTTE et al.

(Circuit Court of Appeals, Eighth Circuit. January 30, 1919.)

Nos. 5099, 5129.

1. INDIANS ⇨10—INDIAN LANDS—GRANTS—CONDITIONS.

The United States, as owner of the fee of lands allotted to Indians, may impose such conditions as it sees fit in its grant to them.

2. INDIANS ⇨15(1)—LANDS—ALIENATION—RESTRICTIONS.

The United States, as guardian of tribal Indians, may impose such restrictions on their alienation of lands allotted as may seem advisable for their protection and welfare.

3. INDIANS ⇨16(3)—LANDS—LEASES.

Under First Allotment Act June 28, 1906, §§ 2-7, 12, *held* that the Secretary of the Interior is required to approve a lease of lands allotted under the statute and held by minors or other incompetent Indians, whether such lands came to them by allotment, descent, or devise, and whether the lease was arranged by a parent, guardian, or administrator, who might or might not be a nonmember of the tribe, or an Indian certified as competent, or was approved by the state county court.

4. INDIANS ⇨16(3)—LANDS—LEASES.

Under Osage Allotment Act, §§ 2-7, 12, where lands are held by tenants in common, part of whom are incompetent and part competent, or nonmembers of the tribe, a lease to be valid must be approved by the Secretary of the Interior; the remedy of the competent tenant being to secure partition in accordance with Act April 18, 1912, c. 83, § 6.

5. INDIANS ⇨16(3)—LANDS—LEASES.

Under the Osage Allotment Act of June 28, 1906, *held* that, though restrictions as to alienation removed from surplus lands do not, where the lands have been conveyed or devised, etc., follow the land into whosoever hands it may pass, yet a lease of lands owned by noncompetent Indians, to be valid, must be approved by the Secretary of the Interior, though it has come to them through descent, devise, or purchase from or through competent or nonmembers of the tribe.

6. INDIANS ⇨16(3)—LANDS—LEASES—FORMS.

Under the Osage Allotment Act of June 28, 1906, which requires leases of the lands of noncompetent Indians to be approved by the Secretary of the Interior, and in view of section 12 declaring that all things necessary to carry into effect the provisions of the act shall be done, the Secre-

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

tary may prescribe a form of lease, and require that leases be executed in such form as a condition to his approval.

7. INDIANS \Leftrightarrow 16(3)—LANDS—AUTHORITY OF UNITED STATES.

Where a lease by an Indian allottee was approved by the Secretary of the Interior, and the lessee went into possession, the government is not concerned, and has no authority to protect the lessee from trespass by cattle, where the freehold is not injured, and the allottee lessor is not affected.

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Bill by the United States against George G. La Motte and others. From the decree, defendants appeal, and complainant cross-appeals. Modified and affirmed.

T. J. Leahy and C. S. Macdonald, both of Pawhuska, Okl., for La Motte and others.

John A. Fain, U. S. Atty., of Lawton, Okl., and Redmond S. Cole, Asst. U. S. Atty., of Pawnee, Okl.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

STONE, Circuit Judge. Cross-appeals from an injunction bill brought by the government against George G. and Anna Marx La Motte. The purpose of the bill as revealed in the prayer was to prevent the La Mottes from—

"entering into any lease, of any kind or character, with any incompetent Osage Indian, and by any means or manner, other than that prescribed by the Secretary of the Interior; and that they be further restrained and enjoined from using, occupying, and exercising any control, and from assigning and subleasing any lands informally leased or acquired, as aforesaid, from any incompetent Osage Indian member of the Osage Tribe of Indians in Oklahoma, without first having complied with the rules and regulations of the Secretary of the Interior."

The basis of the bill was (a) that the La Mottes were dealing and intended to continue to deal in agricultural leases of lands of non-competent Osage Indians without securing the approval of such leases or subleases by the Secretary of the Interior and without complying with the rules and regulations of the Secretary concerning such leases; (b) that in so doing and in placing their customers upon such lands they were interfering with and preventing the proper leasing of the lands by the Secretary in accordance with such rules and regulations; (c) that the placing of such customers upon these lands gave rise to numerous trespasses on such lands and also upon other land inclosed within the fencing of the lands so attempted to be controlled by them; (d) that it would require a multitude of suits by the government to prevent such trespasses and clear these lands of such intruders.

The modus operandi of the La Mottes is described as follows:

"That the defendants are pretending to be engaged in the business of leasing Osage Indian lands for the use of various and numerous persons, firms and corporations to graze cattle thereon, and for agricultural purposes. That the manner and means of procuring leases for use as aforesaid is, in

substance, as follows: That the said defendants will solicit various incompetent Osage Indians to execute a lease upon lands allotted to them, which said leases are not in the form prescribed by the Secretary of the Interior, but are informal, in that they do not comply with the provisions of Exhibit A [form of lease required by the Department]. That the defendants will continue to procure as many leases from as many allottees within a certain prescribed area until said defendants have, under the guise of said leases, obtained in their own name, or in the name of the person whom they represent, a body of land which they cause to be inclosed with fence, and denominate the same a 'pasture'; that this 'pasture' is then leased, or subleased, or contracted, to the person, firm, or corporation desiring the use of the same to graze cattle thereon and for agricultural purposes. That the said defendants charge said persons, firms, or corporations a large sum of money, and place said persons, firms, or corporations in possession of said land, and thereafter said lands are used by said persons, firms, or corporations, for grazing purposes and for agricultural purposes, the said defendants guaranteeing to said persons, firms, or corporations that they will pay all trespass money and all rentals, and that the defendants will assume all liability to the said persons, firms, or corporations that may be occasioned by the use and occupancy of the said lands as aforesaid; that it is not the intention, nor the custom of said defendants, to have said leases, so procured from said incompetent Osage Indians, signed, subscribed and sworn to before an officer of the Osage Indian Agency; neither is it the intention nor the custom to submit said leases to the Secretary of the Interior for his consent and approval; but that, on the contrary, immediately after the procurement of said leases as aforesaid, the said defendants, for a sum stated, proceed to place the person, firm, or corporation [designing] to use the said land, in possession.

"The plaintiff alleges that the defendants have, by the aforesaid manner and means, acquired informal leases from incompetent Osage Indians to the amount of approximately 25,000 acres of land, the exact number of which the plaintiff is unable to ascertain, but alleges that it is informed and believes that the number of acres so acquired will far exceed the amount of 25,000 acres. The plaintiff alleges that, for a number of years past, the defendants have procured, by the manner and means aforesaid, 'pastures' for H. M. Stonebreaker, T. P. Kyger, Lee Russell, Brown & Ellingwood, a partnership, R. H. Chowling, Thompson & Shipman, a partnership, Ross Heaton, and divers other persons, and have placed said persons and firms in possession, and have used and occupied lands belonging to incompetent Osage Indian allottees, for agricultural purposes and for grazing cattle, without complying with the rules and regulations of the Secretary of the Interior, as above set out, and without the knowledge or consent of the Secretary of the Interior, and that the defendants have established themselves in a permanent business conducted in the aforesaid manner, and are at the present time procuring, and will continue to procure, leases as aforesaid, for persons, firms, and corporations for the aforesaid purposes."

The bill also particularizes as to 26 described pieces of property so treated by them.

The answer admits the leasing of "lands in Osage County from Osage Indians and other people for grazing and agricultural purposes." It further says that it leases large bodies of land for grazing purposes adjacent to lands belonging to noncompetent Osage Indians and "that in order to lease their own lands * * * to cattle men who desire and demand large acreage, it is necessary for them to agree with such cattle men that they will protect and guarantee them from damages by reason of trespass upon such Indian lands. These defendants deny that they take possession of such lands or that they deliver possession to their own lessee of the same, but merely hold themselves liable for any trespass money that may be due on account

of stock running upon the same." The answer then deals with the specifically described tracts raising various questions concerning the authority of the Secretary over grazing and agricultural leases on Osage Indian lands in the different instances there illustrated. The answer concludes with a prayer:

"That the court declare and decree that these defendants may, without any violation of any authorized rules and regulations of the Secretary of the Interior, lease lands from the parents of minor Osages; also lands which are under the control of guardians and administrators duly appointed by the county court of Osage county, Oklahoma, and lands which are inherited by members of the tribe from deceased members of the tribe, even though such members do [not?] have certificates of competency, without conforming to the rules and regulations of the Secretary of the Interior concerning the leasing of Osage Indian lands, and that the court decree that the Secretary of the Interior has no authority under the law to promulgate rules and regulations concerning the leasing of lands of any of the members of the Osage Tribe of Indians and define and determine the authority of the Secretary of the Interior concerning the approval of farming and grazing leases of lands belonging to members of said tribe."

The decree of the court found that the following kinds of leases were invalid without the approval of the Secretary, to wit, of land of minor allottee by parents one of whom was a white nonmember of the tribe; of land of minor allottee by surviving parent, a white nonmember of the tribe; of land of minor allottee by parents after both of them had received certificates of competency under the Act of June 28, 1906 (34 Stat. 539, c. 3572); of land of minor allottee by father after receipt by him of such certificate of competency; of homestead allotment by competent Indian after receipt of certificate of competency under the above statute; of surplus allotment of noncompetent adult; by such heirs of lands allotted to noncompetent adult heirs (deceased dying intestate August 3, 1907, before selection of land); of surplus land, by noncompetent devisee; by a white nonmember of the tribe who was grantee under warranty deed from devisee of sole heir of land allotted to said heir as heir of Indian dying before June 28, 1906 (deceased, heir and devisee all being noncompetents and devisee receiving under will approved by Secretary providing "all devises of real estate made hereunder, are made subject to the condition that the real estate shall not be incumbered or alienated, without the consent of the Secretary of the Interior"). It found to be valid, leases executed by a guardian duly appointed by the county court, such leases being duly approved by the county court, on lands of minor allottees, and declared a certain lease would have been valid had it been made by a duly appointed administrator of surplus land allotted to decedent.

As to certain lands held in common the decree found as follows: (1) That where the lease was upon land inherited from allottee by his father, to whom a certificate of competency had been issued, and by his mother, to whom no such certificate had been issued, and the father thereafter had lost his interest through foreclosure of a mortgage placed by him thereon and the purchaser thereunder and the mother had executed a lease that the lease was valid as to the interest of the purchaser and void as to that of the mother; (2) that where the land of an infant allottee descended to his father, a noncompetent,

and to his mother, a white nonmember of the tribe, and the father acquired by purchase the mother's interest from her grantee, and subsequently leased the entire land, the lease was valid as to the interest coming through the mother and invalid as to that descending to the father; (3) that where lands descended from a noncompetent allottee to five heirs, three of whom were noncompetent (one having since died and his estate being in administration) and two had received competency certificates before the inheritance; and the estate had been administered and partition proceedings in progress; and the competent heirs had conveyed their interests to appellants; that appellants were enjoined from leasing the interest of the noncompetents or "from occupying or using the premises, or any part thereof, without the approval of the Secretary of the Interior"; (4) that where land descended from a noncompetent allottee to three heirs, two of which are noncompetent and one a nonmember of the tribe (lacking enrollment, though apparently a son), and thereafter through the death of the latter his interest descends to one of the other of the above two heirs, his mother, and she sold this latter interest to appellants who occupy and use the land with her consent, the other heir being a minor; that appellants are the owners of the one-third interest purchased but are enjoined from "in any manner occupying or using the said lands, or any portion thereof, or from inclosing same, or in any manner dealing with said lands, or any part thereof, without the consent of the Secretary of the Interior, or without procuring a lease upon the undivided one-third [two-thirds?] interest which is restricted."

The decree also found that there was no duty on the part of the government to protect from trespass, not injurious to the freehold, land leased in accordance with the rules and regulations of the Secretary of the Interior and upon which the lessee was paying the rental due. This was an instance of such land being adjacent to or surrounded by land belonging to appellants which had all been inclosed as a large pasture by an outside fence with no fence between this leased land and that of appellants; the trespass being by grazing cattle. The court denied a motion to dismiss the bill for defect in parties (in that the noncompetent Osage Indians were the real and sole parties in interest) and for lack of equity (in that no grounds for injunctive relief were stated and the existence of an adequate remedy at law by ejectment).

The various assignments of error cover all of the instances presented by the above statement. In their entirety they present for determination the broad questions of the powers and duties generally of the government in the protection of Osage Indian allottees and landowners and their lessees respecting agricultural and grazing leases and, in particular, the powers and duties of the Secretary of the Interior in that regard.

[1, 2] In dealing with tribal Indians in respect to severalty lands the United States has dual sources of authority. In the first place it may, as owner of the fee, impose such conditions as it sees fit in its grant to the Indian. In the second place it may, as the guardian of a people in a state of pupilage, impose such restrictions as seem advisable for the protection and welfare of such wards in the enjoyment or own-

ership of their land. The exercise of this latter authority in no way depends upon the former, but may operate where the land has passed from all restrictions of the grant. *Brader v. James*, 246 U. S. 88, 38 Sup. Ct. 285, 62 L. Ed. 591; *Tiger v. Western Inv. Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738.

As to instances of control through the grant of the lands it is established law (as stated in 14 R. C. L. 131) that:

"In making allotments of tribal lands the federal government has undoubted power to attach conditions to the grant, and it has exercised this power for the purpose of conserving the interests of the Indians by safeguarding the individual ownership of allottees through suitable restrictions designed to secure them in their possession and to prevent their exploitation, such, for example, as a prohibition against alienation for a specified period, or a requirement that an executive officer of the government shall assent to the execution of a conveyance."

Where the land is allotted in fee with no restrictive reservations, or where under the terms of the treaty or statute the land after restricted allotment passes from under the restriction, its ownership becomes untrammelled so far as governmental supervision extends, unless the allottee, or subsequent holder, is an Indian whose acts in respect to any land, or that character of land, are under governmental guardianship and as such controlled by law.

[3] The Osage Indians are recognized as maintaining a tribal organization, and their powers as to alienation of lands held in severalty are covered by the provisions of the Osage Allotment Act of June 28, 1906 (34 Stat. 539). As presented in this court and as found by the trial court the subsequent Act of April 18, 1912 (37 Stat. 86) concerned only two of the tracts of land here involved. In those two instances the act of 1912 did not affect the result reached by the trial court because one (the Wah-tsa-moie allotment) was a tenancy in common and the other (the Jack Wheeler allotment) was land subject to administration, but as to which there had never been any administration. Therefore the controversy is controlled by the Allotment Act of 1906 and what is herein stated refers to that act uninfluenced by later legislation. No opinion is ventured as to the effect of later legislation. That act provided (sections 2, 3, and 4) for the allotment of lands to the members of the tribe, subject to reservation to the tribe of all mineral rights therein for 25 years; the allotments to be divided into homestead and surplus lands; the homesteads to be inalienable until further congressional action and the surplus lands inalienable for 25 years, except that the Secretary of the Interior might grant to adults certificates of competency empowering them to convey their surplus lands and, after 25 years or the death of such allottees, their homesteads. As it would be impossible for such competent Indian to convey by deed after death, that part of the provision must be taken to mean testamentary disposition. It further provided (section 5) that at the expiration of 25 years "the lands, * * * shall be the absolute property of the individual members of the Osage tribe, * * * or their heirs, as herein provided, and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, * * * and said members shall

have full control of said lands, * * * except as hereinbefore provided." It then designated (section 6) the law to govern the descent of such lands. Section 7 provides for the use and control of such lands during the restriction period above designated as follows:

"That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof: Provided, that parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority: And provided further, that all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior."

Section 12 is:

"That all things necessary to carry into effect the provisions of this act not otherwise herein specifically provided for shall be done under the authority and direction of the Secretary of the Interior."

The purpose and policy of this act regarding these lands is clearly expressed. The mineral wealth is reserved for 25 years to the tribe under the strict control and protection of the Secretary, the proceeds thereof to be held in trust by him and distributed to the tribal members or their heirs. The surface is "set aside for the sole use and benefit of the individual members of the tribe, entitled thereto, or to their heirs" for 25 years from January 1, 1907. They are not to be diverted from this "use" by incumbrance or alienation except as to surplus lands of adults whom the Secretary has investigated and certified as competent to protect themselves in that regard, and except as to homesteads of such competent Indians which may be devised by them. To secure the full "benefit" to such Indians and their heirs they are permitted to fully control such lands for "farming, grazing or any other purpose not otherwise specifically provided for" in the act and to control the proceeds from such usage. They may accomplish this through leases, but, to prevent overreaching by lessees and the consequent partial or total destruction of the beneficial use designed by the act, the approval of such leases by the Secretary is required. The only exception to this last statement is in the case of those holding certificates of competency from the Secretary where it is provided that such persons "shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States."

Applying this definition of the statute to the various sets of facts determined in the decree of the trial court there results the following: The approval of the Secretary is required to leases of lands held by minors or other noncompetents whether the land covered thereby came to such through allotment, descent, or devise, provided the land was allotted under the above statute. The circumstance that such lease was arranged by a parent, guardian, or administrator who might or might not be a nonmember of the tribe or a member competent to manage his own affairs or that the lease may have been approved by the state

county court is of no consequence because the statute specifically requires the protection afforded by the approval of the Secretary. The above application applies to all of such sets of facts except those of a lease by a competent allottee of his surplus lands or homestead and of leases by competents or nonmembers of the tribe who were tenants in common with noncompetents. As to the former the statute provides that the homestead cannot be alienated, but it seems clear that such competent Indian, through the "right to manage, control and dispose of his or her lands the same as any citizen of the United States," expressly given by the statute, can make such leases without the approval of the Secretary.

[4]. As to instances where the land is held by tenants in common, part of whom are noncompetent and part competent or nonmembers of the tribe, a more perplexing situation is presented. Each of such tenants is, under the ordinary rules of tenancy in common, entitled to ingress, egress, and possession of the land and to a proper share of the benefits from the usage of the land. Such rights may be transferred by those legally capable of acting for themselves in such matters. But these considerations must bow to the requirements of the statute. Tenancy in common does not change a noncompetent into a competent Indian nor in any wise increase the power of such to deal with his interest in land so held. On the other hand, to permit the competent tenant to lease or use the entire tract or any undivided portion thereof, even though he accounted to the noncompetent tenant for his just portion, would completely obliterate that protection of supervision and approval which the statute carefully lodges in the Secretary alone. Therefore, the conclusion seems necessary that no lease of any part or interest in Osage Indian land held in common where one or more of such tenants in common are noncompetents can be made without the approval of the Secretary. Only through such a conclusion can the protection required by the statute be preserved. Apparent injustice to the competent or nonmember tenant cannot prevail against the statute, and such result is easily avoidable through the definite separation of land among the tenants through partition in accordance with the provisions of section 6 of the act of 1912 (37 Stat. 86).

[5] Another situation is presented by some of the above sets of facts and requires notice. That is where allotted lands have come through descent, devise or purchase to noncompetents from or through competents or nonmembers of the tribe. The provisions of section 2, par. 7, give full power of alienation of surplus lands to competents and make such subject to taxation. The homestead of such is made inalienable and nontaxable for 25 years "or during the life of the homestead allottee." These provisions show the legislative intention that all restrictions are removed from the surplus lands and, after 25 years or the death of the allottee, from the homestead. In short, that such restrictions do not follow the land into whosoever hands it may pass. But this determination is not conclusive of the right of alienation or leasing by a noncompetent Osage Indian who may succeed to or acquire the title to such land. As stated earlier in this opinion the government, through its powers and duty of wardship over a people in

a state of pupillage, may protect them in the disposition of allotted lands coming to them without restriction. Such were the cases of *Brader v. James*, 246 U. S. 88, 38 Sup. Ct. 285, 62 L. Ed. 591, and *Tiger v. Western Investment Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738. The question is, therefore: Has the government retained its control over the disposition by noncompetent Osage Indians of Osage lands no matter from what source those lands came to such noncompetents? If such control is retained it must be found in the act now under consideration. The act contemplates the continuation of the tribal government; the supervision of the valuable mineral rights (retained in the tribe) by the government for 25 years; the holding in trust by the government of tribal funds for 25 years; the absolute inalienability by noncompetents for 25 years of surplus lands and of homesteads until further provision by law; the specific requirement that "all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for their heirs, shall be subject only to the approval of the Secretary of the Interior"; the setting aside of these lands "for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs as herein provided." In the *Brader* and *Tiger* Cases, the Act of April 26, 1906 (34 Stat. 137), which dealt broadly with the Five Civilized Tribes, was reviewed. Both that and the Osage Allotment Act were passed by the same session of Congress. The Supreme Court in those cases determined that the provisions of that law showed a Congressional intention to retain control over the disposition of lands by the class of Indians there involved. A comparison of those provisions, as discussed and construed in those opinions, with the provisions of the act here in question shows a similarity as to many of them and, in our judgment, a stronger situation here where there is dissimilarity. We, therefore, conclude that Congress intended to and did in this act retain for 25 years such control over the Osage lands of noncompetent Osage Indians from whatever source they were derived.

[6] Another question is whether the Secretary has authority under this act to prescribe and enforce rules and regulations and forms of leases respecting the leasing of lands of noncompetents. We read the requirement that such leases "shall be subject only to the approval of the Secretary of the Interior" to mean that they are valid only when approved by him. The Secretary acts in such matters as the protector of the Indians' welfare. He can withhold such approval for any reason that seems to him meritorious. These lands comprise many thousands of acres. It was to be expected, as has proved true, that upon so much land and over a period of 25 years there would be many hundreds of these leases presented for his approval. It would seem the most natural procedure for the Secretary to work out and make public the general requirements he deemed necessary for the protection of such Indians, and therefore for the procurement of his approval. Such would be a great saving to him in the convenient and speedy performance of his duties in this respect and a like saving of delay and uncertainty to those desiring to procure such leases. In fact, such a procedure would seem a necessity to the proper perform-

ance by him of such a trust. This action is expressly authorized by section 12, which is:

"That all things necessary to carry into effect the provisions of this act not otherwise herein specifically provided for shall be done under the authority and direction of the Secretary of the Interior."

[7] There remains for our consideration the determination of the trial court that the government was without authority to maintain an injunction to restrain the La Mottes from leasing or grazing land leased by the allottee to H. G. Ezell. The facts are that Ezell is the valid lessee under the approval of the Secretary; that he has paid the full consideration therein required to the allottee; that the La Mottes have not attempted to lease such premises; that their lessees of other adjacent lands owned or controlled by them permit cattle to pass on and graze the unfenced leasehold held by Ezell. Such trespass does not injure the freehold nor affect the allottee lessor. The wrong is to Ezell alone and he has a legal remedy and he alone. The government is not concerned in and has no authority to protect such interest of Ezell.

There is a clear ground of equitable interference by the government stated in the bill in that leases made contrary to the statute cast clouds upon the title which the government holds in trust for the Indians.

The order is that the decree be modified in accordance with the terms of this opinion, and, as thus modified, affirmed. The costs in the court below to be assessed against the La Mottes.

DELAWARE, L. & W. R. CO. v. TOMASCO.

(Circuit Court of Appeals, Second Circuit. January 15, 1919.)

No. 127.

1. MASTER AND SERVANT Ⓒ220(7)—INJURY—ASSUMPTION OF RISK.

An interstate commerce employé, of experience, who after refusal of a light, and without assurance of safety or a light forthcoming in a reasonable time, continues in the dark at the work of removing a metal platform from where it had been used as passageway between freight cars on parallel trucks, must be held to have assumed the risk.

2. MASTER AND SERVANT Ⓒ204(1)—ASSUMPTION OF RISK—EMPLOYERS' LIABILITY ACT.

It is only risk of employment from violation by the master of a federal statute that under Employers' Liability Act, § 4 (Comp. St. § 8660), the employé may not be held to assume.

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

Action by Michael Tomasco against the Delaware, Lackawanna & Western Railroad Company for personal injuries. Verdict and judgment for plaintiff, and defendant brings error. Reversed.

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

Locke, Babcock, Spratt & Hollister, of Buffalo, N. Y. (Louis L. Babcock, of Buffalo, N. Y., of counsel), for plaintiff in error.
Charles Oishei, of Buffalo, N. Y., for defendant in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. On December 27, 1916, at about 6:10 p. m., the defendant in error, while in the service of the plaintiff in error, as a handler of freight at its freight house in East Buffalo, N. Y., sustained personal injuries, and seeks to maintain this action, claiming that he was injured through the negligence of the plaintiff in error and without any fault on his part. It is conceded that the plaintiff in error is a carrier engaged in interstate commerce, and that at the time of his injury the defendant in error, too, was engaged in work that had to do with interstate commerce. In the performance of his work at the hour above stated, it became necessary to remove the metal platform used as a passageway between the freight cars placed on parallel tracks, and while the defendant in error was engaged in this endeavor, he fell in the space between the two cars, as did the platform; the latter striking him on his arm, causing him to receive serious injury. It is alleged in the complaint, and the defendant in error sought to establish, that his injuries were brought about by reason of the darkness of the place in which he was engaged in fulfilling his work. The happening of his accident is described in his complaint as:

"And that by reason of the plaintiff being unable in the darkness existing to control the movement of the said skid or in the said darkness to catch himself on the sill of the door or opposite doorway, the plaintiff lost his balance and pitched headlong, together with the said heavy iron skid, downwards in the space between said cars, falling heavily to the ground, and so severely injuring his arm as to cause a compound fracture and breaking of the bones of the said arm and permanently injuring the plaintiff."

It was further pleaded that the defendant in error requested the foreman of the plaintiff in error to furnish a light at his place of work, so as to afford him an opportunity to guard himself against injury while in the performance of his work, and that the foreman neglected and refused to furnish a light, and thus the hazards existing while in the performance of the work to the defendant in error were increased. The case was submitted to the jury by the District Judge upon the theory that the negligence of the plaintiff in error might be established in the failure of the foreman to furnish a lighted lantern as requested by the defendant in error, and in failing to provide sufficient light so that the defendant in error might perform his work with reasonable safety to himself. The questions of assumption of risk and contributory negligence were submitted to the jury as questions of fact.

The metal platform in question was 3x4 feet and about three-sixteenths of an inch in thickness. It was used to bridge a space of about 30 inches between the two cars, so that freight might be trucked across from one car to another. The defendant in error says he was on the day shift and quit his work at about 5:30 p. m., and on the evening in question was requested to do extra work, which consisted merely of removing the running board and closing the car doors, for which

he was to receive extra pay. He says that he had been working in the "pitch dark" since a quarter of 5 or half past 4, and that then he met the foreman and asked for a lantern, because it was dark, and he told the foreman it was "kind of dangerous," to which the foreman replied, to go over to the office and get a light, if there was one there. "If there isn't," he said, 'you take one to-morrow.' I did not get a light." Further, defendant in error says that he did not go to the office, but that the foreman went there, and, after the foreman told him that there was no light, then the defendant in error went to work with his fellow laborer, Paladino.

A large number of witnesses called by the plaintiff in error disputed the claim of the defendant in error that the place of work was dark, and testimony was adduced indicating that along the freight platform adjacent to the cars there was an ample system of electric lighting, which the witnesses said was in good repair and lighted at the time of the accident to defendant in error.

[1, 2] But, assuming the condition, as we must upon this appeal, to be as the defendant in error claims, we are of the opinion that he cannot succeed, for we are obliged to hold that he assumed the risk as a matter of law. The District Judge was requested to charge the jury that the defendant in error assumed the risk as a matter of law, by requests couched in varying phraseology, and in each instance denied the request, leaving the question of assumption of risk with the jury as one of fact.

The defendant in error, in narrating his own experience, stated that he had worked for 3 years in a coal mine, and then 12 months as a railroad track laborer, and 3 months as a railroad laborer, loading and unloading rails for the Lehigh Valley Railroad Company, and then about 2 years for his present employer, which time was largely spent in doing work similar to that which he was doing on the night in question. Therefore he must be charged with a thorough knowledge of the details of the work of loading and unloading cars, the location of the freight house, and the railroad trackage thereabouts at the East Buffalo freight yard. This must necessarily include knowledge that the freight cars, while on parallel tracks, would have a space of about 30 inches between them, and that to misstep might result in falling into said space. He seems to have fully appreciated this danger, as also the danger of working about a space of this kind without a light. He says he requested a light, and was told that none was available, and he then went back and resumed his work, and, if it be true that at the time and place it was "pitch dark," this knowledge was better known to him than to his master. After being refused a light, he said he continued without a promise or assurance of safety, or without assurance that a light would be forthcoming within a reasonable time. It appears that he resumed his work without further protest or coercion of any character on the part of his foreman. Indeed, he describes this work as "extra work" or extra hours of service, and he was concerned about his own safety. He had the right to refuse to continue on in the extra work until the necessary light had been furnished. If the plaintiff in error's version of the accident be true, he

was injured because of a danger which he knew and appreciated, and which he asked the foreman to guard against by supplying him a lantern.

We are of opinion that the District Judge, on these facts, was obligated to hold the defendant in error assumed the risk as a matter of law, and the failure to instruct the jury as requested was error. Section 4 of the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. § 8660), provides that in any action against a common carrier, under or by virtue of any of the provisions of the Employers' Liability Act, to recover damages for injuries to or death of any of its employes, such employe shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe. This applies to the so-called Safety Appliance Act, and hence would not debar the plaintiff in error from insisting upon the defense of assumption of risk, just as it may be established under the rules at common law as a complete bar in an action for injuries to the person of an employe. *Boldt v. Pennsylvania R. Co.*, 245 U. S. 441, 38 Sup. Ct. 139, 62 L. Ed. 385; *Seaboard Air Line Ry. v. Horton*, 233 U. S. 493, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475.

While the master here was bound to furnish the employe with a proper and safe place in which to perform his work, and in this it was the duty of the master to see that the place of work was properly lighted to enable it to be done with reasonable safety, it is also true that the servant assumed the obvious risks of his employment. The rule is well settled that if the servant knows of the failure of the master to completely discharge his duty to exercise ordinary care to furnish a reasonably safe place in which to work and sufficient servants or reasonably safe appliances with which to work, and if he appreciated its effect, or if the failure and its effect are obvious or plainly observable, and he continues in the employment without objection, he elects to assume the risk of them and is precluded from a recovery.

We therefore conclude upon this record that the defendant in error is affected by the established doctrine that an employe, with knowledge of the danger, which he fully appreciates, and of which he is conclusively presumed to have assumed the attendant risk, cannot recover, if he continues and is injured. *Butler v. Frazee*, 211 U. S. 459, 29 Sup. Ct. 136, 53 L. Ed. 281.

The exceptions to the requests to charge present error which requires a reversal of the judgment below.

Judgment reversed.

MICHIGAN CENT. R. CO. et al. v. ELLIOTT.

(Circuit Court of Appeals, Second Circuit. January 15, 1919.)

No. 86.

1. COMMERCE ⇨97—INTERSTATE COMMERCE COMMISSION—REPARATION ORDER—ACTION—EVIDENCE BEFORE COMMISSION.

It is the duty of the court, in an action on a reparation order made by the Interstate Commerce Commission, where the record before the Commission is offered in evidence as against the order, to inquire whether there was any substantial evidence before the Commission to justify the order.

2. COMMERCE ⇨95—INTERSTATE COMMERCE COMMISSION—REPARATION ORDER—ACTION—JUDGMENT.

Judgment should be for defendant, in an action on a reparation order of the Interstate Commerce Commission in favor of a consignee; there being nothing but the order and the record before the Commission, showing that, while it found the charge unreasonable, it made the order on the mere assignment by the shipper to the consignee of all its claims in the matter, after it had found that it clearly appeared that the shipper had paid no freight charge, and that there was no proof that the consignee had paid the excess.

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

Action by James R. Elliott against the Michigan Central Railroad Company and others. Judgment for plaintiff after trial by the court, and defendants bring error. Reversed, and new trial awarded.

Locke, Babcock, Spratt & Hollister, of Buffalo, N. Y. (John M. Sternhagen, of New York City, of counsel), for plaintiffs in error.

August Becker and Charles Dautch, both of Buffalo, N. Y., for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge. The Lippard-Stewart Company shipped from Black Rock, N. Y., over the Michigan Central Company's lines, to the Michigan Motors Company, at Portland, Or., three motor cars. The shippers had requested that the cars be placed in one 50-foot freight car. Such car not being immediately available, the motors were put in two smaller cars, thereby increasing the freight charge.

To recover the difference between the rate asked for and that charged, the Lippard and Michigan Motors Companies filed with the Interstate Commerce Commission their joint petition for reparation. The findings of the Commission were in substance that the higher charge was unreasonable, and that reparation was due to some one, as prayed for; but, since it clearly appeared that Lippard Company had paid no freight charge at all, while there was no proof that Michigan Motors Company had paid the excess, no reparation order could be made, and the matter would "be held open." Thereupon Lippard Company assigned to Michigan Motors Company all its "claims, demands, and recoveries" in the premises against the carriers, and the Interstate Commission,

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on production of such assignment, entered a reparation order requiring the carriers to pay Michigan Motors Company a definite sum of money "on account of unreasonable charge" in the transportation of said motor cars.

This order not being obeyed, the Michigan Motors Company began suit, under section 16 of the Act to Regulate Commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [Comp. St. § 8584]), to recover the amount awarded in the reparation order.

[1, 2] At trial, plaintiff introduced the findings and order of the Commission, which by the said section of the act are "prima facie evidence of the facts therein stated," and rested. Defendants offered the record before the Interstate Commission, and agreed that Elliott had succeeded to whatever were the rights of Michigan Motors Company.

The District Court held, as a conclusion of law, that "no legal competent evidence" had been adduced "upon the trial of this action to rebut the prima facie evidence furnished by the report and order of the Interstate Commerce Commission," and gave judgment for the amount fixed in the reparation order, with interest, costs, and counsel fee. Whereupon this writ was taken.

The case for Elliott in final analysis is based on the proposition that the findings and order of the Interstate Commission, though shown to rest on nothing that the law calls evidence, must nevertheless be themselves received as satisfactory evidence of whatever facts, or assertions of fact, are therein contained, unless rebutted by new and more persuasive testimony. Such is not the law. It was the duty of the trial court to inquire whether there was any substantial evidence before the Commission to justify its order. The matter has been so recently and exhaustively considered in *Atchison, etc., Co. v. Spiller*, 246 Fed. 1, 158 C. C. A. 227; 249 Fed. 677, 161 C. C. A. 587, that no further citation is necessary.

When the record of this proceeding is examined, it is seen to be, like all such suits, a claim for damages, and certainly it is a necessary element of most claims for pecuniary damages that the successful party should have pecuniarily suffered. It affirmatively appeared below that the Lippard Company had suffered nothing; there was no evidence that the Michigan Motors Company had suffered—i. e., paid unjust freight charges. Thereupon, on production of an assignment from the petitioner who had received no damage to the one who had proved none, an order of reparation was made in favor of the latter. Such an assignment transferred nothing, and, on the very finding of the Commission, judgment should have been given for defendants.

Judgment reversed, with costs, and new trial awarded.

THE MAY MCGUIRL

(Circuit Court of Appeals, Second Circuit, January 15, 1919.)

Nos. 143, 144.

TOWAGE \Leftrightarrow 11(10)—MOORING LAW—NEGLIGENCE.

A tug which, having in tow, tandem, two scows heavily loaded with brick, on reaching the Gowanus Canal, found congested, left them, for the night, with a single line from the front of the tow to the waist of the scow K., lying with an end fastened to the bulkhead, 15 feet from the end thereof, instead of placing them alongside the K. and each other, as she might, held at fault in not giving them the best mooring the situation afforded, which was the proximate cause of the forward barge, under the influence of tide and wind, catching on an obstruction, beyond the bulkhead, listing, dumping most of her cargo, and injuring herself.

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

Two libels in admiralty, tried together, one by the Sutton & Suderley Brick Company, and the other by Jacob Rice, against the steam tug May McGuirl, her engines, etc.; the Shamrock Towing Company, claimant. From decrees for libelants, claimant appeals. Affirmed.

Alexander & Ash, of New York City (Peter Alexander, of New York City, of counsel), for appellant.

Hyland & Zabriskie, of New York City (Nelson Zabriskie, of New York City, of counsel), for appellee Brick Co.

Macklin, Brown & Purdy, of New York City (William F. Purdy, of New York City, of counsel), for appellee Rice.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. The libelants are owners—the Brick Company of the cargo, and Rice of the hull—of the scow Augusta R., which was in charge of the tug May McGuirl, bound for a point on the Gowanus Canal. After dark of a spring evening, with the wind light from the northeast, the tug arrived as near the scow's destination as she could get that night, and left her tow in what is charged in the pleadings as an unsafe mooring. The tow consisted, not only of the Augusta R., but of another and somewhat larger brick scow, the Rich. The two scows had been taken into the canal tandem, with their ends close together; the tug towing on the Augusta R., as hawser boat, by two short hawsers.

There was great congestion in the canal, and at the point where the tug left her tow the scow Keystone was lying, with several other boats, having one end fastened to the bulkhead, and so projecting athwart the canal; her side nearest the approaching tug being clear, and her other side against, and probably fastened to other vessels lying to the same bulkhead. This bulkhead terminated about 15 feet from the nearer side of the Keystone, and the bottom back of the line of the bulkhead prolonged was not good.

The tow thus about to be left was at least 225 feet long and heavily laden. The forward end of the Augustus R. was put close to the Key-

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stone's side, one line run from her to the Keystone, and the tug went away, leaving 225 feet of brick scows, head on to the Keystone, forming a right angle with her at approximately amidships, and fast to nothing else, with the tide rising, and the wind, though light, tending to swing the tow. That this was a dangerous situation seems very plain; that it was unnecessary is proven by the admission of the McGuirl's master that it was possible to put the boats alongside the Keystone "if you had cared to do it"; and that there was nothing to prevent putting the Augusta R. and Rich alongside each other, instead of tandem—a position which put an enormous leverage on any lines the Augusta R. could get out from her bow or front end to the Keystone.

There was no protest on the part of the two men who made up the crews of the scows at being left in this way. After the tug's departure they attempted, by using their winches, to do what the tug should have done, or furnished the power to do; i. e., get alongside the Keystone and each other. Man power proved insufficient for the work, so they got the side of the Augusta R. against the 15 feet of free bulkhead, made as fast as they could to that mooring, and left the Rich tailing on behind. When the tide fell, the end of the Augusta R. projecting beyond the bulkhead seems to have swung it toward the land, and when the water got low enough caught on some obstruction; the scow listed, dumped most of her cargo, and injured herself. These suits were brought to recover for these damages, which in the opinion of the lower court, and in our opinion, were proximately caused by the failure of the McGuirl to give the scows the best mooring the situation afforded.

The efforts of the boatmen were not successful, but they did the best they could, wherein the case differed from *The Britannia*, 252 Fed. 583, — C. C. A. —. Nor is there any evidence that they might have done anything better, or different, to mend a situation produced by the tug.

We are not unmindful that the master of the Rich is of opinion that the tug could not have done, at the time of her departure, what we find negligence in her not doing. We think, first, that the tug master knew better than the scow captain what was possible; and, second, if he is right, that the tug should not have gone away until safety was assured.

Decrees affirmed, with interest and costs.

THE FLORIDA.

THE CHELSEA.

(Circuit Court of Appeals, Second Circuit. January 15, 1919.)

Nos. 149, 150.

COLLISION ⇌ 153—REVIEW—FINDINGS—CONFLICTING EVIDENCE.

Finding that the C. was at fault in a collision with the F. will be adopted on appeal; the testimony from the contending vessels being hopelessly conflicting, apparently disinterested evidence favoring the F., and the wrongdoing under explanation given by the C. being far more complicated and unusual than under the explanation of the F.

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

Two libels in admiralty, one by the Norwich & New York Propeller Company against the ferryboat Florida, her engines, etc., claimed by the Interborough-Twenty-Third Street Ferry Company; the other by the Interborough-Twenty-Third Street Ferry Company, Incorporated, against the steamer Chelsea, her engines, etc., claimed by the Norwich & New York Propeller Company. From adverse decrees, the Norwich & New York Propeller Company appeals. Affirmed.

Park & Mattison, of New York City (Samuel Park, of New York City, of counsel), for appellant.

James T. Kilbreth, of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. No questions of law are raised by this appeal, and the correctness of the finding below depends on one question of fact.

Suit grew out of a collision in daylight and under no extraordinary conditions of tide and wind, between the side wheel ferryboat Florida and the propeller Chelsea; the former bound across the East River from Manhattan to Brooklyn, and the latter from her pier in Manhattan to New London, Conn. As the Florida left her slip, she had, of course, on her starboard bow much of the usual east-bound traffic of the river, but especially the tug Gillen and her tow, the Chelsea, and the propeller Bunker Hill, in the order given, with the Gillen nearest the Manhattan shore.

Of these vessels all of whom had the right of way over the Florida, the Bunker Hill was nearest Brooklyn and proceeding much faster than the others, while the Gillen was slowest of all, and before any suggestion of danger was plainly changing course to go over to Brooklyn. The Chelsea was rapidly overhauling the Gillen.

In this situation, the Bunker Hill, after an exchange of single whistles, crossed the Florida's bow, while the Florida crossed that of the Gillen. At or about this moment, and when by all the evidence there was room to make the maneuver safely "the Florida (to quote from Chelsea's libel) gave a signal of two whistles, which were promptly answered by the Chelsea with two whistles, and the Chelsea's wheel

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was put to starboard. When the Florida was about a quarter of a mile away from the Chelsea and still upon her port bow, the Florida, instead of proceeding under a starboard wheel across the bow of the Chelsea, as agreed upon by the signals, swung to starboard and showed her port side to those in charge of the navigation of the Chelsea." A moment later, as is charged, the Florida swung back to her own port hand, and collision followed between the Chelsea's starboard bow and the Florida's starboard side.

The question of fact is whether this statement is true, or whether, as charged by the Florida, Chelsea, after agreeing to permit Florida to pass her bow, continued on at too great speed and ran into the ferryboat as the latter was in the act of doing exactly what the Chelsea had agreed to.

The testimony on this point from the contending vessels is hopelessly conflicting, the apparently disinterested evidence from the Gilen favors the Florida, collision could not have happened without very culpable navigation by some one, the explanation given by Chelsea asserts far more complicated and unusual wrongdoing than that of the Florida, and the trial judge, having seen and heard all the witnesses, believed the ferryboat's story. Under such circumstances we should adopt the finding below.

Decree affirmed, with interest, and one bill of costs.

PROCTER & GAMBLE CO. v. BERLIN MILLS CO. *

(Circuit Court of Appeals, Second Circuit. November 13, 1918. On Petitions for Rehearing, January 9, 1919.)

No. 10.

1. PATENTS ⇨328—CONSTRUCTION—VALIDITY.

The Burchenal patent, No. 1,135,351, for a homogeneous lardlike food product, consisting of incompletely hydrogenized vegetable oil or cotton seed oil, *held* valid, and to show invention, despite the contentions that the matter is so obvious, as not to rise to the dignity of invention, that the process of hydrogenating oils was already known, and that a similar product had been previously produced by the mixture of cotton seed oil and animal stearin.

2. PATENTS ⇨312(3)—INFRINGEMENT—DEFENSES—EVIDENCE.

In an infringement suit, the contention that the one in whose name the patent was granted was not the actual inventor is an affirmative defense, which must be sustained by fair preponderance of the evidence.

3. PATENTS ⇨112(1)—VALIDITY—PRESUMPTION.

The presumption of validity of a patent extends to the identity of the inventor, who swore to the invention in the statutory form.

4. PATENTS ⇨312(3)—INVENTOR—EVIDENCE.

It is immaterial whether a patentee understands or correctly states the theory or philosophy of the invention, so the fact that the one who patented a lardlike food, consisting of incompletely hydrogenized vegetable oil, was not a chemist, etc., and did not understand all phenomena leading to the result, does not, in an infringement suit, show that he was not the inventor.

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

*Certiorari granted 249 U. S. —, 39 Sup. Ct. 390, 63 L. Ed. —.

5. PATENTS ⇨312(3)—VALIDITY—INVENTOR.

In a suit for infringement of Burchenal patent, No. 1,135,351, evidence held to establish that the patentee was the inventor, and to overthrow the defense that another was the real inventor.

6. PATENTS ⇨226—INFRINGEMENT—VARIATION.

A variation, to negative infringement, must be at least a variation extending beyond the limits of a valid claim of the patent, read in the light of the disclosure.

7. PATENTS ⇨250—PRODUCT PATENTS—INFRINGEMENT.

A product patent is infringed, if the product complained of is the patented article substantially as described; it making no difference by what path or process, new or old, inferior or improved, the infringing product is manufactured.

8. PATENTS ⇨328—CONSTRUCTION—INFRINGEMENT.

Burchenal patent, No. 1,135,351, for a homogeneous lardlike food product, consisting of an incompletely hydrogenized vegetable oil, etc., held infringed.

Ward, Circuit Judge, dissenting.

On Petitions for Rehearing.

9. PATENTS ⇨328—NOVELTY—HYDROGENIZED VEGETABLE OIL LARD.

What is practically lard, consisting solely of one vegetable oil in a state of arrested hydrogenation, the product covered by the Burchenal patent, No. 1,135,351, is a new thing in the sense of the patent law, and not a lard substitute, so near to existing articles of commerce that the only field open to patentee was limited to a particular mode of making, or by specifically stated chemical tests.

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

Suit by the Procter & Gamble Company against the Berlin Mills Company. From a decree for defendant, complainant appeals. Reversed and remanded, with directions.

The action is upon claims 1 and 2 of patent No. 1,135,351, issued April 13, 1915, to the plaintiff herein, as assignee of John J. Burchenal, who is and long has been an officer of the corporate plaintiff. The claims are as follows:

"1. A homogeneous lardlike food product, consisting of an incompletely hydrogenized vegetable oil.

"2. A homogeneous lardlike food product, consisting of incompletely hydrogenized cotton seed oil."

The court below held in substance:

- (1) The disclosure did not amount to invention;
- (2) If there was invention, Burchenal was not the inventor; and
- (3) Upon a proper construction of the claims in suit there was no infringement.

The bill was accordingly dismissed, and the plaintiff took this appeal.

Livingston Gifford, of New York City, Alfred M. Allen, of Cincinnati, Ohio, and Thomas B. Kerr, of New York City, for appellant.

John C. Pennie, of New York City, and Marcus B. May, of Boston, Mass., for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). 1. The patent declares that—

"This invention is a food product consisting of a vegetable oil, preferably cotton seed oil, partially hydrogenized and hardened to a homogeneous white or yellowish semi-solid, closely simulating lard."

This is a description of a visible, tangible thing which for some years has been manufactured and sold by plaintiff, as to which there is no evidence that anybody else ever made it before, or that if this product is entitled to patent protection there is any closely related prior art.

Invention is denied, first, on the ground once taken by an examiner in the office, namely, that "if the problem of simulating lard from cotton seed oil were presented to an oil chemist, an incomplete hydrogenation of the cotton seed oil would at once suggest itself to him as a solution of the problem"; that is, (a) the matter is said to be so obvious as not to rise to the dignity of invention.

Another objection is that hydrogenation of vegetable oils was not new, and the discovery long prior to this application of catalysts not belonging to the "royal" group of metals had paved the way to effective and comparatively inexpensive hydrogenation. Patent to Normann, British, No. 1,515 of 1903. Prior to Burchenal's effective date it is admitted that the hydrogenic saturation of oil by catalytic means had been practiced at least in well-known laboratories, and a hard fat produced, solid at ordinary temperatures and showing on analysis a very large percentage of stearic or palmitic acid. It is obvious that if one starts with (e. g.) cotton seed oil, which is liquid at ordinary temperatures, because it has too little solid fat in it, and by chemical means so changes the molecular composition or arrangement of the substance as to increase the ratio of solid fat (i. e., unites enough hydrogen with linolin and olein to produce stearin), and thus produces the hard fat commonly known as stearin, there must have been a time during the development of the process when the union of hydrogen had only progressed far enough to convert the liquid into a semi-solid.

Therefore it is said (b) that no man is entitled to a patent upon the thing or product which has always been produced when the process of making another thing or product was (say) half done.

The third objection to invention is substantially this: The merit or value of what Burchenal claims, and what this plaintiff makes and sells, is that it looks like lard, acts like lard, and can be used for the purposes of lard without offending the conservatism of chefs, housewives, and maidservants. But before Burchenal many imitation lards were made by mechanically mixing hard animal fats and cotton seed oil in varying proportions, and some of these mixtures show on analysis substantially the same chemical characteristics as are shown by Burchenal's chemically produced "homogeneous semi-solid." Therefore it is said that to make the same thing as had been made by earlier lard imitators, but in a different way, cannot warrant a patent upon the resulting thing or product, whatever may be true in respect of the process by which that product is reached. This is as much as to say (c) that the Burchenal article when completed and

ready for use must be old, because other men had earlier arrived at the same chemical result by other paths.

[1] Objection (a) raises the question of fact encountered in a large proportion of patent causes, and concerning which discussion is of small value if the record discloses no one who ever tried to do the same thing in the same way. When novelty in that sense appears the question really is one of measuring foresight by hindsight. The problem seems easy now, but, when the object reached was desirable, useful, and apt for commercial success, the bald fact that nobody ever did it before is persuasive, though not conclusive, evidence of some invention. Burchenal's imitation lard has these attributes, and we consider it a sufficient answer, to the statement that any oil chemist could have done the thing, to note that no oil chemist did do it during the more than score of years prior to Burchenal's application, when cotton seed oil (especially) as an abundant American product was endeavoring to supplant lard in the American market.

The next objection to invention (b) really denies the possibility of invention ever residing in noting or discovering a use for something which if not a by-product, may be termed a half-product or unfinished product of an existing method of procedure. Without resorting to the extreme doctrine of *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275, it seems to us that the question presented by this record depends upon whether the thing produced by partial hydrogenation is a different thing from that which existed before hydrogenation began and that which would exist when it ended. The change introduced by catalytic introduction of hydrogen is chemical; the analysis of the cotton seed oil at divers stages of the process of manufacture differs. To be sure, the difference is only in the union of additional atoms of hydrogen with the unsaturated fats (linolin and olein); but if this molecular and chemical change induces a resulting change in appearance, in utility, and in texture, it may well be called, when lardlike, a thing different from what it was as oil, and equally different from what it would be at the point of saturation.

The patent law does not speak in terms of science, though scientific evidence is necessary for the application of its rules. The chemical composition of steam, water, and ice is the same, but they are different things; and in the same common-sense way oil, lard, and stearin are different things, although (with some chemical latitude) the oil may be said ultimately to become stearin, and to pass through the lard stage on the way.

For substantially the same reasons we think there is nothing in the last (c) objection to invention. It may be assumed as true that by the mixture of cotton seed oil and animal stearin a substance can be produced which for practical purposes is the same thing as Burchenal's chemically changed cotton seed oil; but one is a mixture and the other is not, and assuming the difference to be unimportant from the standpoint of either chemist or cook, it is a vital difference from that of the law.

We are therefore of opinion that there was invention in Burchenal's disclosure. Product patents may be justly subjected to critical scru-

tiny, but these claims are far within the border line adverted to in *Fonseca v. Suarez*, 232 Fed. 155, 146 C. C. A. 347; and just as the conversion of an abandoned machine into an operative and successful one by the introduction of new, but simple, features constitutes invention (*United Shirt Co. v. Beattie*, 149 Fed. 736, 79 C. C. A. 442), so we think that seizing upon thing A, which had been thing B, and was to become thing C, and utilizing the half-made, but different, product, amounted to an invention which is duly set forth in this application.

[2-5] 2. The finding below, that Burchenal was not the inventor of whatever invention is revealed, is really a declaration that one Kayzer did the inventing, and Burchenal for some inexplicable reason appropriated it. This is an affirmative defense, and must be sustained by a fair preponderance of credible evidence. Burchenal swore to invention in the statutory form, and the presumption of validity extends to the identity of the inventor, for certainly nothing could be more completely invalid than a patent for invention to one who invented nothing.

The train of evidence resulting in the finding of noninvention in Burchenal is this: The plaintiff corporation is, and long before 1907 was, a large manufacturer of soap. Down to that time it neither made nor dealt in food products, fatty or otherwise. In that year it received from England a letter from one Kayzer, saying that he intended coming to the United States to introduce "a new process of the greatest possible importance to soap manufacturers," and asking substantially for employment or remuneration if he was to communicate his valuable knowledge. He was employed; he divulged his process. It is a process for the hydrogenation of vegetable oils, and is one of the processes which, when arrested (say) halfway, produces Burchenal's "homogeneous lardlike product."

By the time this action was begun Kayzer had returned to England (in 1910), and on or shortly after the outbreak of the present war was interned as an enemy alien. While in this country he had assigned to the plaintiff herein his applications for patents on processes of hydrogenation, had been paid for them, and become a stockholder in the plaintiff corporation. The defendants sent an agent to England, who interviewed Kayzer and sought to extract from him evidence that he, and not Burchenal, either discovered or invented the food product before this court. Kayzer refused all evidence, and in effect declined to either assert or assent to the proposition that he was the deviser or inventor of what Burchenal got a patent for.

There is no evidence that, during the whole period of Kayzer's employment by the plaintiff and his experimentation upon fats he either attempted to produce a "lardlike compound" or observed that such compound was obtainable by his process. There is some evidence (if it can be called by that name) that after Kayzer had carried on experiments at plaintiff's factory for some time he showed to the deposing witness a fat "like tallow," looking as if it had been "molded in a jelly glass," and that Kayzer said in substance that "it was for cooking purposes." What Kayzer showed may be regarded as evi-

dence, but upon what principle the remarks of one who is neither a party nor a witness can be regarded as competent we do not perceive.

Yet in this testimony there is nothing inconsistent with the course of events as plainly proven. When Kayzer began to produce by his processes a hard fat, it occurred certainly to Mr. Procter (the plaintiff's president), and not improbably to Kayzer himself, that since substantially saturated cotton seed oil was a fair commercial equivalent for animal stearin, that since frying and shortening compounds were largely manufactured by combining animal stearin with cotton seed oil, so they might be made by mechanically mixing liquid oil and hardened oil. Such experiment was tried, not at the factory of plaintiff, which had no machinery for the purpose, but at the establishment of one McCaw, who was already a manufacturer of lardlike compounds employing animal fat.

We are satisfied of the truth (entirely apart from all presumptions) of plaintiff's testimony that it was not until Kayzer had returned to England, or was on the point of going, that it occurred to any one that it was not necessary to first harden by hydrogenic saturation the cotton seed oil, and then mix it with the fluid article, in order to make a lardlike compound, but that the hardening process might be arrested in the manner and for the purposes disclosed by Burchenal's application.

Assuming, now, that this mental operation or discovery in the sense of the patent law (Walker on Patents [5th Ed.] § 2) amounted to invention, we not only find no evidence that Burchenal was not the inventor, but it is a strain upon credulity to believe that, when this plaintiff corporation might just as well have advanced an application in Kayzer's name, it deliberately preferred the fraud of prosecuting it in that of Burchenal.

It may be, and we think is, quite true that the evidence reveals Burchenal as not primarily a chemist, but a man of business, deeply interested in the advancement of his corporation's prosperity. We recognize the fact that there is a fundamental difference between "new articles of manufacture" and "new articles of commerce" (*Ceraline, etc., Co. v. Bates*, 101 Fed. 272, 41 C. C. A. 341); and it may also be quite true that Burchenal's contribution to the sum of human knowledge grew out of the trained business man's observation of the possibilities of a chemist's process, which he was himself quite incapable of devising.

But, just as it is immaterial whether a patentee "understands or correctly states the theory or philosophy of the mechanism which produces" his new result (*Van Epps v. United, etc., Co.*, 143 Fed. 869, 75 C. C. A. 77), so it is immaterial whether, when Burchenal observed and seized upon as a new and useful thing a half hydrogenically saturated oil he was actuated rather by commercial instinct than acquired chemical knowledge. It is enough that he had both a mental conception and a tangible reduction to practice (*Corrington v. Westinghouse, etc., Co.*, 178 Fed. at page 715, 103 C. C. A. 479), and that is all that the patent law requires. Quite possibly this patentee would never have conceived the thought, had he not watched Kayzer; but

he could and did get something out of Kayzer's train of phenomena, which the latter neither thought of, nor reduced to practice.

[6-8] 3. The final objection to a decree in plaintiff's favor is that, properly construed, the claims in suit are not infringed, because (a) the defendant's product widely varies from that of the patent in the relative percentages of saturated fats, olein and linolin; (b) the process pursued by defendant is disclosed or assumed in the patent in suit; and (c) that said claims are to be regarded as strictly limited, if not substantially abandoned, through or by reason of the proceedings in the Patent Office as revealed by file wrapper contents.

As to the first point (a), it is enough to note that, while the variation insisted upon is true, it must, to negative infringement, be at least a variation extending beyond the limits of a valid claim read in the light of the disclosure. In this instance it is not denied that what the defendant makes and sells is not only lardlike, homogeneous in the sense of mixtureless, and wholly consisting of an incompletely hydrogenized cotton seed oil, but it is within the limits of iodine value, titer, and melting points specified in the application. Therefore it is an infringement.

It is true (b) that defendant's process of manufacture is very different from that of plaintiff, and we are willing to assume it different from and better than anything known to Burchenal or developed by Kayzer. But this patent is upon a product, and if the product complained of is the patented article substantially as described, it makes no difference by what path or process, new or old, inferior or improved, the infringing product is manufactured. *General Electric Co. v. Laco-Philips Co.*, 233 Fed. 96, 147 C. C. A. 166.

The contention (c), that the office proceedings were such as to limit or nullify the broad claims in suit amounts, we think, to this, viz.: When this application was filed, in 1910, applicant demanded two claims which, if anything, are slightly narrower than the two now in suit. They were rejected by the primary examiner, and thereafter many changes were made in the language of the claims submitted by way of amendment. In our opinion, never at any time did the applicant acquiesce in the examiner's action, but consistently endeavored to obtain, and finally did obtain, in the claims first above quoted, what he had in the first place asked for.

It is the acquiescence of an applicant, and not the action of an examiner, or of many examiners, that surrenders to the public what the applicant first declares to be patentable invention. The very word "acquiescence" necessarily implies obedient action, perhaps enforced, but still submission on the petitioner's part. Here there never was any such acquiescence, and the patent as issued substantially contains in the claims in suit the originally propounded definition of invention. This is far within the rule enforced by us in *Kinnear, etc., Co. v. Wilson*, 142 Fed. 970, 74 C. C. A. 232, where a rejected claim was carried into and obtained grant in another patent. Here the claims rejected were at last substantially victorious in the same patent, apparently through a change in the examining personnel.

For the reasons stated, the decree appealed from is reversed, with

costs both here and below, and the cause remanded, with directions to enter a decree adjudging claims 1 and 2 valid and infringed.

WARD, Circuit Judge (dissenting). I think the District Judge was right in holding the patent void for lack of invention. It was well known that a vegetable oil could be changed chemically into a hard fat by hydrogenation, and of course that at some stage of the process, before complete hydrogenation, it would be a homogeneous semi-solid. It was also known that the process would not affect the edibility of the product. The product at all stages of the process was therefore old, and open to the public for any use of which it was capable. To apply it when semi-solid as a substitute for animal lard in cooking was no doubt novel and useful, but was not in my opinion invention. To one skilled in the chemical art, such a use was as obvious, if he thought about it at all, as were the many mechanical improvements which, though new and useful, have been held not to be inventions, because within the capacity of those skilled in the particular art. There was nothing revolutionary about this new use. There was no crying need, nor any problem to be met. The market was and still is abundantly supplied with mixtures of vegetable oils and animal fats which satisfactorily meet culinary needs. Yet the complainant is given a monopoly of all semi-solid homogeneous hydrogenized vegetable oils, however produced, when applied to culinary purposes.

On Petitions for Rehearing.

Kerr, Page, Cooper & Hayward, of New York City (Livingston Gifford, of New York City, Alfred M. Allen, of Cincinnati, Ohio, and Thomas B. Kerr, of New York City, of counsel), for appellant.

John C. Pennie, of New York City (Marcus B. May, of Boston, Mass., of counsel), for appellee.

Sullivan & Cromwell, of New York City (Charles E. Hughes and Royall Victor, both of New York City, of counsel), for American Oil Co.

HOUGH, Circuit Judge. [9] The principal producer of cotton seed oil has joined in this application as *amicus curiæ*, and by figures of oil production, as well as of food products derived therefrom, has greatly magnified the importance of Burchenal's patent.

It seems to be now assumed that hydrogenized oil, as a substitute for lard, is so superior to an amalgam, combination or mixture, of oil and animal fat, or oil and stearin artificially produced, that the patent in suit is almost basic, instead of disclosing a mere variant among products of equal utility.

If this importance in result be real, it is a reason for giving to the claims in suit a broad range of equivalents, and suggests reflections not contained in our former opinion, but leading to an identical result.

Defendant's petition restates with painstaking ability an argument perfectly good, if the premise be admitted. That premise is that Burchenal invented nothing but an artificial lard, or lard substitute,

so near to existing articles of commerce that the only field open to him was limited to a particular mode of making, or by specifically stated chemical tests.

The chemical tests or limits indicated in Burchenal's disclosure are put with an "about"; they are not carried into the claims sued on, as they are into some not in suit; nor do all the usable and marketable specimens of defendant's factory show uniform tests. We adhere to the remarks concerning "iodine values, titer, and melting points" heretofore made, but do not and did not ground judgment thereon.

Our decision is and has been based on a firm conviction that what is practically lard, consisting solely of one vegetable oil in a state of arrested hydrogenation, is a new thing in the sense of the patent law, almost as new as a synthetic egg, evolved from vegetable albumen by chemical treatment.

The results of such evolutionary treatment are by their genesis so novel that analysis of constituents is immaterial. Patentable novelty is not in their parts, as revealed by quantitative or qualitative analysis, but in a practical functional identity between animal products and a vegetable product as chemically changed.

Our view of the nature of this invention permitted us to assume (not find) a possibly quite superior method as used by defendants; but, when the product was seen to be something that was (in effect) lard resulting from an arrested hydrogenation of cotton seed oil, there was infringement.

On this record, it may almost be said that defendants' machines will cease to produce infringements only when they yield what a plain man would not call lard.

Application denied.

ROGERS, Circuit Judge, concurs.
WARD, Circuit Judge, not voting.

WEBER ELECTRIC CO. v. CUTLER-HAMMER MFG. CO.
(Circuit Court of Appeals, Second Circuit. January 22, 1919.)

No. 137.

1. PATENTS ⇐327—ACTIONS—JUDGMENT—EFFECT.

While it is true that each succeeding defendant encountered by the owner of a patent is not estopped by previous litigation from advancing defenses often overruled, defenses contrary to fundamental findings long adhered to do not merit discussion.

2. PATENTS ⇐301(2)—INFRINGEMENT—ESTOPPEL.

In a suit for infringement of the Weber patents, No. 743,206 and No. 916,812, relating to sockets for electric lamps, *held*, that plaintiff was not estopped from asserting infringement, on the ground that one in whose patent defendant had an interest was the commercial pioneer, and was allowed to build up a large trade in such fixtures without objection.

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

3. ESTOPPEL ⇐58—EQUITABLE ESTOPPEL.

Logically there can be no equitable estoppel, unless the party against whom it is asserted is seeking to do something injurious to the party setting up the estoppel.

4. PATENTS ⇐328—VALIDITY—INFRINGEMENT.

The Weber patents, No. 743,206 and No. 916,812, for electric lamp sockets, *held* infringed by defendant's device, made in conformity with the Klein patent, No. 1,146,885.

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

Suit by the Weber Electric Company against the Cutler-Hammer Manufacturing Company. From an order granting plaintiff an injunction *pendente lite*, defendant appeals. Affirmed.

The order granted an injunction *pendente lite*, in action on patents to Weber, No. 743,206, claims 1 to 4, inclusive, and No. 916,812, claim 1.

W. Clyde Jones and Arthur B. Seibold, both of Chicago, Ill. (E. B. H. Tower, Jr., of Milwaukee, Wis., and Everett N. Curtis, of Boston, Mass., of counsel), for appellant.

Frederick P. Fish, of Boston, Mass., and Frank C. Curtis, of Troy, N. Y., for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. Each of these patents, and all the claims in suit (and some others), have been considered in this court, as well as other jurisdictions.

For the language of the claims, reference may be had to Weber, etc., Co. v. National, etc., Co. (D. C.) 204 Fed. 79, which decision we affirmed in 212 Fed. 948, 129 C. C. A. 468. The Third Circuit arrived at the same conclusion in Weber, etc., Co. v. Union, etc., Co. (D. C.) 226 Fed. 482, and also in a decision by Davis, J., affecting No. 743,206 only, filed November 6, 1918, in the District of New Jersey. Weber Electric Co. v. E. H. Freeman Electric Co., 253 Fed. 657. In the First Circuit, Dodge, J., also expressed opinion on the same patent in Weber, etc., Co. v. Wirt, etc., Co. (D. C.) 226 Fed. 481.

The substance of No. 743,206 is well stated by Rellstab, J., in (D. C.) 226 Fed. 485. This elder patent is the principal invention, and the relation to it of the improvement (916,812), is amply shown by Ray, J., in 204 Fed. 83.

These patents have thus for years, and until the term of the older grant is nearly spent, succeeded in the courts, and in the business world. They have become and are the foundation of a large business, in no small part based upon the above-recited judicial recognition, the propriety of which is now challenged by a new defendant, who makes and sells what is asserted to be no infringement, even should the scope and interpretation heretofore so widely given to Weber's patents be still adhered to.

[1] While it is true that each succeeding defendant encountered by the owner of a patent is not estopped by previous litigations from advancing defenses often overruled, there are some matters which even in patent suits must finally cease to merit discussion. We have examined this record without discovering any new matter, substantial and persuasive, and inducing us to depart from the considered decisions above recited.

[2, 3] We therefore adhere to the following fundamental findings, viz. that by January 1, 1898, Weber had embodied the invention described and claimed in his earlier patent, which invention is a positive lock for the engagement of the sleeve and cap of lamp sockets, as distinguished from any and every variety of friction device.

It is asserted that certain prior art in the form of patents is now for the first time brought to the attention of this court—at all events. We have examined it, and the oft-repeated remark that one good reference is worth any number of poor ones is applicable to it all. The nearest and best references have been considered in some or all of the reported cases.

There is now presented certain new or additional evidence, all related to the Kenney patented device—for the same purpose as Weber's—and its commercial introduction or development. The present defendant owns an interest in the Kenney patent, and now advances the doctrine that, even if Kenney did not invent his socket before Weber did his, Kenney was the "commercial pioneer," and introduced his apparatus with such success, while Weber in the interval between 1898 and about 1902 was doing nothing, that this defendant can offer an "equitable estoppel" to Weber's proceeding against the present alleged infringement.

The contention lacks merit, either on the facts or in logic. Kenney seems never to have made any sockets; under his patent the Yost Company made and distributed as samples about 1,000; thereafter the style was changed and sales made, until about 1910, when further changes invited suit by Weber, whereupon yet another change was made, and the result is still on the market. It is said without contradiction that in about 16 years some 20,000,000 Yost-Kenney appliances have been sold. How many of them were of the sort that invited action by Weber we are not informed; the form presently offered is not an infringement of the patents in suit, and 20,000,000 sockets in 16 years is very far from entitling the vendor to plume himself on commercial success.

Logically there can be no equitable estoppel, unless the party against whom it is asserted is seeking to do something injurious to defendant; and in a patent case like this the argument assumes that Weber is seeking to enjoin one who is only doing what Kenney either taught or practiced. This is not true, for the reasons first above summarized, and the fact that it is possible by the exercise of violence, or without serious effort, if old and worn sockets are used, to relatively rotate the sleeve and cap of Weber's earlier sockets, is immaterial. If defendant wishes to use Kenney's frictional lock, it is

entirely at liberty to do so; hence we fail to perceive how or why anything done or omitted under the Kenney patents affects rights under those of Weber.

[4] Assuming now validity and scope as heretofore decided, the question of infringement (viewed most favorably to defendant) is whether something made in conformity with Klein, No. 1,146,885, must pay tribute to Weber. As not infrequently occurs, the question is complicated by the possibility of making sockets of such varying fit of parts or strength of metal that they do not all work alike. We agree with A. N. Hand, J., in the court below, that some of defendant's sockets are so made as to engage sleeve and cap with and by a simple longitudinal thrust, others require a rocking movement and invite the use of the tool suggested in Klein's disclosure, but none of them, when made as suggested and unworn, will or can lock by the frictional engagement of Kenney.

If they engage by a straight thrust, infringement is too clear for discussion; if they fit only under force, it is but a question of degree whether thumb pressure suffices, or hand power is increased by the use of Klein's lever; it is hand power just the same. The vital point is that Weber's way is to engage by a straight thrust, and release by pressure on the sleeve at a point under an engaging projection. Defendant always effects both processes in substantially the same way, because, under the range of equivalents always hitherto accorded these patents, it makes no difference that sometimes defendant's cap has to be rocked on, and disengaged with more power than resides in most thumbs.

Order affirmed, with costs.

AMERICAN ELECTRIC WELDING CO. et al. v. LALANCE & GROSJEAN
MFG. CO.

(District Court, D. Massachusetts. July 31, 1917.)

No. 809.

1. PATENTS ⇨288—INFRINGEMENT SUITS—JURISDICTION—NONRESIDENT DEFENDANT—"REGULAR AND ESTABLISHED PLACE OF BUSINESS."

A New York manufacturing corporation, whose only business done in Massachusetts was to maintain a room in Boston in charge of a salesman, with one stenographer, such salesman soliciting and forwarding orders, which were passed on and, if accepted, filled, and collections made by the company from New York, *held* not to have a "regular and established place of business" in Massachusetts, within Judicial Code, § 48 (Comp. St. § 1030), and not subject to suit for infringement in that district.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Established Place of Business.]

2. PATENTS ⇨288—INFRINGEMENT SUITS—JURISDICTION—"PLACE OF BUSINESS" IN DISTRICT.

A "place of business" of a foreign corporation, which renders it subject to an infringement suit in that district, under Judicial Code, § 48 (Comp. St. § 1030), is not any place where transactions relating to its business may

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

be carried on, but a place where it does such business as makes it "found" within the district for purposes of service.

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

3. PATENTS ⇨288—INFRINGEMENT SUIT—JURISDICTION—DISTRICT OF INFRINGEMENT.

A foreign corporation held not to have sold alleged infringing articles in a state, because a clerk in the office of its solicitor there, who was without authority, and so stated, was induced to receive money in payment for an order for goods left with her, which was forwarded for acceptance by the company in accordance with its usual course of business.

In Equity. Suit by the American Electric Welding Company and others against the Lalance & Grosjean Manufacturing Company. On plaintiffs' motion for preliminary injunction filed June 15, 1917, and on defendant's motions to quash service of process and dismiss bill for want of jurisdiction, filed June 26, 1917. Defendant's motions granted.

Van Courtlandt Lawrence, of Boston, Mass., for plaintiffs.

Choate, Hall & Stewart, and Charles F. Choate, Jr., all of Boston, Mass., for defendant.

DODGE, Circuit Judge. The defendant has appeared specially to assert want of jurisdiction in the court, and this objection is first to be considered.

The bill charges the defendant with infringing the Harmatta patent, No. 1,046,066, which the Court of Appeals for this circuit has heretofore held valid and infringed by a Massachusetts citizen in a suit brought by Thomson Electric Welding Company against Barney & Berry, Incorporated. See 227 Fed. 428, 142 C. C. A. 124; 236 Fed. 1022, 149 C. C. A. 671. In two other suits pending in this court against Massachusetts citizens, injunctions have been issued since the above decision, as set forth in paragraphs 7-9 of the bill.

[1] 1. From the affidavits submitted, it appears without dispute that before December, 1915, the defendant maintained a Boston branch, where a stock of goods, all manufactured by it in New York, and presumably including goods embodying the patented invention, were kept for sale, but that it discontinued said branch in December, 1915, pursuant to a directors' vote on June 22, 1915, disposed of the stock of goods, and thereafter did in Boston no business, except as below stated. The Court of Appeals decision referred to above was on October 5, 1915.

Whatever business has been since done on the defendant's account in Boston has been done in one room, No. 404, at 261 Franklin street, in charge of George A. Bath, employed by it as salesman, who has solicited orders for its goods and has been there assisted only by a Miss Edwards, employed as clerk and typewriter. A few samples brought from the former place of business have been kept there, but no stock of goods.

Bath has had no authority from the defendant to accept any order for goods made to him, or to make any sale, whether for cash or on credit. All orders received by him have been forwarded to the de-

defendant in New York. They do not bind the defendant, unless and until there accepted by it. After transmitting an order, he has performed no further duties in connection with the goods ordered. All orders have been filled at the New York factory. Bills for all goods so ordered and forwarded are sent from New York direct to purchasers, and remittances in payment thereof have been made direct to the defendant in New York. No manufacturing has been done by the defendant, nor any of its books of account kept, in Massachusetts; nor has it had any bank account in said state.

[2] "Place of business," in section 48 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1100 [Comp. St. § 1030]), is understood to mean, not a place at which any transactions having any reference to the foreign corporation are carried on, but a place at which it does such business as makes it "found" within the district for purposes of service; i. e., business carried on in such manner and to such an extent as will warrant the inference that it is present there through its agents. Business being done within the district in this sense, and acts of infringement done therein appearing, section 48 is understood to impose the further requirement, as necessary to jurisdiction, that it be done at a regular and established place, but not to imply that jurisdiction may be obtained without showing that the business done within the district is of the above character.

So long as it followed in Boston only the course of business above described, I do not think the defendant can be said to have been doing business at the Franklin street office in the necessary sense. Its representative there found only took and forwarded orders to its home office in New York for acceptance or rejection. *Green v. Chicago, etc., Co.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916; *Tyler Co. v. Ludlow-Saylor, etc., Co.*, 236 U. S. 723, 35 Sup. Ct. 458, 59 L. Ed. 808; *General, etc., Co. v. Best (D. C.)* 220 Fed. 347. That his authority from the defendant enabled him to complete transactions there on its behalf, or to represent it there in negotiations so as to bind it, as in *St Louis, etc., Co. v. Alexander*, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77, does not appear, nor that he ever assumed to exercise such authority there. Only in the solitary instance below considered is there any claim that said course of business was departed from in any respect.

If the above conclusion is wrong, and the business done as above in Massachusetts is to be regarded as sufficient in character to make it liable to service of process therein, I see no reason to doubt that the requirement of a regular and established place of business is satisfied. The defendant's name appeared in full on the office door, with "George A. Bath, Manager," following. Its name appeared also in the directory at the entrance of the building as occupant of the office, and in the telephone directory as having its telephone address there. There is no claim that the office was shared with any one else. Whether the defendant or Bath was lessee of the office does not appear, but, although Bath advanced the monthly rent as it fell due, the defendant reimbursed him in their next monthly accounting for office expenses. But these facts go no further, in my view, than to show a regular and

established place for receiving and transmitting communications to or from the company in New York, which is not enough for the plaintiff's purpose.

[3] 2. Is the defendant shown to have committed acts of infringement in Massachusetts? The course of business shown as above certainly involved no such acts, and, as has been said, only one instance appears of any departure from it whatever. On January 11, 1917, one Landeck, employed for the purpose by the plaintiff, went into the office in Bath's absence and prevailed on Miss Edwards, whom he found there alone, to let him leave with her an order for certain articles, which he indicated to her from a copy of the defendant's catalogue kept there by her for her personal use in performing her duties as clerk and typewriter. He ordered them to be delivered to one Kamins, at a store kept by Kamins at 504 Massachusetts avenue, in Cambridge. Although she told him she would have to submit the order to the defendant in New York, that it would take some time before the articles could be shipped, and that he would receive from New York an invoice when they were shipped, he also persuaded her to figure up the amount of the catalogue prices and let him leave \$12.36, the amount thus ascertained, with her. Although she told him the billing was done in New York, and that she had no way of making out a bill, he further persuaded her to make out and give him a memorandum of said articles and prices on an old letter head of the defendant, followed by a receipt in its name and her initials. The money she afterward gave to Bath, whose personal check she mailed to the New York office with the order. Landeck had at the time no authority from Kamins, who, however, afterward consented to receive the articles when they came. They were subsequently shipped by the defendant from New York, and reached Kamins April 2, 1917. Among them were articles now produced as exhibits, welded according to the method of the patent.

A sale of infringing articles may no doubt be proof of infringement, such as will warrant a preliminary injunction, notwithstanding that it has been induced and procured by the plaintiff, who cannot, for that reason, claim to have been damaged by it. But this is because of its tendency to show a regular course of business involving infringement and an intent to infringe. *Chicago, etc., Co. v. Philadelphia, etc., Co.* (C. C.) 118 Fed. 852; *Badische, etc., Co. v. Klipstein* (C. C.) 125 Fed. 556; *Dick v. Henry* (C. C.) 149 Fed. 429, 430; *Kessler, etc., Co. v. Goldstrom*, 177 Fed. 392, 394, 101 C. C. A. 476. The circumstances attending this alleged infringing sale prevent me from regarding it as tending to show any such course of business or any such intent; and I should not, therefore, consider it sufficient ground for a preliminary injunction, supposing jurisdiction to exist. Nor can I consider it proof of a completed infringing sale made in Massachusetts. Though he left the money with Miss Edwards, who had no authority from the defendant to take it, I think her statement that she would have to submit the order required Landeck to understand that the company was still at liberty to refuse both the order and the money. I do not agree with the plaintiff that her receipt of the money "nullified and set aside"

what she had told him about submitting the order. If the defendant afterward decided to accept the money and fill the order, it did this in New York. I therefore hold that acts of infringement in Massachusetts are not shown.

3. It follows that the service of the subpoena, which was by copy delivered to "George A. Bath, manager," at the office referred to, cannot be held due service on the defendant. Though representing the defendant there for certain purposes, Bath is not shown to have been its agent in the sense required by section 48.

4. These conclusions require allowance of the motions to quash and to dismiss. Jurisdiction not appearing, of course, no injunction is to issue. It is obviously better, as was remarked in *General, etc., Co. v. Best, etc., Co.* (D. C.) 220 Fed. 348, that such litigation should be conducted before a court whose jurisdiction is not open to the possibility of successful challenge. Since the first-named plaintiff and the defendant are both New York citizens, such a court is readily accessible.

Decrees in accordance with the above may be submitted. The dismissal ordered, being for want of jurisdiction, is to be without costs.

HOWIE MINING CO. v. MCGARY et al.

(District Court, N. D. West Virginia. February 26, 1919.)

1. JUDGMENT \Leftrightarrow 143(10)—DEFAULT—GROUNDS FOR SETTING ASIDE.

Defendants *held* not entitled to vacation of a default judgment, entered over a year after return day, although their nonappearance was apparently due to loss in the mails of a letter from their attorney to the clerk, asking a copy of the declaration when filed, to which no answer was received, where no further inquiry was made, and under the state statute, if no declaration was filed within three months, they were entitled to nonsuit or dismissal.

2. ARMY AND NAVY \Leftrightarrow 34—SOLDIERS' AND SAILORS' CIVIL RELIEF ACT—CONSTRUCTION—DEFAULT JUDGMENTS.

Provision of Soldiers' and Sailors' Civil Relief Act March 8, 1918, § 200 (Comp. St. 1918, § 3078 $\frac{1}{2}$ bb), requiring plaintiff, before entry of judgment against a defendant in default, to file affidavit that he is not in the military service, construed, and the fact that such affidavit was not filed *held* not to entitle defendants, who were not in fact in the service, to have set aside a default judgment against them.

At Law. Action by the Howie Mining Company against David McGary and W. E. Covert. On motion by defendants to set aside judgment by default. Denied.

H. M. Abercrombie, of Baltimore, Md., Fred A. Dolph, of Chicago, Ill., Clarence E. Martin, of Martinsburg, W. Va., D. B. Evans, of Moundsville, W. Va., and Frank A. O'Brien, of Wheeling, W. Va., for plaintiff.

John P. Arbenz, of Wheeling, W. Va., for defendants.

DAYTON, District Judge. Defendants, under section 4979, Hogg's W. Va. Code 1913 (section 5, c. 134), have made a motion to set aside

the default judgment entered in this case in term at Martinsburg, on the 4th day of April, 1918. The reasons assigned for such relief sought are:

First—Because of the fraud practiced therein against the defendants, and each of them, by the plaintiff, or at least by certain of its attorneys.

Second—That both of the defendants exercised due diligence in the protection of their rights and the prosecution of their case, but they virtually never have had their day in court—never had even an opportunity to be heard or to present their defense, and all this, too, through no fault of theirs.

Third—That the judgment was taken after the act of Congress, known as "Soldiers and Sailors Civil Relief Act," approved March 8, 1918, was in force, and the affidavit or proof that defendants were not in the military or naval service of the United States at the time was not filed.

The substantial facts are these:

Summons was sued out of the clerk's office at Martinsburg on February 7, 1917, returnable to March rules. By the West Virginia statute rules are held in the clerk's office every first Monday in a month, except when a term of court happens to commence on the first Monday in a month, or either of the two following days, or on the preceding Tuesday, Wednesday, Thursday, Friday, or Saturday, the rules which otherwise would have been held for the said month on the first Monday, shall be held on the last Monday in the next preceding month. The rules may continue three days; but when in any case such continuance would interfere with the terms of the court for which the rules are held, they shall not continue in such case beyond the day preceding the commencement of the term of court. The rules may be to declare, plead, reply, rejoin, or for other proceedings; they shall be given from month to month.

A defendant may appear at the rule day at which the process against him is returnable, or, if it be returnable in term, at the first rule day after the return day, and, if the declaration or bill be not then filed, may give a rule for the plaintiff to file the same. If the plaintiff fail to do this at the succeeding rule day, or shall, at any time after the defendant's appearance, fail to prosecute his suit, he shall be nonsuited, and pay to the defendant, besides his cost, \$5. If three months elapse after the process is returned executed as to any one or more of the defendants, without the declaration or bill being filed, the clerk shall enter the suit dismissed, although none of the defendants have appeared. Hogg's W. Va. Code, §§ 4755, 4759, 4760, and 4761 (chapter 125, sections 1, 5, 6, and 7).

[1] It is not controverted that the summons, served in person on both defendants, with proper indorsement of such service, was returned by the marshal to March rules, 1917, at which no appearance was made and no declaration filed; at April rules following no appearance was made and no declaration filed; at May rules the declaration was filed and common order taken, which at June rules was confirmed and a writ of inquiry awarded. The effect of these proceedings at rules, with no appearance by the defendants, was to establish liability and leave only the amount of damages to be awarded, to be ascertained by the court. The next term of court was held, commencing on the third Tuesday of September (the 17th), 1917, when

ordinarily, this writ of inquiry would have been executed, the damages ascertained, and judgment therefor rendered. This, however, was not done, but, on the contrary, an order was entered continuing the execution of the writ of inquiry, setting it down for trial at the following term, to be held commencing on the first Tuesday (the 2d) of April, 1918, when on the third day of that term the writ of inquiry was tried, the damages ascertained, and the judgment therefor entered. Under the rules of pleading and practice of the state, which we are required to follow, up to the this 4th day of April, 1918, the defendants were entitled to appear, have the common order set aside, and enter such pleas and make such defense as they might be advised to do; but no such appearance was made. Specifications of damages were filed, and a number of witnesses were introduced by the plaintiff on the trial to support its demands.

It is now set forth in affidavits tendered, and not disputed, that, shortly after defendants were served with process instituting the suit, they employed a most reputable attorney of large practice and great ability, resident in Wheeling, distant from Martinsburg something near 300 miles, to represent them and protect their interests in the case; that this attorney, under date of March 5, 1917, directed to the deputy clerk of this court at Martinsburg a letter as follows:

"As soon as the declaration is filed in the case of Howie Mining Company v. David McGary and W. R. Covert, please send me a certified copy of it, together with your bill therefor."

This letter was dictated by the attorney to his stenographer, who says he made a transcript of it, signed the attorney's name to it, made a letter press and a carbon copy of it, addressed it to the deputy clerk at Martinsburg, and mailed it to him. At the instance of the clerk of this court, his deputy at Martinsburg has made two statements, to the effect that he has made two distinct careful examinations of his official files, finds no such letter therein, has no recollection of ever having received or seen any such letter, and that his uniform custom, upon receipt of such letters, is to answer them promptly. It is not improper to say in this connection that this deputy clerk has long held this place, is thoroughly competent, very careful and experienced in the duties of his office, a lawyer of high standing in his profession, and a man of the strictest integrity and honor. It would seem, therefore, beyond question that such letter was sent, but not received.

The defendants in their affidavit say, after stating the employment of the attorney, that upon a number of occasions they had conversations with him, and was informed by him that he had received no reply to this letter from the deputy clerk, and that therefore he assumed that no declaration had been filed; that at least four months after the bringing of the suit the attorney told them no reply had been received to the letter, and that undoubtedly the suit had been dismissed for failure to file a declaration therein. It further appears from these affidavits that one Smith H. Bracey was president of the plaintiff company; that in the criminal court at Wheeling an indictment had been presented against him at the instance of the defendants McGary and Covert as prosecuting witnesses; that they had employed this

same attorney of theirs to assist, and he did assist, in the prosecution of this criminal proceeding against Bracey; that three of the attorneys representing the plaintiff in this civil action had defended Bracey in the criminal prosecution, and therefore defendants verily believe that said three attorneys knew, at the time this judgment was taken by default, that they had employed their attorney to make defense herein, but concealed such knowledge from the court.

Much as this court may regret any injustice done, if any has been done, to defendants, it cannot reconcile itself to the conclusion that these facts warrant it in setting aside this judgment. It can hardly be held that failure to receive an answer to a letter, liable to be lost in the mails, as doubtless was the case here, will justify their sleeping on their right to appear on the return day of their summons, give rule to plaintiff to file its declaration, and in case it failed to do so within the time expressly required by statute, have the case promptly dismissed in the clerk's office. Too much hazard is involved in basing court procedure upon the delivery of ordinary letter mail. Fully conceding the letter to the clerk was mailed, the mental query constantly recurs, why, when no answer came, was no other inquiry made, no other letter even written, to ascertain whether they could rest in security and believe the action dismissed for failure to file the declaration? Neither attorney nor defendants seem to have made a suggestion, one to the other, that such very natural course could be taken, in order that they might be sure in their suppositions that the action had been abandoned. And yet for a year, substantially, they could have made such inquiry and been in time to make defense. The law can hardly justify any one, in small and unimportant litigation, to be so negligent. Here a very large sum was sued for, and yet a year was allowed to go by without any effort made to defend, solely because a letter to the clerk remained unanswered.

But, if we were to assume that the letter had been received by the clerk, that he laid it aside and forgot, when the declaration was filed, to send the copy, or the extreme case that he deliberately declined to answer it and send the copy, it would seem to be no excuse for the defendants' laches in the premises. The law lays down a straight road for one sued to travel to his defense. He must obey its mandate, appear in person or by attorney, demur or plead to the declaration, if filed, and, if not, by rule demand either that it be filed or the action be dismissed. The law goes farther in his behalf, and requires the action to be dismissed by the clerk after the lapse of three months, if no declaration is filed. Surely the least degree of prudence would require a defendant to see that this was done. The letter in question, only by implication, could convey to the clerk, if he had received it, any idea that it was the purpose of the attorney sending it to enter an appearance in any way to the action for the defendants. It does not disclose that he was writing on their behalf or as their attorney. The clerk, living so far away, was not at all likely to have knowledge that the relation of attorney and client had ever existed between the parties, or that they even knew each other. It is certainly no uncommon thing for clerks of courts to receive requests for copies of papers of

this kind from attorneys who are not representing either plaintiffs or defendants, and in many cases it would be deemed impertinent for him to inquire for what purpose such attorney desired such copy.

Nor can this court perceive how the proposition can be maintained that any legal obligation rested upon attorneys for plaintiff, even if they knew of the employment of the attorney by defendants in the case, to inform such attorney that the declaration had been filed and the action was to be prosecuted. Of the three attorneys for plaintiffs assumed to have such knowledge, one lived in another state, another in another county, and only one in the same county and city as the attorney employed by the defendants. As to this latter it is suggested in argument that, if defendants desired to know from him the status of the proceeding, it was incumbent upon them and their attorney to come to and ask it of him, and not incumbent upon him to go and volunteer the information to them; that, if they did not seek information of the kind from him, he had right to assume they were fully informed through other channels, or did not care for it. While this court strenuously insists upon the broadest exercise of courtesy between members of the bar in their relations to each other, it cannot go so far as to require additional obligations as to the maturing of law causes than those imposed by the law of pleading and practice. The law of the case, as held by the courts, is so clearly enunciated in the opinions of Judges Keller and Pritchard in *Wylie Permanent Camping Co. v. Lynch*, 195 Fed. 386, 115 C. C. A. 288, as to make further citations unnecessary.

[2] The third and last ground on which this motion is based, that the "Soldiers' and Sailors' Civil Relief Act" (Act March 8, 1918, c. 20, 40 Stat. — [Comp. St. 1918, §§ 3078 $\frac{1}{4}$ a–3078 $\frac{1}{4}$ ss]) was not complied with by the filing, at the time this judgment was taken, of an affidavit, or other evidence, that these defendants were not, at the time, in the military or naval service, has presented greater difficulty in its determination. It will be recalled that this act was not approved until March 8, 1918, and this judgment was rendered less than a month after, on April 4, 1918. At that time the act had not been generally promulgated, and, as yet, this court has not been able to find where any judicial construction of its terms has been enunciated. The plaintiff has, upon this motion, tendered an affidavit of one of its attorneys that neither of these defendants had been or were in the service contemplated by the act during the war, and it is not contended by defendants themselves that they, or either of them, are or have been in such service.

They contend, in effect, however, that in all cases where defendants fail to appear this statute goes to the jurisdiction of the court—that it has no power, while its provisions are in force, to enter judgment against any defendants until the affidavit, or one of them, required by the act, has first been filed by the plaintiff. They base this contention upon the first section of article 2 of this act (Comp. St. 1918, § 3078 $\frac{1}{4}$ bb) reading as follows:

"In any action or proceeding commenced in any court if there shall be a default of an appearance by the defendant the plaintiff before entering judg-

ment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest and the court shall on application make such appointment. Unless it appears that the defendant is not in such service the court may require as a condition before judgment is entered that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of the defendant under this act."

If this construction contended for by defendants' attorney be true, this act must inevitably have very sweeping, far-reaching effect, not only during this period of the war, but for years thereafter; for it is safe to say that in the inferior courts of the country many hundreds, if not thousands, of judgments have been taken where the affidavit has not been filed, all of which would become absolutely void. In such case, it might be doubted whether the act could be maintained as constitutional even as war-time legislation, but it is not deemed necessary here to discuss that proposition. There are several reasons why I do not regard it as applicable to this case:

First. By the terms of this section itself a question arises at once as to what character of cases is meant by the words "default of an appearance" by the defendant. There are a large number of cases constantly brought in our courts by publication of notice or summons, such as divorce cases in personam, or attachment cases in rem, where no personal service is had upon a defendant, in which, however, the courts are by law authorized to proceed to decree and judgment. This statute in construction could very well be restricted in application to such, for when one has been, in person, properly served with process, he is presumed to be in court, and the legal obligation upon him to appear and make his defense, if he has any and desires to do so, becomes imperative. It can hardly be presumed that Congress intended that one, for instance, not in service, so served, and upon whom such obligation in consequence rests, should, by reason of being even afterwards called to service, be relieved of the instant legal obligation upon him that he had theretofore incurred.

Second. Be this as it may, it seems clear that the terms of the act should be construed together, with a view to ascertain the reasonable purpose designed to be accomplished by it. It cannot be questioned that it is exclusive in its terms, designed solely for the benefit of certain persons for the time being in certain defined classes of military and naval service, their sureties, indorsers, and guarantors, and no others. This is made very clear by the sections of article 1 of the act; further, that it does not pretend to abrogate the contracts of such persons, but only to suspend the enforcement thereof by legal proceed-

ings for a specified period; that the entering of such judgment or decree against such persons may notwithstanding be by the court done, provided it has appointed an attorney to represent such person in service to protect his interest, and has required of plaintiff a bond to indemnify the defendant in such service "against any loss or damage that he may suffer by reason of any judgment, should the judgment be thereafter set aside in whole or in part."

Third. If action is brought against such person in service, the court in which it is pending, in its discretion, on its own motion, or upon application of such defendant in service, or some one for him, shall stay the prosecution of the action for the period specified, "unless, in the opinion of the court, the ability of the plaintiff to prosecute the action, or the defendant to conduct his defense, is not materially affected by reason of his military service," and in case of executions, attachments, and garnishments, like stay may, in the discretion of the court, under like conditions, be granted, and attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment, may be vacated. Where the person in military service is a codefendant with others, the plaintiff may nevertheless, by leave of court, proceed against the others. From all these provisions, taken together, it seems to be clear that Congress had no intention by this act to either destroy or limit the inherent jurisdictional right of the courts to try cases, or enforce rights and remedies, against people generally, but only to secure certain security for those certain persons in military and naval service who might otherwise by reason of service be subject to injustice and oppression.

Fourth. To fully establish the view herein taken, it would seem that the terms of the fourth clause of this article 2 of the act is conclusive. This clause reads as follows:

"(4) If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment."

In view of all these provisions, I conclude that this statute does not affect in any way the right of the courts to assume jurisdiction over individual citizens not engaged in the service specified by the statute; that in case they have or do assume such jurisdiction over one in such service, it is their duty, in case attention is called to the fact, by either the defendant in service or some one for him, to see to it that such defendant is properly represented by attorney and the action is stayed unless his interests will not be materially affected or he is by bond indemnified; that in case judgment is taken against him he has full remedy under this fourth clause to have such judgment vacated; that

none of these provisions can in any way inure to the benefit of persons not in such service and therefore, unless one or the other of these defendants can show that he was in such service at the time this judgment was rendered the failure of the plaintiff to file affidavit that such was not the case becomes wholly immaterial, so far as any right on their part is concerned, to disturb or cause this judgment to be set aside. They do not assert or claim to have been in such service, and, on the contrary, the plaintiff tenders an affidavit that they were not. I can see no reason why such affidavit, uncontradicted by defendants, cannot on this motion be accepted and filed, to show that no injustice in this particular has been done defendants and no error in rendering the judgment to their prejudice has been committed.

The motion to set aside must be overruled.

THE MELBOURN P. SMITH.

THE ONTARIO.

(District Court, E. D. Virginia. February 18, 1919.)

1. COLLISION ⚡85—VESSELS IN FOG—EVIDENCE AS TO SIGNALS.

Positive testimony of the officers and others on board that the correct signal was given by a schooner at night in fog, shortly before collision, showing the tack she was on, cannot be overcome by testimony of those on the other vessel, half a mile away, as to the signal heard by them.

2. COLLISION ⚡82(2)—STEAM AND SAILING VESSEL IN FOG—EXCESSIVE SPEED.

A collision at sea at night in a fog between a steamer and schooner held due solely to the fault of the steamer, which was the burdened vessel and admittedly going at 9 or 10 knots when she saw the schooner half a mile away, after hearing her fog signals for some time.

In Admiralty. Suit for collision by R. J. Leseman, master of the schooner Melbourn P. Smith, against the steamship Ontario, with cross-libel. Decree for libellant.

Edward R. Baird, Jr., of Norfolk, Va., for the Melbourn P. Smith.
Hughes, Little & Seawell, of Norfolk, Va., for the Ontario.

WADDILL, District Judge. This litigation involves a collision between the sailing ship Melbourn P. Smith, and the steamship Ontario, which occurred about a quarter past 12 on the morning of the 21st of March, 1918, in the Atlantic Ocean, some 30 miles to the northward and eastward of Cape Charles Light. The schooner was a four-master, en route from New York to Newport News, for a cargo of coal. The Ontario was one of the Merchants' & Miners' Transportation Company line of steamers en route from Norfolk to Boston. The weather was thick, rain especially heavy, and the wind blowing 30 miles an hour from the eastward.

The material facts, save as to whether the schooner was sounding a signal of one blast, indicating it was on the starboard tack, or two blasts, indicating it was on the port tack, are not in serious dispute. The collision occurred, in the main, as claimed by the libellant. That the weather was thick, that each vessel was giving appropriate fog

signals, as they had been doing for some time prior to the collision, and that the lights of the schooner were seen half a mile off before the collision, are facts admitted, as is also that the steamship, upon observing the light of the schooner, which was then on the port tack half a mile away, heading offshore, gave the appropriate danger signal, but too late to avert the collision.

There is some difference in the evidence, as to the speed at which the vessels were proceeding, the libellant's testimony being that the Ontario was making from 12 to 14 knots an hour, whereas the steamship admits she was making 9 to 10 knots. The schooner claims to have been making 2 knots, whereas the steamship says she was making perhaps about 7 knots at the time of the collision.

There is a sharp conflict in the testimony as to what signal the schooner was giving shortly before the collision, as indicating the tack she was on. The steamship insists that the schooner only sounded one blast of its horn, indicating that it was going to the north or north-eastward on the starboard tack, whereas it was actually on the port tack, and heading to the south or southeastward, and that that fault of navigation by the schooner was the sole cause of the collision. The steamship's owners admit that, if the schooner was giving the appropriate port tack signal of two blasts, the steamship is liable for the collision.

Which signal was being given by the schooner presents a clear issue of fact, which must be determined by the court in the light of all the facts and circumstances of the case, and the reasonable inferences to be drawn from the testimony. The evidence of the officers and crews of each vessel examined supports the contentions of their respective ships. The steamship also examined two of her passengers, the evidence of one of whom strongly sustains her contention as to the signals heard by the steamship's witnesses. That the schooner was actually on the port tack, as it had been for some hours previously, is not disputed, and those on board of her, including her master, wheelsman, and lookout, positively support the schooner's contention that she was properly sounding two blasts of her horn, as claimed by her, as do all the witnesses examined in her behalf.

[1] The case turns, as far as this testimony is concerned, upon whether the court will accept their version, or that of the witnesses, including the passengers, for the Ontario, who were approximately a mile away, as to what they heard. Testimony of witnesses from a ship as to what signals were actually sounded, cannot be lightly ignored because some one from another ship, some distance off, claims to have heard different signals. Especially is this true, as here, where the signals claimed to have been sounded are those which should have been given upon the tack on which the vessel then was. To have given signals indicating the vessel was proceeding in the direction opposite from the one she was actually on would have been gross fault and criminal negligence, involving the loss of the ship and the lives of all on board.

The court cannot see its way clear to disregard this testimony, and accept that of witnesses from the Ontario, including the passenger,

whose mind at the time was admittedly distracted by other things, especially considering the distance they were away, and their liability to have misunderstood or confused the signal, indicating the tack on which the schooner was, with that of fog signals then being sounded. This conclusion, as conceded by the respondent, the Ontario, effectually disposes of the case.

[2] Moreover, the steamship was the burdened vessel, and there was imposed on her the obligation to avoid collision, as well as the risk of collision with this schooner. She admits seeing the latter's lights half a mile off, and had heard its signals for a short time before; and she cannot escape liability under those circumstances, while navigating in a fog at the speed she admits she was going. There is no dispute as to the prevalence of the fog, nor that the sailing vessel, whose fog signals had been heard, was ahead enveloped therein; and where the steamship navigated at such speed as not to be able to avoid hazards from a vessel hidden in the fog, arising either from eccentricities of navigation or misunderstanding of signals, as seems to have been the case here, she cannot avoid the consequences of her conduct. She not only had warning and knowledge of the presence of the schooner, but actually discovered its lights when half a mile away, and, had she then been proceeding at the moderate rate of speed contemplated by law, she doubtless would have avoided the disaster, which she was unable to do at the high rate of speed she was maintaining.

It follows, from what has been said, that the Ontario is solely responsible for the collision, and a decree so holding will be entered on presentation.

WALSH v. ATLANTIC COAST LINE R. CO. (two cases).

(District Court, D. Massachusetts. February 19, 1916.)

Nos. 679, 680.

1. COURTS ⇨274—FOREIGN CORPORATIONS—JURISDICTION OF SUIT AGAINST—“DOING BUSINESS” IN STATE.

A Virginia railroad company with lines in the Southern States, but maintaining an office in Boston, for which it paid a substantial rent, with an office force in charge of a salaried agent, advertised as its New England agent, through which office it solicited business and arranged for transportation of passengers and freight over its lines, *held* to be “doing business” within the district of Massachusetts, and subject to suit there on a claim for injury to a passenger.

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

2. COURTS ⇨344—PROCESS—SUFFICIENCY OF SERVICE—FOREIGN CORPORATIONS.

Where a foreign corporation is doing business within the district, service upon it which would be good under the state law is sufficient in the federal court.

3. CORPORATIONS ⇨668(4)—SUFFICIENCY OF SERVICE—FOREIGN CORPORATIONS.

Under St. Mass. 1913, c. 257, where a foreign corporation doing business in the state has a usual place of business there, service in an action against it may be made upon the person in charge.

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

At Law. Actions by Gertrude Walsh and by Alfred E. Walsh against the Atlantic Coast Line Railroad Company. On motions to quash service, and to dismiss for want of jurisdiction over defendant. Denied.

Hurlburt, Jones & Cabot and Cunningham & Ronan, all of Boston, Mass., for plaintiffs.

Putnam, Putnam & Bell and Arthur F. Ray, all of Boston, Mass., specially, for defendant.

MORTON, District Judge. These are two actions at law begun by writs issued out of this court. That by Mrs. Walsh is to recover damages for personal injuries received by her in the state of Florida through the alleged negligence of the defendant, and that by her husband is to recover for loss of consortium. The writs were served by delivering this summons and attested copy of each writ "to J. H. Johnson, New England agent of said corporation, in hand, at its usual place of business, 248 Washington street, Boston" (marshal's return). The defendant has filed a motion "to vacate and quash the plaintiff's alleged service of the writ, * * * and to dismiss said writ, for want of jurisdiction over the person of said defendant," for certain reasons therein alleged; the principal ones being that the defendant is a Virginia corporation, and at the time of the alleged service, was not present, nor doing business within this district, nor subject to service here, and that Johnson at that time was not "such an agent of the defendant as to permit service upon the defendant by delivering an original summons of the writ * * * to him, * * * and that no due service has been made on the defendant." Of course, under the Massachusetts practice, a motion to dismiss is properly used only with reference to defects or lack of jurisdiction which appear upon the face of the papers. This motion is in effect a plea in abatement; it has been treated as such by the parties; and I shall deal with it in the same way. There was a hearing upon it before me, at which witnesses testified orally, and documentary evidence was introduced.

The material facts are as follows:

The plaintiffs are residents and citizens of Massachusetts; the defendant is a Virginia corporation, as alleged in the writ. It owns and operates a railroad in certain of the Southern States, no part of which comes into Massachusetts. It does not own or operate any railroad or transport any passengers or freight within this state. For about 20 years Johnson has been New England agent for the Atlantic Coast Line (which is a combination of the freight departments of the defendant company and of the Merchants' & Miners' Transportation Company), and has also been New England agent of the defendant for the solicitation of passengers; his duty being to try to get passengers to travel upon the defendant's line. In connection with this work, the defendant itself hired, under a written lease from one Marsters to it, part of a shop on Washington street, Boston, paying therefor \$3,300 a year rent. On the window of this shop is a prominent sign, bearing the words "Atlantic Coast Line"; other signs there bear the words "Tickets" and "Freight." Johnson paid the run-

ning expenses of this office out of money sent to him by the defendant for that purpose, including the pay of certain employés, whom he hired and discharged on orders from the defendant's home office. He kept no books for the defendant, and no bank account was here kept in its name. At the time of the service upon him, he had no tickets of the defendant for sale. The defendant paid him a monthly salary, and he did not receive any commissions on the business which he procured. He was employed to drum up trade, both freight and passenger, for the defendant.

When persons came there to buy tickets, Johnson sent to one of the local railroads and purchased the tickets on his credit, or that of the defendant company, delivering the tickets to the passenger, and paid the local road for them. Receipts for deposits for tickets taken by him were made on a blank having across the end:

"Atlantic Coast Line R. R. Co.,
"248 Washington Street,
"J. H. Johnson, N. E. Agent."

—and were signed "J. H. Johnson, N. E. A." (i. e., "New England Agent"). He gave to the local railroad from which he obtained tickets an I. O. U., signed "J. H. Johnson, N. E. A." He sold tickets on the defendant's railroad, as well as connecting lines, which he obtained in this way. He did not, except in a few unusual cases, issue bills of lading for freight. Those were regularly issued by the Merchants' & Miners' Transportation Company, upon a form which bore in conspicuous letters "Atlantic Coast Line," and also bore "J. H. Johnson, New England Agent, 248 Washington Street, Boston." Blank forms of these bills of lading were kept at the Washington street office or shop; and there was also kept at the same place a supply of the defendant's time-tables, on which Johnson's name appeared as "New England Agent." It was not explicitly proved that the form of receipt, or I. O. U., used by Johnson, was known to, or approved by, the defendant; but Johnson testified that he had done business in the same way for more than 20 years, that the way he did business was the general way of doing it in other places, that he thought the defendant must know about it, and that the defendant had never objected to it. He impressed me as being a truthful and accurate witness, and I see no reason to doubt that the facts are as stated in his testimony. Up to January 1, 1915, there had been on sale in Johnson's office mileage books of the defendant company; but on that date, owing to objections raised by the New England railroads, their sale was withdrawn; and at the time of the service of the writ, August 30, 1915, there were, as above stated, no tickets on sale by Johnson. In December, 1914, one of the traveling auditors of the defendant had called at Johnson's office.

Johnson's activities for the defendant were naturally confined to matters in which it was interested, arising in that part of New England of which Boston is the business center. It is not alleged, and does not appear, that he sold the tickets or had anything to do with the contract of transportation under which the plaintiff was riding when

injured, or that said contract was made in this state. Except as to the matters above stated and those naturally connected therewith, Johnson was not, as between him and the defendant, authorized to represent it, and he had no express authority from it to receive service of process.

Two questions are presented:

(1) Was the defendant corporation within this jurisdiction so as to be subject to suit here?

(2) Was the summons served upon its authorized agent?

See *St. Louis, etc., Ry. Co. v. Alexander*, 227 U. S. 218, 226, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77; *Connecticut Mutual Life Insurance Co. v. Spratley*, 172 U. S. 602, 610, 19 Sup. Ct. 308, 43 L. Ed. 569.

[1] As to the first question: As the jurisdictional requirements for federal courts cannot be affected by state statutes, this question is to be determined upon the federal statutes and decisions. *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437, 30 Sup. Ct. 125, 54 L. Ed. 272. Jurisdiction, as to the points under discussion, depends on the presence of the defendant within the territorial limits of the court's power. In cases of corporations, it was at first held that they were so present only in the state where they were organized; but this view no longer prevails, and they are now held to be present wherever they are sufficiently engaged in business and are represented by an agent competent to receive service of process upon them. *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; *Riverside Mills v. Menefee*, 237 U. S. 189, 35 Sup. Ct. 579, 59 L. Ed. 910.

How far it is necessary that a foreign corporation should engage in business in a given district or state, in order to be subject, generally, to the jurisdiction of the courts there, is somewhat uncertain. The Supreme Court has expressly declined to establish any general rule and has said that every case must turn upon its own facts. In a general way it may be said that the—

“business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process.” *Day, J., St. Louis S. W. Ry. Co. v. Alexander*, *supra*.

See, too, *Washington Virginia Ry. Co. v. Real Estate Trust Co.*, 238 U. S. 185, 186, 35 Sup. Ct. 818, 59 L. Ed. 1262.

It has been held that a corporation which did any business whatever in a district or state had submitted itself generally to that jurisdiction (*Beale on Foreign Corporations* [1st Ed.] § 280, collecting authorities); but the better opinion seems to be that there is necessarily some relationship between the extent of business done and the extent of jurisdiction acquired, and I think that this is the view on which the decision in *St. Louis, etc., Ry. Co. v. Alexander*, *supra*, proceeds. See, too, *Boulton, Adm'x, v. International Paper Co.* (C. C. A. 1st Cir., Feb. 10, 1916), 229 Fed. 951, 144 C. C. A. 233. It is, however, clear that jurisdiction is not limited to business done by the corporation within the district or state; the liability to suit depends not upon

the situs or character of the business out of which the litigation arises, but upon the fact that the corporation is present and therefore amenable to process. *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964.

In this case the defendant was maintaining an office on one of the principal streets of Boston, for which it was paying a very substantial rent; it kept there an agent who was under salary, and whom it advertised as its "New England agent"; it also hired and paid an office force to transact its business, through this office and force; it solicited business and arranged for the transportation of persons and freight over its lines. The business carried on at the Washington street office was not Mr. Johnson's business; it was the business of the defendant. The cause of action here alleged arose out of the defendant's undertaking to transport the plaintiff as a passenger. While it was not transporting passengers in New England, it was soliciting that sort of business here, and was making contracts in relation thereto. Business evidently of a pretty wide scope, and—to judge from the rent paid and the office force maintained—of substantial volume, between the defendant, on the one side, and passengers and shippers of freight, on the other, was transacted through the Washington street office. The plaintiff's claim arose out of that sort of business.

As to such controversies as might naturally be expected to arise, from time to time, between the defendant and persons with whom it did business, out of transactions of the same general character as Johnson was authorized to enter into here on its account, the defendant must, I think, be held to have submitted itself to this jurisdiction. *International Harvester Co. v. Kentucky*, 234 U. S. 579, 589, 34 Sup. Ct. 944, 58 L. Ed. 1479; *Newby v. Von Offen*, L. R. 7 Q. B. 293, 296.

[2] As to (2): There remains the question whether service upon Johnson was sufficient service upon the defendant. As the defendant was present within the district, service which would be sufficient under the state law is sufficient in this court. *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *Barron S. S. Co. v. Kane*, *supra*.

[3] Under the Massachusetts statutes (St. 1913, c. 257), service of process in an action against a foreign corporation having a usual place of business in this state, or which is engaged in soliciting business here, may be made by leaving the summons with the agent who has charge of the business. Johnson was concededly in charge of such business as the defendant did here. In *St. Louis, etc., Ry. Co. v. Alexander*, *supra*, service under a New York statute is somewhat analogous to the Massachusetts statute here in question, but limited to causes of action arising on transactions in that state, was approved by the Supreme Court. This Massachusetts statute is explicitly restricted to foreign corporations and does not apply to natural process. It is plainly an attempt on the part of the state of Massachusetts to regulate foreign corporations doing business within its territory, and as such it seems to me to be within the power of the state and to be valid. A similar conclusion as to it was reached by Judge Wait in *Reynolds v. Missouri, Kansas & Texas Ry. Company et al.*, Massachusetts Superior Court, Suffolk County, 1915. Johnson was therefore a proper

person upon whom service against the defendant could be made. On all the evidence, I find and rule that the defendant was within this jurisdiction, and the service was good.

Motion denied.

In re DAVIES.

(District Court, W. D. Tennessee, W. D. March 4, 1919.)

No. 4602.

1. **BANKRUPTCY** ⇨184(1)—CLAIMS—RIGHTS OF PARTIES.

Where personal property of the bankrupt, mortgaged in Illinois, was with consent of the mortgagees removed to Tennessee, and thence removed to Mississippi, and later carried to Arkansas, wherein the mortgagor was adjudicated a bankrupt, rights of the mortgagees and general creditors must be determined by the Arkansas laws.

2. **BANKRUPTCY** ⇨184(1)—RIGHTS OF MORTGAGEES—REMOVAL OF PROPERTY.

Where mortgaged chattels, with consent of the mortgagee, were taken from the state where the mortgage was executed, and thence brought into Arkansas, *held*, that the mortgage lien continued and might be asserted by the mortgagee to obtain priority over general creditors, on bankruptcy of the mortgagor, which occurred while the property was in Arkansas; it appearing that the mortgage was registered in Arkansas prior to bankruptcy.

3. **COURTS** ⇨366(18)—DECISION OF STATE COURT AS CONTROLLING.

In absence of a decision by the highest court of the state, as to rights under a chattel mortgage, the federal District Court will follow the rule of decision prevailing in the Circuit Court of Appeals for the district.

4. **ACKNOWLEDGMENT** ⇨5—REGISTRATION OF MORTGAGE—REACKNOWLEDGMENT.

Where mortgaged chattels, with the consent of the mortgagee, were removed from the state where the mortgage was executed and registered, and later brought into Arkansas, *held*, that no reacknowledgment was necessary to registration in Arkansas.

5. **CHATTEL MORTGAGES** ⇨61—EXECUTION—STATUTES.

Where, after chattel mortgage was executed and registered in foreign state, chattels were brought into Arkansas, and the mortgage there registered, *held*, that Kirby & Castle's Dig. Ark. §§ 840, 844, 6397, requiring chattel mortgages to be acknowledged as required for deeds of real estate, did not apply.

In Bankruptcy. In the matter of the bankruptcy of R. M. Davies. Roach & Stansell objected to an order of the referee allowing Baer Bros. priority by virtue of a chattel mortgage on property that was sold. On certification of exceptions. Order affirmed.

Henry Craft, of Memphis, Tenn., for plaintiff.

W. B. Rosenfield, of Memphis, Tenn., for defendant.

McCALL, District Judge. On the 8th day of October, 1917, R. M. Davies executed his several promissory notes to Baer Bros. and secured the payment thereof by executing on even date a mortgage on 28 head of mules. The mortgage was properly acknowledged and filed for registration in St. Clair county, state of Illinois, in which county both the mortgagor and mortgagees lived, and where the prop-

erty was at that time located. No question was raised as to the bona fides of the indebtedness, nor as to the validity of the mortgage in the state of Illinois.

Davies was a levee contractor, and had employment at Millington, Shelby county, Tenn. Soon after the execution of the mortgage, by and with the consent of the mortgagees, Davies removed the property to Millington, Tenn., to perform his contract there. The mortgage was not recorded in Tennessee. Thereafter, and without the knowledge or consent of the mortgagees, Davies removed the property into the state of Mississippi, and from there into the state of Arkansas, in the summer of 1918, to perform a levee contract he had made with Roach & Stansell. It became necessary for Davies to borrow money as the work progressed to take care of his pay roll, and this he, from time to time, borrowed from Roach & Stansell, to the amount of about \$4,500. Davies did not disclose to them the fact of the Illinois mortgage, nor did Roach & Stansell know of its existence. It was represented to them by Davies that the property was all his, and following this representation they loaned the money to Davies without security. The Illinois mortgage was registered in Arkansas on December 14, 1918, after Roach & Stansell's debt was contracted.

On December 19, 1918, R. M. Davies was adjudged a voluntary bankrupt by this court, and scheduled as a part of his assets 23 mules, then in Crittenden county, Ark., which were covered by the Illinois mortgage. The trustee, if not with the consent, did with the acquiescence of the mortgagees, take possession of and sell the mules as the property of the bankrupt estate, and now has in hand the money arising from said sale.

Roach & Stansell filed their claim with the trustee as an unsecured claim against the bankrupt estate. Baer Bros. filed their notes for \$1,814.62 against the bankrupt estate as a secured claim under the mortgage executed in Illinois and re-registered in Arkansas. On the same day Roach & Stansell filed exceptions to said claim as a preferred or lien claim, insisting that the mortgage under which the preference was claimed was not valid as against them as creditors of R. M. Davies, the bankrupt, because the property in question had been removed from the state of Illinois with the consent of the mortgagees, and subsequently into the state of Arkansas, and had not been legally registered in the latter state, and that they were without notice of its existence at the time of the extension of the credit by them to Davies.

The referee held that Baer Bros. at the date of adjudication had a valid mortgage on the property, and therefore had a preferred claim against the funds arising from the sale thereof by the trustee in bankruptcy, and overruled the exceptions of Roach & Stansell. Upon exceptions by them to the action of the referee, he has certified the case for review.

[1-3] The referee was of opinion that the rights of the parties should be determined by the laws of the state of Arkansas. I concur in that view. *In re Nuchols* (D. C.) 201 Fed. 437; *Potter Mfg. Co. v. Arthur*, 220 Fed. 843, 136 C. C. A. 589, Ann. Cas. 1916A, 1268; *Title Guaranty Co. v. Witmire*, 195 Fed. 41, 115 C. C. A. 43.

In *Creelman Lumber Co. v. Lesh & Co.*, 73 Ark. 16, 83 S. W. 320, 3 Ann. Cas. 108, it was decided that where personal property removed to Arkansas was covered by a mortgage executed and recorded in another state, it will be good by comity, and the lien created by such mortgage was not misplaced by such removal. In that case the removal of the property from the state of its execution was without the consent of the mortgagee. That fact distinguishes it from the instant case, wherein the mortgaged property was removed from Illinois with the consent of the mortgagees. Whether the court would have sustained the lien through comity in the *Creelman Case*, supra, had it appeared that the property was removed out of the state where the mortgage was executed with the consent of the mortgagee, is not determined, although it appears the minority of the court was of opinion that it should so decide. Hill, C. J., in concurring opinion, 73 Ark. 16, 83 S. W. 320, 3 Ann. Cas. 108.

Judge Thayer, speaking for the Circuit Court of Appeals for the Eighth Circuit, in a case quite similar to this one, which arose under Arkansas law, said:

"The general consensus of judicial opinion seems to be that when personal property, which at the time is situated in a given state, is there mortgaged by the owner, and the mortgage is duly executed and recorded in the mode required by the local law so as to create a valid lien, the lien remains good and effectual, although the property is removed to another state, either with or without the consent of the mortgagee, and although the mortgage is not recorded in the state to which the removal is made. The mortgage lien is given effect, however, in the state to which the property is removed, solely by virtue of the doctrine of comity." *Shapard v. Hynes*, 104 Fed. 449, 45 C. C. A. 271, 52 L. R. A. 675.

This court called upon to determine and give effect to the laws of Arkansas, in the absence of decisions of the question in point by the highest court of that state, feels bound by the rule announced in *Shapard v. Hynes*, supra.

[4] But, if mistaken in this, then I am of opinion that it was not necessary to the registration of the mortgage in Arkansas that it should have been reacknowledged by the mortgagor in order to effect a lien on the property covered by it and which had been removed into that state. The lien already existed by virtue of the execution and registration of the instrument in Illinois, and was good everywhere as between the mortgagor and mortgagees. If necessary to register again in Arkansas, it was not for the purpose of validating a lien; but to give constructive notice of the already existing lien to the people of Crittenden county, Ark. *Shapard v. Hynes*, supra; *Alferitz v. Ingalls* (C. C.) 83 Fed. 965; *Smead v. Chandler*, 71 Ark. 517, 76 S. W. 1066, 65 L. R. A. 353; *Dodd v. Parker*, 40 Ark. 536; *Ringo v. Wing*, 49 Ark. 457, 5 S. W. 787.

[5] It is insisted, however, that a chattel mortgage legally executed between parties and on chattels in another state, if such property be removed to Arkansas with consent of the mortgagee, it must be reacknowledged according to the requirements of law in that state for deeds to real estate in order to make it a valid lien as to third parties. *Kirby & Castle's Digest Ark.* §§ 840, 844, 6397. This is true as to

mortgages executed on chattels in Arkansas. But it cannot be said with reason that the Legislature, when providing the forms of acknowledgment to deeds for real estate, had in mind real estate outside the boundaries of that state; hence it would seem to follow that, in providing that chattel mortgages must be acknowledged according to the requirements for deeds to real estate, they likewise must have had in mind only chattels situated in that state when the mortgage was executed and the lien created, and did not intend to prescribe a form for or require reacknowledgment of chattel mortgages properly executed on property in a foreign state and there registered, as in this case.

There are other questions raised which have been considered, but, since they seem to be without merit, it is not deemed necessary to discuss them.

An order will be entered, affirming the order of the referee, with costs, and re-referring the case for further proceeding.

In re ROBINSON.

(District Court, D. Massachusetts. February 7, 1919.)

No. 25160.

BANKRUPTCY ⇨407(5)—**RIGHT TO DISCHARGE—OBTAINING PROPERTY BY FALSE STATEMENT—“MATERIAL FALSE STATEMENT IN WRITING”—WORTHLESS CHECK.**

A bankrupt, who obtains property by means of a check which he knows to be worthless, obtains it upon a “materially false statement in writing,” within the meaning of Bankruptcy Act, § 14b (3), as amended by Act Feb. 5, 1903, c. 487, § 4 (Comp. St. § 9598), which defeats his right to a discharge.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Materially False Statement.]

In Bankruptcy. In the matter of Harry E. Robinson, bankrupt. On petition for discharge. Granted.

Thomas P. McKenna, of New York City, and Percy A. Atherton, of Boston, Mass., for objecting creditor.

Alvah L. Stinson, of Boston, Mass., for bankrupt.

MORTON, District Judge. The specifications of objection based on alleged false oaths by the bankrupt to the schedules, on his failure to keep books of account, and on the destruction by him after adjudication of his paid checks returned to him by the bank, involve an element of knowledge or intent by the bankrupt, which in each instance the learned referee finds not to have existed. On questions of this sort, the appearance of the bankrupt and the general atmosphere of the case are of much assistance in arriving at the truth; and the referee's conclusions accordingly carry great weight. In the present case he seems to have been clearly right as to the alleged false oaths; his findings that the failure to keep books, and the destruc-

tion of paid checks, were not prompted by an intent to conceal financial condition, are by no means so plainly erroneous that they can be set aside and disregarded. None of these specifications is sustained.

The only other specification is based on the giving by the bankrupt of a worthless check. The facts are not in dispute, and are as follows:

The bankrupt had a trading or speculating account with J. R. Williston & Co., stockbrokers. In August, 1916, they called on him for additional margin. He thereupon gave them his check to their order for \$5,000, dated August 9, 1916, and drawn on the International Trust Company of Boston. As I understand the facts, the check was not dated ahead, but was delivered to Williston & Co. on its date and in the ordinary course of business. On that day and on the day previous the bankrupt's account at the Trust Company was overdrawn more than \$1,500, and it had been continuously overdrawn since August 6th. He had no credit balance on it until September 16, 1916, when one of less than \$30 is shown. For a considerable period prior to August 9th the bankrupt's bank account had been overdrawn much of the time. The \$5,000 check was presented for payment on August 10th, and payment was refused. The bankrupt knew that he had not \$5,000, nor anything like that sum, on deposit when he delivered the check; it was much larger than he was in the habit of drawing, and it does not appear that he had any reason to believe, or did believe, that it would be paid when presented.

The learned referee ruled that the check was not a materially false statement in writing made for the purpose of obtaining credit. He was apparently of opinion that the statement intended by section 14b (3) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [Comp. St. § 9598]) was a statement of financial condition only, like a commercial report. This is the view taken, with qualifications, by the District Court of Montana in *Rea Bros.*, 251 Fed. 431.

Just what is meant by "a financial statement," or "a statement of financial condition," in this connection is not obvious. Must it be an asset and liability statement? Must it purport to be complete? If not, would a very condensed abstract showing net worth be within the act? It would seem that it must be so. But it would be a curious corollary that if the statement be not in the form of a commercial report (i. e., not in columns of figures), or be limited to a single piece of property, ownership of which is asserted, it is not within the act. In *re Pincus* (D. C.) 147 Fed. 621, 623, it was held that a false statement as to a single item of \$10,000 noted at the foot of a commercial report was sufficient to bar the discharge. May a person obtain goods by means of written lies about his property or debts—a substantial crime—and still be entitled to a discharge in bankruptcy, provided only that he does not lie in columns? Or limits his statement to the assertion that he has \$5,000 in the bank? There is difficulty in making the form of a statement or the ground which it purports to cover, rather than the purpose and substance of it, the controlling element.

The language of the act is "a statement in writing"—a plain expression, and one well known in the law in a somewhat analogous

connection. The wide scope given to the statutes making false pretenses criminal led in many states to legislation providing that false pretenses as to the purchaser's means or ability to pay should not be criminally actionable unless made in writing; e. g., Rev. Laws Mass. c. 208, § 28. Undoubtedly these statutes were known to the lawyers in Congress. The proceedings in Congress show that its attention was directed chiefly to commercial reports, or formal statements of financial condition, but the language used was not limited to them, as it easily might have been, if that had been the intention. The principle being adopted, that to obtain property on credit upon a materially false statement in writing should bar discharge, I see no sufficient reason why the natural meaning of the language in the act should be cut down, so as to include only statements made in a particular form, or purporting to have a certain scope. Assuming (although without so deciding) that the statement must be one relating directly to means or ability to pay, it seems to me that statements of that sort in whatever form, and however framed, come within section 14b (3).

By the law of Massachusetts a check delivered by the drawer to another person in payment for property or credit is a statement that there are funds on deposit to the drawer's credit, and the check will be paid. "If the drawer passes a check to a third person, the language of the act is, 'It is good and will be duly honored.' * * * In such case, if he knew that he had neither funds nor credit, it would probably be holden to be a false pretense." Morton, J., *Commonwealth v. Drew*, 19 Pick. (Mass.) 179, 186. And such appears to be the general law. *Merchants' Bank v. State Bank*, 10 Wall. 647, 19 L. Ed. 1008; 12 Ency. of Law (2d Ed.) 838. To obtain property by a worthless check is to obtain it, in my opinion, by means of a materially false statement in writing, within the meaning of the Bankruptcy Act.

There remains the question whether the bankrupt "obtained money or property on credit." If not, he is entitled to his discharge, notwithstanding that he may have made a false statement within the meaning of the section under discussion. The testimony on this point is meagre. All that appears is that Williston & Co. got the check and passed it to the bankrupt's account. It was dishonored the next day and presumably was immediately charged back to him. There is no testimony that he obtained any money or property by it. The most that counsel for the objecting creditors assert is that Williston & Co. did not close out the commodities or securities which they were carrying for the bankrupt, as they would have done, but for the check. Even of this there is no clear evidence. The burden is upon the objecting creditors to establish their objection; and that they have not done. The result is that this specification of objection also fails and the discharge should be granted.

So ordered.

EX PARTE WEITZ.

(District Court, D. Massachusetts. February 25, 1919.)

No. 1680.

ARMY AND NAVY § 44(2)—PERSONS SUBJECT TO MILITARY LAW—"RETAINER TO CAMP"—"SERVING WITH THE ARMIES"—HABEAS CORPUS.

The driver of an automobile employed and paid by the owner, a contractor for construction work at a training camp in the United States, which is not under martial law, his duty being to transport civilian employes of the government auditing department at the camp, not shown to have any direct connection with the army, is not a "retainer to the camp or accompanying or serving with the armies," within Articles of War, art. 2d (Comp. St. § 2308a), and not subject to trial by court-martial for a death inflicted by his machine within the camp.

Habeas corpus by William Weitz, on relation of Robert E. Weitz. Writ granted.

John D. Carney, of Boston, Mass., for petitioner.

Louis Goldberg, of Baltimore, Md., for the United States.

MORTON, District Judge. Habeas corpus to secure the discharge of the petitioner, who is held by the army authorities for trial by court-martial. The facts are agreed and are as follows:

The petitioner was not in the military service. He was employed as an automobile driver by Coleman Bros., who had a contract with the government to do construction work at Camp Devens. The automobile which he operated was owned by Coleman Bros., and was used for transporting civilian employes of the government auditing department at Camp Devens. It does not appear that this auditing department had any direct connection with the United States Army. The cost of operating the automobile, including the wages of the petitioner, was charged by Coleman Bros. to the United States. Practically all of his work was within the cantonment; he had his quarters in the garage there, where the automobile was kept.

At the time in question, there were in Camp Devens more than 40,000 men in training for active service on the fighting front. They constituted part of the United States Army and included the Twelfth Division, which was being intensively trained for the purpose of getting it overseas at the earliest possible moment. No martial law had been proclaimed at Camp Devens; the courts of the state and of the United States were open; and, of course, there was no fighting within the territorial limits of the United States.

Under these circumstances, the automobile driven by the petitioner struck and killed a soldier of the Twelfth Division within the limits of the camp. The petitioner was arrested by the military authorities and is held for trial by court-martial. The question is whether he is amenable to military law.

The answer to this question depends on the true construction of article 2d of the Articles of War (Compiled Stats. 1916, § 2308a),

which provides, in substance, that "retainers to the camp and all persons accompanying or serving with the armies of the United States * * * in the field," shall be subject to military law. The precise issues are: (1) Whether the petitioner was a retainer to the camp, or accompanying or serving with the army; and (2) whether the army at Camp Devens was an "army in the field."

While the accident happened within the territorial limits of the camp, no military jurisdiction attached—or is claimed—by reason of that fact. It arises, if it exists, solely out of the petitioner's employment or status. He was not hired by any public officials, and had no contractual relation with the United States; his employer was Coleman Bros. Nor was his work directly connected with the military activities of the camp; he transported civilian employes of the auditing department. The contract which Coleman Bros. had was "for certain construction work * * * to be performed within the cantonment * * * known as Camp Devens."

No case has gone so far as to hold that such a person comes within the Articles of War. In every case which has come to my notice, in which the civilian was held subject to military law, he was either employed by the United States or was directly concerned with the movement or supply of troops.

"The discipline authorized by the article has mainly been applied to the description of 'persons serving with the armies of the United States in the field'—that is to say, civilians employed by the United States or serving in a quasi military capacity in connection with troops in time of war and on its theater. But the mere fact of employment by the government pending a general war does not render the civilian employe so amenable. The employment must be in connection with the army in the field and on the theater of hostilities." *Military Law of the United States*, by General Davis, late Judge Advocate General and Professor of Law at West Point Academy (3d Ed. 1915) p. 478.

See, too, *Opinions of Attorney General*, volume 16, pp. 13, 48.

The expression "retainers to the camp" means "officers' servants and the like, as well as camp followers generally." Davis, *Military Law*, p. 478. It would not, in my opinion, include firms engaged in construction work, nor their employes. Persons "accompanying or serving with * * * armies in the field" are those who, though not enlisted, do work required in maintenance, supply, or transportation of an army. The work which Weitz was doing was not of that character. He was no more serving with or accompanying the army than was a carpenter building barracks, or a laborer working on a road in the camp, or a machinist hired by the day to do work in the machine shop. There is, I think, a clear distinction between work done in the erection or maintenance of a camp of semipermanent character, and work having a direct relation to the transport, maintenance, or supply of an army in the field. Both sorts of work are necessary to the army, but only persons engaged in the latter sort are amenable to military law and punishment. To hold otherwise would be to subject to military law a very large body of civilian employes, never directly coming in contact with military authority, and not heretofore generally supposed to be subject thereto.

It is unnecessary to decide whether the military force at Camp Devens constituted an army "in the field."

There is no proper return to the writ; but that fact is no sufficient reason for depriving the petitioner of his legal rights. An order may be entered discharging him from custody.

In re MAIER.

(District Court, D. Maine. March 4, 1919.)

No. 12726.

BANKRUPTCY ⇨410—EXTENSION OF TIME FOR PETITION FOR DISCHARGE—MOTION TO VACATE ORDER.

A motion to vacate an order extending the time for a bankrupt to file petition for discharge denied, as not having been seasonably made.

In Bankruptcy. In the matter of Augustus W. Maier, bankrupt. On motion to vacate order extending time within which to file petition for discharge. Denied.

Howard Davies, of Portland, Me., for bankrupt.

Frank H. Haskell, of Portland, Me., for petitioning creditor.

HALE, District Judge. In this case the adjudication was July 21, 1917. On January 16, 1919, the bankrupt filed a petition for an extension of time in which to file petition for discharge. Petition for extension of time was allowed; on the same date his petition for discharge was filed. This was done under section 14 of the Bankruptcy Act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 550 [Comp. St. § 9598]), which provides that:

"Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months."

In the exercise of its judicial discretion the court, finding that the bankrupt was unavoidably prevented from filing petition for discharge within the 12 months, extended the time to 18 months.

After the expiration of the 18 months, namely, on February 5, 1919, a motion is filed by Willard B. Sweetsir, a creditor, to vacate the order of January 16, extending the time of filing the petition for discharge. This motion to vacate is based upon the allegation that the motion to extend the time was an imposition on the court from the fact that the bankrupt was not "unavoidably prevented," within the meaning of the statute, because the bankrupt was not ill during the greater portion of the 12 months.

This motion to vacate is addressed to the judicial discretion of the court. It is ex parte, and without notice to creditors. The granting

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

of this motion would preclude the bankrupt from obtaining his discharge. In spite of this fact, however, the court should, in its discretion, grant the motion, if it finds that the motion is made seasonably and in good faith. This motion was not made until the expiration of the 18 months. In the Casey Case, 195 Fed. 322, 329, the District Court of the Northern District of New York denied the motion to vacate on the ground of laches in presenting the motion. The court says:

"Laches is measured sometimes by years and sometimes by days, depending on the nature of the case and the circumstances. Here it was a question of months with the bankrupt. If his order extending his time to file his application for a discharge was to be attacked by a motion to vacate, the motion should have been made promptly and long enough before the expiration of the 18 months period to enable him to renew his application or file more proofs in support thereof, assuming the petition to have been insufficient."

In the case before me, the petition for an extension of time was filed on January 16, 1919, 5 days before the expiration of the 18 months. The motion to vacate was not filed for 20 days thereafter. The petition for discharge was published on January 20, 1919, notice was sent the creditors on January 27, 1919, and the bankrupt paid for the expense of publishing the notice.

Under all the circumstances of the case, I am constrained to find that the motion to vacate the order of extending the time in which to file petition for discharge was not seasonably made. The motion is denied.

THE JOHN B. ROBBINS.

(District Court, E. D. Virginia. February 18, 1919.)

SHIPPING Ⓒ132(5)—DAMAGE TO CARGO—LIABILITY.

Evidence held insufficient to establish unseaworthiness of a vessel at the beginning of the voyage or improper stowage, but to show that damage to cargo resulted from errors in navigation or dangers of the sea, for which neither vessel nor owners were liable under Harter Act, § 3 (Comp. St. § 8031).

In Admiralty. Suit by the Hubbard Fertilizer Company against the auxiliary schooner John B. Robbins and J. H. Sturgiss and J. E. Mapp, its owners. Decree for respondents.

John H. Skeen, of Baltimore, Md., and John W. Oast, Jr., of Norfolk, Va., for libellant.

Edward R. Baird, Jr., of Norfolk, Va., for respondents.

WADDILL, District Judge. The libel in this case is filed to recover for alleged damage to and loss of a certain portion of a cargo of 35 tons of guano, undertaken to be transported by the respondents from Cape Charles, Va., to Bayford, Va.

The facts, briefly, are that the respondents undertook the service, and the fertilizer was duly loaded upon the deck of the schooner on Saturday, the 25th day of February, 1918. The schooner sailed at

8 o'clock on Monday morning, the 27th, from Cape Charles, and arrived off Bayford at about 10:30. Wind and weather conditions were propitious for the voyage, and no trouble was encountered until arriving off Bayford, when the vessel came to a standstill, and the master in his yawl boat proceeded to the mouth of the creek, which it is necessary to enter with a view of sounding to see if he could safely go in. Meantime the vessel was left adrift with a man on board, and upon the master's return the schooner had gone aground, and he was unable to float her until that night about 10:30, when he anchored in deep water, and during the night, about 3 o'clock in the morning, a violent storm came up, driving the Robbins ashore, and her cargo was either damaged or lost, with the exception of about 12 tons, and this suit is to recover for such loss.

The libelant especially charges that the Robbins was unseaworthy at the beginning of the voyage, as was unknown to the libelant, and that said cargo was negligently, wrongfully, and improperly stowed by the respondents upon said vessel.

The court has given much consideration to this case, and its conclusion is that the evidence does not establish the unseaworthiness of the vessel at the beginning of the voyage, nor does it show that there was any negligence either in the loading, stowage, or custody of the goods after their delivery. It is true that the cargo was not loaded below deck of the vessel, where perhaps it would have been safer from exposure to rain or storm; but those conditions did not enter especially into this disaster, and the fact that the cargo was loaded on deck in no manner, in the opinion of the court, affected the loss, as it would have been quite as seriously damaged in the hold, and probably more so, than upon deck.

Under the provisions of the act of Congress of February 13, 1893, known as the Harter Act (27 Stat. 445, c. 105 [Comp. St. §§ 8029-8035])—Hughes on Admir. pp. 167, 168—no recovery can be had for the loss sustained, either as against the vessel or its owners, and a decree may be accordingly entered dismissing the libel.

In re SPANGLER.

(District Court, D. Massachusetts. February 25, 1919.)

No. 26730.

BANKRUPTCY ⇨404(2)—FAILURE OF BANKRUPT TO OBTAIN DISCHARGE—EFFECT OF SECOND PROCEEDINGS.

Where a bankrupt failed to obtain a discharge, creditors whose claims were proved are not affected by subsequent bankruptcy proceedings against him, which afford no ground for a stay of suits by them, nor are such suits barred by his discharge therein.

In Bankruptcy. In the matter of Harold G. Spangler, bankrupt. On petition for stay of application for discharge. Denied.

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

Adolph M. Schwarz, of New York City, and Stanley A. Dearborn, of Boston, Mass., for creditor.

Reuben Hall, of Boston, Mass., for bankrupt.

MORTON, District Judge. Inasmuch as the bankrupt failed to obtain his discharge on his previous voluntary petition, the debts scheduled in that proceeding will not be affected by any discharge granted in this proceeding, if the creditors interested appear and assert their rights. Under such circumstances, the discharge would be restricted to debts incurred since the filing of the former petition and would expressly exclude debts scheduled in or covered by the former petition. As to such debts the pendency of the present petition affords no reason for any stay of action in the state courts, and, if pleaded for that purpose, the plea could be met, I should suppose, by a replication setting up the complete facts.

As the bankrupt may be entitled to a discharge from some of the debts now scheduled, he ought not to be prevented from applying for one; and the present petition must therefore be denied.

THE LEXINGTON.

(District Court, S. D. New York. December 31, 1917.)

COLLISION ⚡75—MEETING STEAM AND SAILING VESSEL—FAILURE TO SHOW LIGHTS.

A collision in Long Island Sound on a clear night between a passenger steamer, with a lookout posted and officers on duty and a meeting schooner, held due solely to the fact that the schooner was not showing her port light.

In Admiralty. Suit for collision by Judson L. Hamilton, master of the schooner Stetson, against the steamer Lexington. Decree for respondent.

Affirmed 256 Fed. 65, — C. C. A. —.

Alexander & Ash, of New York City (Peter Alexander, of New York City, of counsel), for libellant.

Burlingham, Montgomery & Beecher, of New York City (Chauncey I. Clark, of New York City, of counsel), for claimant.

AUGUSTUS N. HAND, District Judge. The steamer Lexington collided with the three-masted schooner Stetson in Long Island Sound. The Lexington seeks to excuse the collision upon the ground that the Stetson had no port light and maintained a negligent lookout. The accident occurred at night in clear weather. The libellant says the lights of the Stetson were set and brightly burning at the time of the collision, but that the impact of the Lexington extinguished the port light and shook down the starboard light.

A general consideration which has impressed me is the inherent unlikelihood of such a collision if the port light had been burning. The

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Lexington was a passenger steamer. She had a bow lookout. Her master and quartermaster were also on duty at the time of the collision. That she should have run straight into a properly lighted schooner on a clear night without seeing her until she was $2\frac{1}{2}$ lengths away is in itself, though possible, highly improbable. The *John H. Starin*, 122 Fed. 236, 58 C. C. A. 600. The libelant admits that there was no light immediately after the collision and is forced to claim that it was put out by the collision. Whether the collision would have had such an effect may be doubted. Moreover, the fact is highly significant that five of the depositions of the libelant were taken before those of the claimant, and not one of these five witnesses said that the port light was extinguished by the collision, nor had the libel anywhere mentioned such an occurrence. They were followed by nine witnesses on behalf of the Lexington who swore that her port light was out. The deposition of Hamilton, the master of the *Stetson*, was taken, and he first testified that the light was shaken out by the collision. His report to the local inspectors had not mentioned that the light was thus extinguished. Moreover, he said he told his counsel all the facts, but admitted on cross-examination that he did not think he told him that the port light went out.

Neither the light, nor the man who lighted it, was produced at the trial. In view of the sharp conflict of testimony as to whether this lamp was ever lighted, and the admission that it was found to be out immediately after the collision, I cannot believe the explanation of the single witness, Hamilton, that this condition was caused by the collision.

The *Stetson* did not have a lookout just before the time of the collision. Chevie, the lookout, testified that he went aft to look at the clock after another steamer had passed the *Stetson*, and when he got back the Lexington "was pretty near on top of us." Therefore he was absent at the most crucial time. The captain, however, was aware of the presence of the steamer which had been reported by Chevie before; he was holding his course as he ought, and the steamer was under the rules bound to keep out of his way. The absence of the lookout therefore apparently did not contribute to the injury, and I place my decision purely upon the ground that the *Stetson* had insufficient lights.

The libel is dismissed, with costs.

THE LEXINGTON.

(Circuit Court of Appeals, Second Circuit. January 15, 1919.)

No. 118.

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

Suit for collision by Judson L. Hamilton, master of the schooner Stetson, against the steamer Lexington. Decree for respondent, and libelant appeals. Affirmed.

For opinion below, see 256 Fed. 63.

Alexander & Ash, of New York City (Peter Alexander, of New York City, of counsel), for appellant.

Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Decree affirmed.

 ELDER DEMPSTER & CO., Limited, v. TALGE MAHOGANY CO.

(Circuit Court of Appeals, Fifth Circuit. February 17, 1919.)

No. 3320.

1. ADMIRALTY ⇔34—LACHES.

While courts of admiralty are not governed by any statute of limitations, laches or delay in judicial enforcement of maritime claims constitutes a valid defense, where the circumstances are such that it is to be inferred that defendant was prejudiced thereby, because of it depriving him of evidence and the means of effective defense.

2. ADMIRALTY ⇔34—LACHES.

In absence of excuse or explanation, delay of five years, after explicit denial of liability because of no disclosure of fault as to claim filed, in filing libel, counting on faults of vessel for logs intended for cargo going adrift from alongside ship anchored, some distance from shore, at Axim, off west coast of Africa, *held* laches constituting valid defense; the occurrence being such that knowledge of it was likely to be confined to the officers and crew and persons bringing the logs to the ship.

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

Libel by the Talge Mahogany Company against Elder Dempster & Co., Limited. Decree for libelant, and defendant appeals. Reversed, with directions.

Henry P. Dart, Jr., of New Orleans, La. (Henry P. Dart, Benjamin W. Kernan, and Benjamin W. Dart, all of New Orleans, La., on the brief), for appellant.

Edwin T. Merrick and Wm. J. Guste, both of New Orleans, La. (Merrick, Gensler & Schwarz, of New Orleans, La., on the brief), for appellee.

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

WALKER, Circuit Judge. This was a libel in personam to recover the amounts of alleged expense to the libelant of recovering 30 mahogany logs, and of the alleged value of 21 other such logs which were lost; it being alleged that both the logs recovered and those lost went adrift, between September 23, 1910, and October 15, 1910, after they were delivered alongside the ship chartered by the libelant to carry a cargo of logs from Axim, on the west coast of Africa, to New Orleans. The libel charged that the logs went adrift because of faults chargeable against the ship; the faults alleged being that the ship was anchored too far from shore, that the captain required more logs to be brought out each day while the loading was in progress than could be taken aboard during the day of their delivery alongside the ship, and that there was a lack of proper watch during the nights when the logs went adrift. The libel was filed April 22, 1916. The charter party, which was made a part of the libel, contained a provision requiring the cargo to be "delivered alongside of the vessel, where she can load, * * * always safely afloat within reach of her tackles." The delay in filing the libel was duly set up as laches, such as to bar the action.

Before the filing of the libel the libelant had asserted no claim based on the logs going adrift further than was disclosed by the following occurrences: On February 17, 1911, a firm of lawyers in New Orleans addressed to the respondent (the appellant here) a letter stating that they had received for collection a claim of the libelant for the loss of 21 logs shipped by the respondent's steamer, costing the sum of \$500, and the recovery of 30 logs allowed to go astray, the recovery of which cost the libelant \$245. In the reply of the respondent's agents to that communication, dated February 18, 1911, they said, after stating the contents of the communication replied to:

"We have never been presented with the claim by the Talge Mahogany Company. We do not know anything about any such claim, as the Talge Mahogany Company have never presented us with one. If you wish to take proceedings for the recovery of this money, you are at liberty to do so. If you think this action is necessary, please communicate with our attorneys, Messrs. Dart & Kernan.

"We certainly will not pay any claim until we have some evidence that we are obligated to pay, or have caused other people to suffer damages that are claimed."

In a letter of the libelant, dated February 23, 1911, and addressed to the respondent at New Orleans, it stated merely the inclosure of an invoice of which the following is a copy:

"The Talge Mahogany Company.

"Indianapolis, Ind., Jany. 31, 1911.

"Sold to Elder Dempster & Co., Ltd., New Orleans, La.:

Recovering 10 mahogany logs.....	\$ 50.00
Recovering 20 mahogany logs.....	195.00
Lost—21 mahogany logs at \$25.64.....	538.44

\$783.44

"All the above logs went adrift from alongside the S. S. Andoni while loading at Axim, Sept. 23—Oct. 15, 1910."

On June 8, 1911, respondent's agents at New Orleans, after having communicated with their principal in Liverpool, wrote a letter to the libelant, containing the following quotation from a letter of the principal:

"We are duly in receipt of your letter of the 1st inst., inclosing claim for \$783.44, which the Talge Company have rendered to you for loss of certain logs whilst the Andoni was loading at Axim in Sept./Oct. last. However, we cannot admit this claim, because our steamer cannot be held for loss or cost in recovering logs, unless she herself had actually signed for them, and this we do not suppose is the case."

That quotation was followed by the following statement in the letter of the agents:

"If you have not got any receipts for the logs in question, we think that it is not reasonable to expect that we can get Liverpool to assume the responsibility for loss of logs whilst in your possession."

Nothing further occurred between the parties until the libel was filed as above stated. Evidence adduced indicated that when, in consequence of the filing of the libel, the respondent had occasion to get the testimony of the officers and crew of the chartered ship in reference to the circumstances of the alleged delivery and going adrift of the logs, it was unable to do so because the officers and crew had long before that time left the respondent's service, and none of them could be located.

After the respondent's explicit denial of liability, based upon the absence of any disclosure of fault chargeable against it, more than five years elapsed before the filing of the libel, which, so far as appears, was the first assertion of any fault chargeable against the respondent which would make it liable for the alleged damage and loss. Until the respondent in some way was notified or informed that fault or negligence with reference to the logs going adrift was imputed to it or the ship, there was no occasion for it to seek evidence to meet or rebut that imputation. Its response to a demand which was made in such a way as not to indicate that the claim had any validity amounted to an invitation to the libelant to assert in a proper way whatever claim was relied on. Under the circumstances, a natural result of the libelant's failure for more than five years so to assert its claim as to indicate to the respondent that there was any need for it to seek evidence to show the invalidity of the claim was a loss by the respondent of the opportunity of adducing evidence which it may be supposed would have been available to it, if the claim had been properly asserted with reasonable promptness. There is an absence of any showing of an excuse or explanation of the protracted delay in bringing suit. Continuously from the time of the occurrence in question the respondent had agents resident in New Orleans, and it could have been sued there, and funds in the hands of such agents attached, at any time after the alleged claim is asserted to have accrued.

[1, 2] While courts of admiralty are not governed by any statute of limitation, laches or delay in the judicial enforcement of maritime claims constitutes a valid defense, where the circumstances are such that it is to be inferred that the party proceeded against was prej-

duced by the delay because of it having the effect of depriving him of evidence and the means of effectively defending himself. The Key City, 14 Wall. 653, 20 L. Ed. 896; Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135. Coburn v. Factors & Traders Ins. Co. (C. C.) 20 Fed. 644. In the instant case the claim asserted grew out of circumstances attending the delivery and loading of a cargo of logs intended for a vessel anchored some distance from the shore at Axim. The occurrence was such a one that knowledge of it was likely to be confined to the officers and crew of the vessel and the persons who acted for the owner of the logs in bringing them out from the shore. It well may be supposed that the details of such an occurrence would not long be kept in mind by participants in it, who were unaware of the existence of any question or controversy in regard to it. A long-continued failure of the cargo owner to make any disclosure of a claim that the ship was chargeable with faults in such a transaction is likely to result in the shipowner losing evidence, which would have been available if the claim had been promptly made, even if the witnesses on whose testimony the shipowner might be expected to rely remain alive and within reach. But when a party's reliance is on the testimony of the seafaring men composing the officers and crew of a freight-carrying ocean vessel, it well may be expected that all or a material part of that testimony will be unobtainable, if the occasion of seeking to secure it does not arise for more than five years after the occurrence in question. The conclusion is that the delay in filing the libel was under such circumstances that it involved prejudice to the party proceeded against, and that it amounted to such laches as constitutes a valid defense to the claim asserted.

It will be added that on the testimony of the two employés of the libelant who were witnesses in its behalf it is, to say the least, questionable whether the logs which went adrift were ever in the custody or at the risk of the ship. The testimony indicated that the logs brought out in rafts remained in charge of the libelant's employés until they were placed, one or more at a time, within reach of the ship's tackle, and that the logs which the evidence showed went adrift were never so placed.

The decree appealed from is reversed, with direction to dismiss the libel.

Reversed.

STANDARD BITULITHIC CO. v. CURRAN.

(Circuit Court of Appeals, Second Circuit. January 15, 1919.)

No. 145.

1. PLEADING \Leftrightarrow 246(2)—AMENDMENT—ACTION ON CONTRACT.

In actions ex contractu, so long as plaintiff adheres to the original contract on which the complaint is founded, an amendment is not objectionable which merely states more fully and accurately the facts with reference to the contract, or changes the alleged date of the contract.

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

2. FRAUDS, STATUTE OF \S 51—AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR—OPTION TO TERMINATE WITHIN YEAR.

A parol contract, which by its terms may be terminated at the end of six months at the option of either party, is not within the statute of frauds of New York, as one that "by its terms is not to be performed within one year."

3. COURTS \S 366(1)—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

A federal court in an action at law will follow a decision of the highest court of the state, construing its statute of frauds.

Hough, Circuit Judge, dissenting.

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

Action by Joseph Curran against the Standard Bitulithic Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This cause comes here on writ of error to the District Court for the Southern District of New York. The defendant in error, plaintiff below, and hereinafter called plaintiff, is a citizen of the United States and a resident of the borough of Richmond, city and state of New York. The plaintiff in error, defendant below, and hereinafter called defendant, is a corporation organized and existing under the laws of the state of West Virginia. The action is in contract, and the complaint alleges three separate causes of action.

The first cause of action sets forth the employment of the plaintiff by the defendant on September 2, 1910, as agent or promoter, to secure for defendant the selection and adoption of bitulithic and Warrenite pavements, with the right and privilege of making bids and executing contracts for the laying of such pavements in certain communities in the states of New York and New Jersey, for the agreed price of \$1,800 per annum as salary, and in addition thereto the further sum of 3 cents per square yard for each square yard of the aforesaid pavements laid in said communities; that such employment provided for a temporary or probationary period of six months, and if, at the end of that period, the services were satisfactory, such employment was to continue for the further period of about nine years; that, pursuant to said agreement, plaintiff performed work, labor, and services, under the direction of the defendant, for said period of six months, which were announced by said defendant to be satisfactory and acceptable; that thereafter plaintiff continued in said employment, pursuant to and under the terms thereof, and that between the said 2d day of September, 1910, and the 1st day of August, 1912, he secured for the defendant certain specified contracts for the laying of its pavement in certain municipalities in the states of New York and New Jersey, to the amount of 141,700 square yards; that plaintiff performed all of the conditions of said contract upon his part to be performed, until prevented by defendant on or about August 1, 1912; that the defendant, in violation of its agreement, neglected and refused to pay plaintiff for the pavements laid by defendant to the extent of 94,500 square yards, under bids and contracts secured for it by the plaintiff, and for which defendant was to pay the plaintiff the sum of 3 cents per square yard as a commission, amounting in the aggregate to the sum of \$2,835, although plaintiff duly demanded payment.

The second cause of action set forth in the bill of complaint is substantially the same as that set forth in the first, but is alleged in a different form, and as for work, labor, and services, without any reference to the agreement set forth in the prior cause of action.

The third cause of action, after setting forth the making of the agreement alleged in the first cause of action, and the due performance of all of its terms and conditions upon the part of the plaintiff, and his readiness and willingness to continue to perform the same, alleges its repudiation and termination by the defendant, to the plaintiff's damage in the sum of \$150,000. And judgment is asked against defendant in the sum of \$152,835.

The first two causes of action are in effect the same, but put in different form. The first and second causes of action relate to what the plaintiff earn-

ed while employed with the defendant before he was discharged. The third cause of action is based, not on what the plaintiff earned under the contract during the time it was in force, but on what he claims he would have earned after the contract had been terminated, and during its unexpired term, from the time that he was discharged up to the time that he claims the contract ran.

The defendant admitted in its answer that it had not paid to plaintiff the said sum of \$2,835, or any part thereof, and it denied that the same, or any part thereof, was due and owing to the plaintiff, as alleged in the second cause of action. The defendant denied, as a defense to the first and third causes of action, that any such agreement or contract was made as alleged, and that, if one was made, the same was void, in that it was not to be performed within one year, and no note or memorandum thereof was made by the defendant and subscribed as required by the statute of the state of New York in such case made and provided.

The case was submitted to a jury, and a verdict was found in favor of the plaintiff in the sum of \$8,527.20. The defendant moved to set aside the verdict, and the court granted the motion, unless the plaintiff consented to reduce the same to the sum of \$5,640.50. The plaintiff so consented, and judgment was entered for this amount, together with the costs.

Strong & Mellen, of New York City (Chase Mellen, of New York City, of counsel), for plaintiff in error.

Eadie, Innes & Walsler, of New Brighton, N. Y. (Bertram G. Eadie and Frank H. Innes, both of New Brighton, N. Y., of counsel), for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The complaint sets forth with particularity in its first cause of action a contract, the performance by the plaintiff of certain services thereunder, the failure of the defendant to pay for such services, and a demand for judgment; in its second cause of action the complaint sets forth the same work, labor, and services as in the first cause of action, and demands judgment upon quantum meruit; and in the third cause of action the same contract is alleged as is set forth in the first cause of action, and damages for its breach are demanded. The allegations of the complaint are denied by the answer. A question of fact was thereby created, which was submitted to the jury, and that body has found a verdict in favor of the plaintiff, which is not to be disturbed, but must be accepted as conclusive, unless errors of law have been committed which require a reversal.

It is alleged for error that during the progress of the trial the court permitted an amendment of the pleadings to conform the pleadings to the proof. Courts, in the exercise of their common-law jurisdiction, may in their discretion permit pleadings to be amended at any time before verdict, if such amendment does not surprise or prejudice the opposite party. The authorities differ upon the question whether a court, in the exercise of its common-law jurisdiction, may of its own motion and without application by one of the parties order an amendment to be made. The Code of Civil Procedure of the state of New York (§ 723) provides as follows:

"The court may, upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems

just, amend any process, pleading, or other proceeding, * * * by inserting an allegation material to the case; or, where the amendment does not change substantially the claim or defense, by conforming the pleading or other proceedings to the facts proved. And in every stage of the action the court must disregard an error or defect, in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party. * * *

In the instant case the court did not amend on its own motion, although under the statute it would seem to be possessed of power to do so; but it allowed the amendment to be made after counsel for plaintiff stated that he wished the amendment to be made. The first cause of action was amended, so as to state that the plaintiff is entitled to a commission of 3 cents a square yard, on the yardage on all sorts of pavement and kinds of pavement laid in the borough of Queens and the borough of Richmond; in the borough of Queens 330,000 square yards, and in the borough of Richmond 140,480 square yards. This was objected to on the ground of surprise, as the complaint contained nothing to show that plaintiff claimed anything outside of the Warrenite and bitulithic contracts which he secured. The plaintiff was also allowed to amend the first cause of action as to the time when the contract was to commence. The complaint was amended to state:

"That the contract dated on the 2d day of September, 1910, was that the term of employment was for the term of the Warrenite and bitulithic patents, approximately 9½ years, to commence September, 1910, with the option to the plaintiff and an option to the defendant to terminate such contract within 6 months thereafter, if the services of the plaintiff were unsatisfactory, or the position was unsatisfactory to the plaintiff."

The statement in the original complaint was as follows:

"That on or about the 2d day of September, 1910, in the city and county of New York, the plaintiff and the defendant mutually entered into a contract wherein and whereby the defendant, for a valuable consideration, appointed the plaintiff its agent or promoter for a period of about 9 years; said period to commence at a date 6 months subsequent to the said 2d of September, 1910, should the plaintiff's services prove satisfactory during the said period of said 6 months, immediately following the said 2d day of September, 1910, said period of 9 years being coextensive with the life of certain patents. * * *"

The first of these amendments may now be disregarded, as the defendant has not been prejudiced thereby; for the court, after the verdict, stated that he did not think there was any evidence to support the verdict as to the claim for pavements in Richmond and Queens, and added:

"I will either permit you to set the verdict aside, or shut out that part of the damages which relate to Richmond and Queens."

Plaintiff's counsel consented to that, and the verdict was reduced from \$8,527.20 to \$5,640.50.

[1] So far as the second amendment is concerned, it was quite within the power of the court to make it, and error cannot be predicated upon it. The amendment was in the furtherance of justice, and worked no prejudice to the other party. In actions ex contractu, so long as the plaintiff adheres to the original contract on which the com-

plaint is founded, an amendment is not objectionable which merely states more fully and accurately the facts with reference to the contract or changes the alleged date of the contract. See *Stevenson v. Mudgett*, 10 N. H. 338, 34 Am. Dec. 155; *Pickett v. Southern R. Co.*, 74 S. C. 236, 54 S. E. 375.

[2] It is said, however, that plaintiff cannot recover, as the contract was not in writing, as required by the statute of frauds, and that the statute is applicable alike to the contract alleged in the original complaint as well as to that in the amended complaint, as it is clear that the contract could not be fully performed within one year. We need not concern ourselves with the contract as stated in the original complaint. The question for this court is whether the contract as stated in the amended complaint is or is not within the statute.

The rule in England is clear that an option to determine at any time a contract for a designated period exceeding a year has no effect in taking the case out of the statute of frauds. *Birch v. Liverpool*, 9 B. & C. 392; *Dobson v. Collis*, 1 H. & N. 81; *Pentreguinea Fuel Co., Pegg's Claim*, 4 D. & G. F. & J. 54. And see *Reed on Statute of Frauds*, vol. 1, § 202. But whether such an option contained in a New York contract is within or without the statute depends upon the construction given to the statute by the courts of that state.

In *Blake v. Voight*, 134 N. Y. 69, 31 N. E. 256, 30 Am. St. Rep. 622, a contract required the plaintiff to procure consignments of goods to the defendants during one year from December 1, 1888, and that the defendants should pay the plaintiff a commission therefor; but it permitted either party to terminate it in June, 1889. The court said:

"The statute applies to 'every agreement that by its terms is not to be performed within one year from the making thereof.' 4 R. S. (8th Ed.) p. 2590, § 2. As it was the design of the statute not to trust the memory of the witnesses beyond one year, it has been repeatedly held that it does not apply to a contract which, consistently with its terms, may be performed within that period. The contract in question, therefore, as we construe it, is free from the restraint of the statute. This conclusion finds support in the adjudged cases, which, although uniform in this state, are somewhat at variance in other jurisdictions."

[3] This court will follow a decision of the New York Court of Appeals, construing a statute of the state of New York. *D'Wolf v. Rabaud*, 1 Pet. 476, 502, 7 L. Ed. 227. And as in the instant case the contract could have been performed according to its terms within one year by an exercise of the option at the end of 6 months, we must hold that the contract is one not required by the New York statute to be in writing.

It is said, finally, that the plaintiff had been paid in full for all his services, and that on August 2, 1912, he signed a voucher check which contained the words "In full settlement to date," and that he rendered no services thereafter. The plaintiff claimed that this voucher carried on its face the condemnation of the construction for which the defendant contended, as it particularly limited the amount for which it was drawn to the particular items which it contained, and that none of such items were within the claim of the plaintiff in this case. The

court in the charge to the jury called attention to this receipt and said:

"It is for you to properly construe, together with the whole testimony, the meaning of that receipt. If you believe it was a receipt in full for all commissions up to date, then, unless there was a mistake, a mutual mistake, in the execution of it, it would be conclusive on the plaintiff that he was getting all he was entitled to get at that time, all that was due him at that time."

The defendant took no exception to this part of the charge, and made no request with respect to it. In the absence of an exception, the defendant cannot raise the question in this court on writ of error. Moreover, there is no reference to the matter in the assignment of errors.

Judgment affirmed.

HOUGH, Circuit Judge (dissenting). When a plaintiff pleads on oath a contract obviously obnoxious to the statute of frauds, brings his case to trial on the eve of the running of the statute of limitations, swears to an entirely different agreement, which it is hoped escapes the statute, and then before the jury seeks to plead his newly sworn-to contract by way of amendment, the motion should be denied. To grant it is, in my opinion, abusing discretion. Nor is the contract as last stated within the rule thought to be discoverable in *Blake v. Voight*.

For these reasons I dissent.

In re F. & D. CO.

Petition of HAGAR.

(Circuit Court of Appeals, Second Circuit. January 15, 1919.)

No. 154.

1. CHATTEL MORTGAGES ⇨85—CORPORATE MORTGAGES AGAINST REAL AND PERSONAL PROPERTY—FILING AS CHATTEL MORTGAGE.

Lien Law N. Y., § 231, providing that "mortgages creating a lien on real and personal property executed by a corporation as security for the payment of bonds issued by such corporation" need not be filed as a chattel mortgage, applies to such a mortgage executed by a corporation to secure a single bond.

2. COURTS ⇨366(1)—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

While a federal court will follow a settled construction of a state statute by its highest court, it is not bound to follow a single decision of a trial court of the state.

3. CONFUSION OF GOODS ⇨9—SALE OF PROPERTY BY TRUSTEE—MINGLING OF MORTGAGED AND UNMORTGAGED GOODS.

Where a trustee sells for a lump sum goods of the bankrupt, some of which are within a mortgage, although some, not identified, may not be, by the law of New York the mortgagee is entitled to the entire proceeds, on the principle of confusion of goods.

Petition to Revise Order of 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

In the matter of the F. & D. Company, bankrupt. Petition by Marshall S. Hagar, trustee, to revise order of District Court. Affirmed.

See, also, 242 Fed. 69, 155 C. C. A. 13.

This cause comes here on petition to review an order in bankruptcy, entered in the United States District Court for the Southern District of New York and entered therein on the 2d day of October, 1918.

The bankrupt executed a mortgage, dated 5th of February, 1912, to Thomas W. Joyce for the sum of \$650,000. This mortgage was subordinate to a mortgage executed by the bankrupt to the Title Insurance Company of New York on the real property comprising the Madison Square Garden and the Garden Theater securing a loan of \$2,300,000. The second mortgage embraced the property known as the Madison Square Garden and Garden Theater. It was a real estate mortgage and was recorded as such. It was never separately filed or refiled as a chattel mortgage. It contained, however, the following clause: "Together with all fixtures and articles of personal property, attached to or used in connection with said premises, all of which it is declared are to be covered by this mortgage."

On the 13th of November, 1916, the F. & D. Company was adjudicated a bankrupt in the United States District Court for the Southern District of New York, and a few days later the petitioner herein was appointed trustee in bankruptcy of the estate. The first mortgage, the one executed to the Title Insurance Company, and which covered the real property, was sold on the 8th of December, 1916, upon the foreclosure of the mortgage, and there was left a balance of more than \$300,000 due on the mortgage debt.

The referee in bankruptcy held that the chattels located in Madison Square Garden and the Garden Theater were not included under the lien of the first mortgage. And the trustee in bankruptcy was authorized by order of the referee in bankruptcy to sell the chattels located in Madison Square Garden and the Garden Theater free of the alleged lien of the second mortgage, the one to the respondent Joyce, and the property was so sold for \$5,600, the proceeds of the sale to be held subject to the order of the court as to the validity of the alleged lien of the second mortgage. The mortgagee under that mortgage claims that under the terms of his mortgage he is entitled to the money; and the trustee in bankruptcy claims that the money is payable to himself for the benefit of the creditors of the bankrupt.

At the hearing before the referee testimony was taken, and thereafter the referee directed the trustee to pay over to the respondent Joyce, the mortgagee under the second mortgage, the said sum of \$5,600, less the amount of \$500 deducted on account of the expenses incident to the administration of the estate.

The trustee subsequently filed a petition, praying that the order of the referee be reviewed by the District Court. Thereafter the trustee's petition was reviewed, and after hearing the District Court entered an order affirming the order of the referee. The last order was entered on the 2d of October, 1918, and it is this order which this court is now asked to review.

Stetson, Jennings & Russell, of New York City (Edward R. Greene and Kenneth E. Stockton, both of New York City, of counsel), for respondent.

Augustus H. Skillin, of New York City (George W. Hubbell, of New York City, of counsel), for trustee.

Before WARD and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1] The sole question to be determined by this court is whether the mortgage given to the respondent Joyce, the second mortgage, is a chattel mortgage and good as against creditors, although it was filed as a real estate mortgage, and not separately as a chattel mortgage. Do the

laws of the state of New York require that this mortgage should also be filed as a chattel mortgage? The District Court filed a memorandum opinion, in which it declared that the case of *Clement v. Congress Hall*, 72 Misc. Rep. 519, 132 N. Y. Supp. 16, is flat authority in favor of the decision under review. The court said:

"As to who should get it no more is held than that a trial court of the United States should not refuse to follow Judge Kellogg's ruling on a purely New York question. For that reason the referee's order is affirmed."

Before we proceed further, it is necessary to consider the provisions of the Lien Law of the state of New York (Consol. Laws, c. 33). The provisions applicable to this case may be found in the margin.¹ The trustee in bankruptcy relies on section 230, and claims that, as the mortgage was not filed as required by the act, it is absolutely void as against creditors, and that he is entitled to the proceeds. The respondent Joyce relies on section 231, and claims that his mortgage is by that section a valid chattel mortgage, although not refiled as a chattel mortgage.

This court is thus called upon to construe an act of the Legislature of the state of New York which appears never to have been construed either by the New York Court of Appeals or by the Appellate Division of the Supreme Court of that state. The act has been construed only by the Special Term of the Supreme Court for Saratoga county, N. Y., in the case of *Clement v. Congress*, supra. That case does not appear to have been carried to a higher tribunal, or to have been cited or referred to in subsequent decisions in the higher courts of the state. The court in that case discussed at length the question whether section 231 applied to chattel mortgages executed by a corporation as security for a single bond, and it came to the conclusion that the section did apply to such cases. The court said:

"It is urged on behalf of the defendants that this provision of law is not applicable, because we have, in the case at bar, only a single bond secured by a single mortgage, and that the phraseology of the section in question is confined to the plural number, including only 'bonds,' and that there must be a plurality of bonds in order that the provision of the section may attach. It is not urged that the same reasoning applies to the plural term 'mortgages,' used in the same section. There is no apparent reason why the same principle of law should not apply to one bond which is conceded to apply to two. This is clearly a case where the provision of section 35 of the General Construction

1 "Sec. 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.

"Sec. 231. *Corporate Mortgages Against Real and Personal Property*.—Mortgages creating a lien upon real and personal property executed by a corporation as security for the payment of bonds issued by such corporation, or by any telegraph, telephone or electric light corporation, and recorded as a mortgage of real property in each county where such property is located or through which the line of such telegraph, telephone or electric light corporation runs, need not be filed or refiled as chattel mortgages."

Law (Consol. Laws 1909, c. 22) applies. This section provides as follows: 'Words in the singular number include the plural, and in the plural number include the singular.' * * * The construction claimed by the defendants, limiting the operation of the section to mortgages securing plurality of bonds, cannot be successfully upheld.

"Neither is there anything in the section indicating any intention on the part of the Legislature to confine its applicability to negotiable as distinguishable from nonnegotiable bonds."

[2] But we are told by counsel for the trustee that this decision is not binding upon this court because it was not rendered by the highest court of the state. In *Pease v. Peck*, 18 How. 595, 15 L. Ed. 518, the Supreme Court of the United States held that, where there is a settled construction of a statute of a state by its highest court, it is the practice of the federal courts to adopt it without criticism or further inquiry. And see *Beals v. Halé*, 4 How. 37, 54, 11 L. Ed. 865, to the effect that a decision of a court other than the court of last resort is not binding on federal courts.

On the other hand we are told by counsel for the respondent that it is not true that the federal courts will follow only the construction of a state law given by the highest courts of the state. In *Erie Railroad Co. v. Hilt*, 247 U. S. 97, 38 Sup. Ct. 435, 62 L. Ed. 1003, the Supreme Court held that the federal court, in construing a statute of the state of New Jersey, should follow the construction given to it by the Supreme Court of New Jersey, although it was not the highest court of that state. "In view of the importance of that tribunal in New Jersey," said Justice Holmes, "although not the highest court in the state, we see no reason why it should not be followed by the courts of the United States, even if we thought its decision more doubtful than we do." The Supreme Court of New Jersey is not a trial court, as is the Special Term of the Supreme Court of New York, and instead of being composed of a single judge, as that court is, it is composed of nine judges, who sit as an appellate tribunal.

We do not regard the decision in the *Hilt Case* as laying down a rule which makes it incumbent upon this court to adopt a construction given to a state statute by a trial judge in a state court. While, therefore, free to examine the statute for ourselves, and to put our own construction upon it, we have no hesitation in saying that we fully concur in the construction that the Supreme Court of New York gave to section 231. We entertain no doubt that the construction which Judge Kellogg gave to that section of the act in *Clement v. Congress*, *supra*, is correct, and rules this case.

The question has been raised, however, whether that section applies to any mortgage not executed by a railroad, telegraph, telephone, or electric light corporation. But the New York Court of Appeals has held that the section applied to a mortgage given by a manufacturing corporation. *Zartman v. First National Bank*, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083. That decision is binding upon this court. See, also, *Westchester Trust Co. v. Hobby Bottling Co.*, 102 App. Div. 464, 92 N. Y. Supp. 482, affirmed in 185 N. Y. 577, 78 N. E. 1114, on the opinion of the court below.

It is said that the respondent's mortgage does not cover chattels ac-

quired subsequent to February 5, 1912, which it will be recalled was the date of the mortgage. The exact wording of the mortgage is:

"All fixtures and articles of personal property attached to, or used in connection with said premises, all of which it is declared are to be covered by this mortgage."

The use of the words "are to be covered," it is argued, indicate an intention to make the mortgage applicable to future acquired property. It seems to us that, if the intention had been to cover future interests or property subsequently to be acquired, that intention would have been more clearly indicated. But, however that may be, it is the law of New York that a mortgage of future interests is valid between the parties thereto and against all other persons claiming under the mortgage voluntarily, with notice, or in bankruptcy. *Reynolds v. Ellis*, 103 N. Y. 115, 8 N. E. 392, 57 Am. Rep. 701. It does not constitute a lien as against creditors whose claims arose subsequent to the mortgage.

But there is no evidence in the record of this case that there were any creditors of the bankrupt whose claims arose subsequent to the execution of the respondent's mortgage. In the absence of any proof that the trustee represents creditors whose claims arose subsequent to the execution of the mortgage, the respondent is entitled to the whole of the sum realized.

[3] And there is no evidence in the record to show that any of the chattels sold were placed in the Madison Square Garden or in the Garden Theater after the execution of the mortgage; and if there were any such it is impossible to say what portion of the lump price obtained for all the chattels represents the selling price of those obtained prior to the execution of the mortgage as distinguished from the price obtained for the chattels subsequently acquired. And we understand it to be the law of New York that, where a person holding goods for the account of another confuses those goods with his own, so that they become inextricably mingled, the owner of the goods so mingled may claim the entire mass. *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62, 108, 513. And see *Dunning v. Stearns*, 9 Barb (N. Y.) 630, 634.

The order is affirmed, with costs.

NATIONAL SURETY CO. v. UNITED STATES for Use of AMERICAN SHEET METAL WORKS et al.

(Circuit Court of Appeals, Fifth Circuit. February 12, 1919. Rehearing Denied March 15, 1919.)


No. 3272.

1. PRINCIPAL AND SURETY ⇐57—SURETY COMPANIES—REINSURANCE—MATTERS COVERED.

Provision of contract, whereby the N. Surety Company agreed to take the place of the E. Surety Company on all its bonds on which no written notice was given by a certain time, that the E. Company agrees that there was no default on any of the bonds known to its officers, does not except from the reinsurance agreement a bond on which there was default known to such officers, in the absence of written notice, but is a

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mere independent covenant, breach of which gives cause of action for damages.

2. PRINCIPAL AND SURETY 57 — SURETY COMPANIES — REINSURANCE — KNOWLEDGE OF DEFAULT.

Within the provision of a contract, whereby the N. Surety Company agreed to take the place of the E. Surety Company on its bonds, that there was no default on any of the bonds known to its officers, they are not shown to have known of a default on a bond for a government building contractor, because advised by government architect that the work would not be completed till about a certain date, seven months after the time provided by the contract; there being no default if the delay was caused, and allowance for it made, by the government, as authorized by the contract.

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

Suit by the United States, for the use of the American Sheet Metal Works and others, against the National Surety Company. From an adverse decree, defendant appeals. Affirmed.

Percy Bell, of Greenville, Miss., and Wm. Grant and Wm. B. Grant, both of New Orleans, La., for appellant.

J. S. Sexton, of Hazlehurst, Miss., for appellees.


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

WALKER, Circuit Judge. The Empire State Surety Company was the surety on a bond given by the contractors for the erection of a post office building at Greenwood, Miss. While that bond was in force, by an agreement entered into by and between the National Surety Company (which will be referred to as the appellant) and the Empire State Surety Company, made and dated September 18, 1912, the former, in consideration of the payment to it by the latter of 68 per cent. of the current unearned premium on each of the surety bonds specified in a schedule annexed to the agreement, in which was included the above-mentioned bond, reinsured—

"all the said unexpired surety bonds * * * for any default of the principals named in said bonds and for loss sustained by the insured in such policies after 4 o'clock p. m. of the 22d day of August, 1912, and agrees to repay to the Empire State Surety Company, its successors and assigns, any sum which the Empire State Surety Company shall be liable to pay in consequence of any such default."

That agreement contained the following, among other, provisions:

"The National Surety Company agrees to fulfill all the obligations of the Empire State Surety Company under the bonds and policies hereby reinsured against loss as above stated, and agrees to adjust all claims arising as aforesaid under any of such bonds and such policies at its own expense, and to pay, as aforesaid, all valid claims arising as aforesaid under said bonds and policies in accordance with their terms and conditions occurring after August 22, 1912, at 4 o'clock p. m. The Empire State Surety Company hereby transfers to the National Surety Company all its rights, interests, powers, and privileges under all such bonds and such policies, so that the National Surety Company may act thereon in all respects as if it had itself issued such bonds and such policies, and said National Surety Company may give any

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notices in relation to said bonds and said policies that the Empire State Surety Company could give, such notices to be given either in its own name or in the name of the Empire State Surety Company, or both, and all notices, proofs of loss and other papers which the obligees in any of said bonds * * * shall have the right to give to the Empire State Surety Company may be given in like manner to the National Surety Company with like effect as if given to the Empire State Surety Company; it being the intention of this agreement that the National Surety Company shall take the place of the Empire State Surety Company as to all said unexpired bonds * * * in all respects with regard to all obligations therein and for loss thereunder, on which no written notice of claim was received by any of the officers of the Empire State Surety Company, located at its home office in the city of New York, or in the borough of Brooklyn, and upon which no written notice was received by any of its general agents, or branch office managers, located at [named places], or upon which any written notice was given to any agent of the said company prior to 4 o'clock p. m. on August 22, 1912. * * *

"The Empire State Surety Company agrees that upon none of the bonds and policies which have been or shall be tendered to the National Surety Company for reinsurance in accordance with the terms of this agreement has there been presented any written notice of claim to any of the officers of the Empire State Surety Company, located at [named places], or written notice of claim given to any agent of the company prior to August 22, 1912, at 4 o'clock p. m., and that there was no known default, claim or loss upon any of said bonds and policies by any officer of the Empire State Surety Company located as aforesaid. And the Empire State Surety Company further agrees and warrants that its officers, located as aforesaid, have not waived or modified any of the conditions or provisions of any of said bonds * * * except as shall be shown by the papers attached to the files relating to such bonds and policies."

[1] By the terms of the bond given by the Empire State Surety Company, it was liable for a default of the contractors which occurred after August 22, 1912. No notice of a claim on that bond was given prior to 4 o'clock p. m. of August 22, 1912, or prior to the execution of the above-mentioned reinsurance contract. This suit involved the question whether, under that contract, the appellant was liable because of the default mentioned. By the decree appealed from it was decided that it was. The correctness of this decision is questioned on the ground that the contractors were in default on the contract prior to August 22, 1912, at 4 o'clock p. m., and that such default was known to officers of the Empire State Surety Company prior to that time. The correctness of the decree appealed from is not questioned on any other ground.

It seems that the last above quoted provision of the reinsurance contract is not entitled to be given such effect that a bond which, by the terms of the preceding part of the contract, was reinsured, was excluded from such reinsurance by the circumstance that a default of the principal was known to the surety at or prior to the time when the reinsurance was made effective. Without condition or qualification the appellant agreed to "take the place of the Empire State Surety Company as to all said unexpired bonds in all respects with regard to all obligations therein and for loss thereunder, on which no written notice of claim was received by" specified officers, general agents, or branch office managers of the Empire State Surety Company, "or upon which any written notice was given to any agent of the said company prior to 4 o'clock p. m. on August 22, 1912." Under that provision,

only the giving of a written notice was to have the effect of excepting an unexpired scheduled bond from the reinsurance obligation expressed. It was not stipulated that the fact that a default of the principal was known to the original surety was to have that effect. It seems that compliance with the other provision, whereby the original surety agreed "that there was no known default * * * upon any of said bonds and policies by any officer of the Empire State Surety Company located as aforesaid," was not made a condition precedent to the taking effect of the reinsurance obligation, and that that provision was an independent covenant, for a breach of which the covenantee would have an action for damages; that covenantee as the reinsurer remaining subject to the obligation imposed upon it by the contract.

[2] But, though the provision be treated as having the effect of excepting from the reinsurance agreement an unexpired bond, a default of the principal on which was known to an officer of the original surety at or prior to the time when the reinsurance became effective, it did not, under the evidence adduced, have that effect with reference to the bond in question. What is relied on to prove that, prior to August 22, 1912, the officers of the original surety knew of a default of the principal, is that, prior to that date, they were advised by a communication from the office of the United States supervising architect at Washington that the contract for the building of the post office would not be completed until about February 1, 1913. Knowledge of that fact, by itself, did not amount to knowledge of a default by the contractors. The contract provided that the work agreed to be performed "shall be completed in all its parts by July 1, 1912," and "that time is and shall be considered as of the essence of the contract on the part of" the contractors. But it contained, also, the following provision:

"It is further covenanted and agreed that the United States shall have the right of suspending the whole or any part of the work herein contracted to be done, whenever in the opinion of the supervising architect it may be necessary for the purposes or advantage of the work, and upon such occasion or occasions the contractor shall, without expense to the United States properly cover over, secure, and protect such of the work as may be liable to sustain injury from the weather, or otherwise; and for all such suspensions the contractor shall be allowed one day additional to the time herein stated for each and every day of such delay so caused in the completion of the work, the same to be ascertained by the supervising architect; and a similar allowance for extra time will be made for such other delays as the supervising architect may find to have been caused by the United States, provided that a written claim therefor is presented by the contractor within 10 days of the occurrence of such delays."

The contractors were not put in default by the noncompletion of the work by July 1, 1912, if the delay was caused and allowance for it made as provided for in the clause just quoted. One who knew only that the work was not completed by July 1, 1912, but did not know whether the delay was or was not such as the contractors had become entitled to in pursuance of the contract, cannot properly be said to have known that the contractors were in default. There was no evidence tending to prove that, at the time the reinsurance agreement was entered into or "prior to August 22, 1912, at 4 o'clock p. m.," any officer of the Empire State Surety Company knew whether the contractors

had or had not become entitled under the contract to delay the completion of the work until about February 1, 1913. The only ground relied on to support the contention that the appellant, under its reinsurance agreement, was not liable for the contractors' default, was unsupported by the evidence adduced. It follows that the complaint against the decree appealed from is not sustainable.

That decree is affirmed.

GREEN v. INTERSTATE CASUALTY CO.

(Circuit Court of Appeals, Fifth Circuit. March 3, 1919.)

No. 3253.

PRINCIPAL AND SURETY ⇨57—**FIDELITY BONDS—RENEWALS—AVOIDANCE FOR BREACH OF WARRANTIES.**

A surety company, which executed a bond, insuring the fidelity of a bank cashier, and annual renewals thereof, each "subject to all the covenants and conditions" of the original bond, and made in consideration of a written statement by the bank that the cashier was not then in default, which statements were by the original bond made warranties, held not liable for defaults occurring after the original term, where it was shown that the cashier was in default during such term, and that all renewal statements to the contrary were false.

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

Action at law by D. L. Green, as receiver of the Bank of Panama City, against the Interstate Casualty Company. From the judgment, plaintiff brings error. Affirmed.

Sterling A. Wood, of Birmingham, Ala. (John H. Carter, of Marianna, Fla., on the brief), for plaintiff in error.

J. T. Stokely and R. H. Scrivner, both of Birmingham, Ala., for defendant in error.

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

WALKER, Circuit Judge. This was an action by the plaintiff in error, suing as the receiver of the Bank of Panama City, on a bond and renewals thereof given to the bank by the defendant in error, the Interstate Casualty Company, as surety of one McKinzie, who was the cashier of the bank. By the original bond the surety agreed "to make good and reimburse to the obligee, to the extent of ten thousand dollars, any and all pecuniary loss sustained by the obligee of money, securities, or other personal property in the possession of the principal, or for the possession of which he is responsible, by any act of dishonesty on the part of the principal in the discharge of the duties of his office or position as set forth in said statement referred to, amounting to larceny or embezzlement, and which shall have been committed during the continuance of this bond, or any renewal thereof, and discovered during said continuance, or within" a time specified. Prior to the mak-

ing of the bond the obligee made a written statement to the surety, which was referred to in a clause of the bond immediately preceding the following one:

"Now, therefore, in consideration of the sum of twenty-five (\$25.00) dollars paid as a premium for the period from October 1, 1910, to October 1, 1911, at 12 o'clock noon, and upon the faith of the said statement as aforesaid by the obligee, and any subsequent statement or statements, all of which statements the obligee hereby warrants to be true, it is hereby agreed and declared that, subject to the provisions and conditions herein contained, which shall be conditions precedent to the right on the part of the obligee to recover under this bond, the surety shall," etc.

Each of the renewals was evidenced by an instrument, called "Continuation Certificate," a copy of one of which is the following:

"In consideration of the sum of thirty no/100 dollars, the Interstate Casualty Company hereby continues in force bond No. 1171-10 in the sum of ten thousand and no/100 dollars, on behalf of Oscar Paul McKinzie, in favor of Bank of Panama City, for the period beginning the first day of October, 1911, and ending on the first day of October, 1912, subject to all the covenants and conditions of said original bonds heretofore issued, dating from the first day of October, 1910.

"Witness the signature of the president and assistant secretary, this 20th day of September, 1911.

Henry B. Gray, President.

"[Seal.]

Cory F. Baker, Asst. Secretary."

Prior to the making of each continuation certificate the obligee gave to the surety a written statement, a copy of one of which is the following:

"To the Interstate Casualty Company:

"This is to certify that the books and accounts of Mr. Oscar P. McKinzie were examined by us from time to time in the regular course of business and we found them correct in every respect, all moneys or property in his control or custody being accounted for, with proper securities and funds on hand to balance his accounts, and he is not now in default.

"He has performed his duties in an acceptable and satisfactory manner, and no change has occurred in the terms or conditions of his employment as specified by us when the bond was executed.

"Dated at Panama City, Fla., this 27th day of September, 1911.

"[Signature of Employer] Bank of Panama City.

"By G. W. West,

"[Bank Seal]

President [Official Capacity]."

The renewals in 1912, 1913, and 1914 were accomplished in like manner. The bill of exceptions contains the following statement:

"It was admitted that a tender of the premiums paid on the bond, with interest, had been timely made, and each tender had been made good by bringing the money in open court, which tender had been and was refused by the plaintiff."

The evidence adduced was without conflict to the effect that at the time of each of the renewals McKinzie was in default, having misappropriated to his own use funds of the bank while acting as its cashier. It did not show that he was in default at the time the original bond was made. The court instructed the jury to find for the plaintiff for the agreed amount of the shortage which accrued during the period covered by the original bond, with interest on that amount. It ruled that as to all other shortages the plaintiff was not entitled to recover. The last-mentioned ruling was duly excepted to.

By the terms of each of the continuation certificates the obligation it evidenced was "subject to all the covenants and conditions of said original bond heretofore issued, dating from the 1st day of October, 1910." This resulted in making the covenants and conditions of the original bond parts of the renewal agreements as effectually as if they had been copied in the continuation certificates. It follows that each continuation certificate is to be regarded as containing the provision warranting the truth of the statement referred to in the original bond and of any subsequent statement or statements. That included a warranty of the truth of the statement made prior to and in contemplation of the issue of each continuation certificate. Each of those subsequent statements was false in its assertion, with reference to McKinzie, that "he is not now in default."

The bank had notice from the terms of the original bond that it was issued in reliance upon statements made in its behalf to the surety company, and that, in the ordinary course, renewals, which the terms of the bond showed were in contemplation, might also be based upon further statements to be made on behalf of the bank. In view of these circumstances, and of the additional one that each continuation certificate expressly made the obligation it evidenced subject to the covenants and conditions of the original bond, one of the provisions of which was a warranty of the truth of the statement specifically referred to in the bond and of any subsequent statement, there is no room for holding the surety company bound by a continuation certificate issued on the faith of a statement which was warranted to be true, but was false in a respect material to the obligation which the surety company conditionally incurred. *Guarantee Co. v. Mechanics, etc., Co.*, 183 U. S. 402, 22 Sup. Ct. 124, 46 L. Ed. 253; *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, 22 Sup. Ct. 833, 46 L. Ed. 1193.

It is not fairly questionable that the statement in reference to the cashier that "he is not now in default" was one of a fact material to the contemplated undertaking of the surety company. *Max J. Winkler Brokerage Co. v. Fidelity & Deposit Co.*, 119 La. 735, 44 South. 449. The terms of its undertaking were such as to make the truth of that statement a condition precedent to the right on the part of the obligee to recover on the renewals of the bond. As the evidence without conflict showed that the quoted statement was false, the court did not err in ruling that the plaintiff was not entitled to recover for shortages which occurred during the periods covered by the renewals of the bond. The evidence disclosed a state of facts under which, by the explicit terms of the renewal agreements, the surety company was not to be liable for shortages occurring during the periods covered by the renewals.

In the course of the argument in behalf of the plaintiff in error attention was called to a number of decisions with reference to contracts not based on statements warranted to be true. Those decisions are not pertinent to the question presented in the instant case, which is a suit on contracts based on statements warranted to be true, but which turned out to be false.

Affirmed.

BANK OF COMMERCE & TRUSTS OF RICHMOND, VA., v. McARTHUR
et al.

(Circuit Court of Appeals, Fifth Circuit. February 27, 1919.)

No. 3289.

1. FRAUDULENT CONVEYANCES ⇨241(5)—REMEDY OF CREDITOR—CONDITIONS
PRECEDENT.

A creditor, to maintain a suit to set aside fraudulent transfers by debtor and subject the property, need not have judgment at law and execution returned unsatisfied in that jurisdiction; he showing that he had exhausted his legal remedies by recovering judgment, on which execution was returned unsatisfied, in the only jurisdiction in which process could be served on the debtor.

2. FRAUDULENT CONVEYANCES ⇨255(3)—SUIT TO AVOID—NECESSARY PARTIES.

Judgment debtor, having no longer any interest in property fraudulently transferred by him, is not a necessary party to suit by judgment creditor to set aside the transfer and subject the property to the judgment.

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

Suit by the Bank of Commerce & Trusts of Richmond, Va., against Adam McArthur and others. Bill dismissed (248 Fed. 138), and complainant appeals. Reversed.

E. J. L'Engle and M. H. Long, both of Jacksonville, Fla. (J. Crawford Biggs, of Raleigh, N. C., on the brief), for appellant.

H. L. Anderson, of Jacksonville, Fla., and H. M. Hampton, of Ocala, Fla., for appellees.

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

WALKER, Circuit Judge. This is an appeal from a decree dismissing, on motions of the appellees Walter Ray and N. G. Wade, a bill of complaint filed against them and others by the appellant, Bank of Commerce & Trusts of Richmond, Va. The dismissed bill, which was filed September 29, 1916, disclosed the following, among other, facts:

On or before October 1, 1912, Adam McArthur, J. Sprunt Newton, and W. M. Walker, by written indorsement, guaranteed \$100,000 of the bonds of the Newton-McArthur Lumber Company, a North Carolina corporation, which bonds became the property of the appellant. In an action on some of those bonds brought in September, 1913, in the United States District Court for the Eastern District of North Carolina by the appellant against Adam McArthur, Newton, and Walker, who reside in North Carolina, judgment was rendered against them in the sum of \$7,082.32. In another action brought in the same court in March, 1914, by the appellant against the same parties on other bonds of the same issue, judgment was rendered on June 13, 1914, for the sum of \$80,000, with interest thereon from October 1, 1913. Executions were duly issued on the two judgments. Under the execution issued on the \$7,082.32 judgment, all of Adam McArthur's personal

property, subject to levy, which could be found by the marshal, was sold, and the net amount of \$163.12 was realized and applied on that judgment. The sum of \$56.81 was realized on the execution issued on the \$80,000 judgment; the net proceeds, \$4.99, being applied on that judgment. Before the institution of the suits in which the two judgments mentioned were rendered, all the property of the Newton-McArthur Lumber Company had been put in the hands of a receiver. By proceedings in the receivership suit, all the property of that company, with an exception to be stated, was converted into cash, and the net amount realized, \$27,500, was applied on the above-mentioned \$80,000 judgment. The only other assets of that company are two claims, upon which suits have been brought, and \$1,500 cash in the hands of the receiver. Not more than \$7,500 can be realized in any event on the claims in suit. In a suit instituted in a North Carolina court by the appellant and other creditors of Adam McArthur, all his real estate which could be subjected to the payment of his debts was placed in the hands of a receiver. A judgment in favor of a creditor other than the appellant constitutes a first lien on that real estate. That real estate is greatly less in value than the amounts remaining unpaid on the above-mentioned judgments in favor of the appellant. Adam McArthur, J. Sprunt Newton, and W. M. Walker are named as defendants. The averments of the bill show that all three of them reside in North Carolina, and that there is no one in Florida the service of process upon whom would bind either of them. Each of them is wholly insolvent. Formerly, and while the debts on which the appellant recovered judgments in North Carolina were in existence, Adam McArthur had sundry items of property in Florida. That property was acquired from him by defendants, who live in Florida, and upon whom process in this suit has been served. It was so disposed of that Adam McArthur ceased to have any interest in it. But the dispositions of it were made under such circumstances as to be invalid against the creditors of such former owner.

[1] The averments of the bill bring the case within an exception to the general rule that to maintain a creditors' bill there must first have been a judgment at law and execution thereon returned unsatisfied in the jurisdiction in which such bill is filed. A creditor sufficiently shows that he has no adequate remedy at law, in the jurisdiction in which he seeks equitable relief, when he discloses the impossibility of obtaining in that jurisdiction a judgment at law against the debtor, and that the only remedies at law anywhere available have been exhausted without satisfying the demand asserted. The averments of the bill show that the appellant had exhausted the legal remedies available to it. It recovered judgments against the debtors in the only jurisdiction in which process could be served upon them, and executions on those judgments have been returned unsatisfied. Because of the absence from Florida of Adam McArthur, that not being the state of his residence, an action at law on the North Carolina judgments against him could not be maintained in Florida, as service on him of process in such action could not be had. By no action at law could the creditor have reached and subjected the property in Florida which the debtor

had transferred. Where a creditor invokes the aid of a court of equity to set aside transfers by the debtor of his property in fraud of the creditor, and to subject transferred property in which the debtor no longer has any beneficial interest, and shows that it is impossible to obtain a judgment at law against the debtor within the jurisdiction where the suit in equity is brought, nothing more is required to show that the creditor has no plain, adequate, and complete remedy at law. A creditor so situated is entitled to resort to a court of equity. *National Tube Works v. Ballou*, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. Ed. 1070; *Case v. Beauregard*, 101 U. S. 688, 25 L. Ed. 1004; *Williams v. Adler-Goldman Commission Co.*, 227 Fed. 374, 142 C. C. A. 70; *Hardware Co. v. Driggs*, 13 App. D. C. 272; *N. T. Bank v. Wetmore*, 124 N. Y. 241, 26 N. E. 548.

[2] In behalf of the appellees it is contended that the dismissal of the bill is sustainable on the ground stated in the decree, namely:

"That the defendants Adam McArthur, J. Sprunt Newton, and W. M. Walker are necessary parties to this cause, and that they are not citizens or residents of the state of Florida, and not subject to the process of this court, and cannot be subjected to the jurisdiction thereof by personal or constructive service."

The property sought to be subjected to the satisfaction of the appellant's demands is the above referred to Florida property which formerly belonged to Adam McArthur, and was transferred by him as above stated. Under the averments of the bill, that former owner of the property in question no longer has any interest in it. He has no such interest in the subject of the suit as requires that he be made a party to it. He would not be prejudiced or affected by a decree subjecting the property in question to the satisfaction of the appellant's demands. The attacked transfers and conveyances are binding as between him and his transferees or grantees, the resident defendants proceeded against. The averments of the bill show that those transfers are not binding upon the appellant, the transferrer's creditor. Relief sought could be granted without affecting either of the three nonresidents who were named as defendants. As to them, the suit can be abated, and it may then be prosecuted against the resident defendants. No one of the three named nonresidents is an indispensable party to the suit.

The court erred in dismissing the bill. Its decree to that effect is reversed.

In re AMERICAN CANDY MFG. CO. Appeal of MOORE. Appeal of HANRAHAN.

(Circuit Court of Appeals, Second Circuit. January 15, 1919.)

Nos. 119, 120.

BANKRUPTCY ⇐205—EQUITABLE LIENS—PROPERTY FRAUDULENTLY TRANSFERRED TO BANKRUPT.

Under the law of New York, by which one corporation may transfer all its property to another, but subject to objecting creditors' rights or "equitable liens" therein, judgment creditors of a corporation, which transfers its property, all in New York, to another corporation, although both are foreign to that state, may follow such property in the hands of the trustee in bankruptcy of the transferee.

Appeals from the District Court of the United States for the Eastern District of New York.

In the matter of the American Candy Manufacturing Company, bankrupt. From orders of the District Court, Ella L. Moore and Josie G. Hanrahan separately appeal. Reversed.

For opinion below, see 248 Fed. 145.

Appeals by petitioners from orders in bankruptcy entered in the District Court for the Eastern District of New York. By stipulation the following facts appeared:

Franklin's, Incorporated, is a New Jersey corporation, which did business in New York. In or shortly before January, 1915, certain officers of that company, by fraudulent representations, induced both petitioners to purchase the "coupon notes" of their company. On April 12, 1915, Franklin's conveyed all its property, real and personal, to the bankrupt above named, a corporation of Delaware whose officers and directors were the same as those of Franklin's. The transferred property was all in Queens county, N. Y., and such transfer divested Franklin's of all it owned. The conveyance was expressly subject to the grantor's debts and liabilities, and the bankrupt by resolution of its directors assumed said debts. The deed for the conveyed realty was recorded November 9, 1915, and no bill of sale for the personalty was ever recorded.

In June, 1915, Franklin's defaulted as to the interest then due on petitioners' "coupon notes." Such default precipitated maturity, petitioners brought suit, and judgments against Franklin's were docketed in Queens county, by Moore for \$2,271.12 on October 20, 1915, and by Hanrahan for \$537.50 on November 16. On both judgments executions were issued, before November 19th, which were returned nulla bona on December 24th, and on November 19th petition in bankruptcy against American Candy Manufacturing Company was filed; adjudication following.

January 1, 1916, alias executions on both judgments were issued; and while such executions were outstanding (viz. on January 18th) both Moore and Hanrahan filed separate petitions herein, on behalf of themselves and "all other persons similarly situated," setting forth (as was subsequently admitted) that the trustee in bankruptcy had possession of property, or the proceeds thereof, which had been conveyed by Franklin's to the bankrupt; that Franklin's was insolvent, and had made said conveyance in fraud of its creditors, and that the District Court, by the trustee in bankruptcy, therefore had custody and control of property upon which petitioners by virtue of the premises had an "equitable lien." Wherefore it was prayed that so much of said property as was necessary might be devoted to paying petitioners who have at no time filed any claims against the American Candy Manufacturing Company in the bankruptcy proceeding. All creditors of Franklin's other than Moore and Hanrahan have filed claims, and none has sought to join in either petition.

The District Judge rejected both petitions, whereupon these appeals were taken.

Hazel M. Cole, of Albany (Henry D. Merchant, of New York City, of counsel), for appellants.

Harry H. Schutte, of Brooklyn, for trustee in bankruptcy.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). Some facts dwelt on in argument are irrelevant. That petitioners became creditors of Franklin's by fraud does not affect the question; they sought no such mesne process as attachment, whereby they might have secured liens, and creditors, who do not avail themselves of the remedies given by their debtors' fraud in creating the debt, obtain no lien merely by a money judgment for what the fraud cost them.

Success for these petitioners depends on whether they have, timely and in proper manner, asserted rights inherent in all creditors of Franklin's, and violated by the conveyance to American Candy Manufacturing Company.

Possession and control of property late of Franklin's, being all that gave jurisdiction to the District Court, all the transactions complained of having taken place in New York, and no statute of the United States affecting the matter, we consider the question of rights as one depending wholly on the law of New York. So far as procedure is concerned, that discussed in *Re Superior Jewelry Co.*, 243 Fed. 368, 156 C. C. A. 148, was followed, and meets with our approval.

In New York it is lawful for a business corporation to transfer its entire property to a new or another corporation, and leave its creditors to collect from such other or successor company, unless the creditors object; but, if they do object, they cannot be compelled to recognize as their debtor any one with whom they did not contract; and the conveyance, good inter partes, becomes fraudulent as to the nonconsenting creditors, who by appropriate suit (as for sequestration) may pursue the property that was their debtor's unless prevented by some equity other than that of the transferee. *Cole v. Millerton, etc., Co.*, 133 N. Y. 164, 30 N. E. 847, 28 Am. St. Rep. 615; *Hurd v. Laundry, etc., Co.*, 167 N. Y. at 96, 60 N. E. 327, and cases cited; *Wilson v. Æolian Co.*, 64 App. Div. 337, 72 N. Y. Supp. 150, affirmed 170 N. Y. 618, 63 N. E. 1123.

It may be noted that this doctrine, developed proximately from the *Cole Case*, has had to do usually with New York corporations, and with creditors who at the date of transfer complained of, had pending suits; both circumstances are here absent. They are in our judgment immaterial; a transfer made in New York, and of property in the state, is subject to the laws of the state, and the rule now invoked does not depend on the origin of incorporation, but on the nature of the transaction as reprobated by public policy. Nor do the rights of creditors as such depend on their diligence in bringing suit before transfer made, however much delay in seeking some remedy may open them to the charge of laches. In this case no such defense is made.

The result is that the petitioners, as creditors of Franklin's, who have never consented to a transfer of property, good as between Franklin's and the bankrupt, but fraudulent as to them, are entitled to sat-

isfaction of their demands out of what was, and still is as to them, Franklin's property. This result is reached by applying a principle so fundamental that some other rights of petitioners as judgment creditors (of Franklin's, not of American Candy Manufacturing Company) do not contribute thereto, although existing.

Thus the Moore judgment was docketed before any conveyance of realty out of Franklin's was recorded, and became a lien accordingly, and the delivery of execution to the sheriff of Queens gave a lien on Franklin's personalty. In re Superior Jewelry Co., supra. But these facts do not affect or aid the ruling doctrine that the petitioners, as creditors of Franklin's, are entitled to an accounting from American Candy Manufacturing Company in respect of property as to which as creditors they have rights, called in the Cole Case "equitable liens."

The trustee in bankruptcy stands in the shoes of the American Candy Manufacturing Company, except in so far as he has by statute the rights of a lien creditor; but that means a creditor of the American Candy Mfg. Co. In re Seward Dredging Co., 242 Fed. 228, 155 C. C. A. 65. These petitioners' rights rest on the truth that in equity the American Candy Manufacturing Company took nothing by the conveyance, except what remained after accounting to Franklin's non-consenting creditors. Similarly the fact that petitioners' judgments and original executions were within four months of adjudication is irrelevant; Franklin's has never been adjudicated.

Petitioners are entitled substantially to the relief prayed for, and the property that was Franklin's, together with whatever else the bankrupt had, having been sold free of liens, and held to await this litigation, interest is demanded. As we pointed out in the Superior Jewelry Case, supra, such petitions as these are in the nature of judgment creditors' bills, and proceed on equitable principles. The trustee's possession was and is lawful, subject to accounting; petitioners' demands are for their judgments, with statutory interest, but the trustee should not be required to pay more than he has; and that is what was due when in contemplation of law he got the property (i. e., judgment and interest to November 19, 1915), plus whatever interest has been earned on funds held awaiting result of litigation.

We express no opinion as to the standing, in view of this decision, of creditors of Franklin's who have proved in the American Candy Manufacturing Company's bankruptcy. We do not know whether there are any creditors of the latter concern, who were not once, at all events, creditors of Franklin's.

Petitioners will recover from the estate in bankruptcy the costs of these appeals. The orders appealed from are reversed, and causes remanded for further proceedings not inconsistent with this opinion.

CHATHAM & PHENIX NAT. BANK OF CITY OF NEW YORK v. GUARANTY TRUST CO. OF NEW YORK.

KINGDOM OF ROUMANIA v. SAME.

(Circuit Court of Appeals, Second Circuit. January 15, 1919.)

No. 111.

1. APPEARANCE \Leftrightarrow 9(5)—GENERAL APPEARANCE—MOTION TO VACATE ORDER.
One not a party to a suit against whom an order is made does not make a general appearance by moving to vacate the order, under Code Civ. Proc. N. Y. § 421.
2. JUDGMENT \Leftrightarrow 243—PERSONS NOT PARTIES.
A court is without jurisdiction to order a bank which is not a party to the action to pay interest to the defendant on money which was paid into court by defendant and deposited in the bank by the clerk, as provided by Rev. St. § 995 (Comp. St. § 1644).
3. DEPOSITS IN COURT \Leftrightarrow 8—PUBLIC MONEYS OF UNITED STATES.
Moneys in court deposited in a designated depository of the United States are not public moneys of the United States.
4. DEPOSITS IN COURT \Leftrightarrow 8—DEPOSITS OF MONEY BY FEDERAL COURT—INTEREST.
An order by the Secretary of the Treasury requiring depository banks to pay interest on daily balances on all deposits by government agencies, including courts, does not authorize a court to order a bank to pay interest on a deposit by its clerk to a party to a suit.

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

Action by the Kingdom of Roumania against the Guaranty Trust Company of New York. The Chatham & Phenix National Bank of the City of New York brings error to review an order requiring it to pay interest to defendant. Reversed as to allowance of interest, and judgment in that respect modified and affirmed.

Kaye & Scholer, of New York City, for plaintiff in error.

Frank M. Patterson, of New York City (John B. Loughborough, of New York City, of counsel), for defendant in error.

Francis G. Caffey, U. S. Atty., and John E. Walker, Sp. Asst. U. S. Atty., as amici curiæ.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. The District Court, in the suit of the Kingdom of Roumania against the Guaranty Trust Company of New York, entered an order substituting one Arditti as defendant in place of the trust company upon its paying into court to the credit of the action \$73,433.55, with interest at the rate of 2 per cent. per annum, the trust company thereupon to be discharged of all liability either to Arditti or to the Kingdom of Roumania.

The trust company paid the money, with interest, to the clerk of the court, who deposited it with the Chatham & Phenix National Bank, a designated depository of the United States, in his account as clerk, and he has never received any interest upon it. This order we re-

versed, upon the ground that the court had no jurisdiction to make it; the Kingdom of Roumania being a sovereign state, immune from suits in the courts of this country. 250 Fed. 341, — C. C. A. —, Ann. Cas. 1918E, 524.

Thereafter the District Court, upon motion of the trust company, entered an order that the clerk pay to it the money so deposited, less his statutory fee of 1 per cent., and that the Chatham & Phenix National Bank pay to it interest at the rate of 2 per cent. per annum on the said fund to date of payment. This is a writ of error taken by the bank to the said order.

[1, 2] We do not think that the bank's motion to vacate amounts to a general appearance by it, submitting it to the jurisdiction of the court. *Wood v. Furtick*, 17 Misc. Rep. 561, 40 N. Y. Supp. 687; *Regelmann v. South Shore Co.*, 67 Misc. Rep. 590, 123 N. Y. Supp. 353. The bank was not a party to the action, had made no contract with the trust company, and if it owed interest on the deposit it owed it to its depositor, the clerk of the court, who alone had standing to collect the same. The objection that the court was without jurisdiction to make the order is good.

Section 995, Rev. Stat. U. S. (Comp. St. § 1644), provides:

"All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the Treasurer, an Assistant Treasurer, or a designated depository of the United States, in the name and to the credit of such court: Provided, that nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court."

Section 996, Rev. Stat. U. S. (Comp. St. § 1645), provides:

"No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said court, respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn."

[3] Moneys in court deposited in a designated depository of the United States are not public moneys of the United States. *Branch v. United States*, 100 U. S. 673, 25 L. Ed. 659; *Coudert v. United States*, 175 U. S. 178, 20 Sup. Ct. 56, 44 L. Ed. 122; *United States v. MacMillan* (D. C.) 209 Fed. 266, affirmed 251 Fed. 55, — C. C. A. —.

[4] Section 5153, Rev. Stat. U. S., provides:

"All national banking associations, designated for that purpose by the Secretary of the Treasury shall be depositories of public money, except receipts from customs, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the government; and they shall perform all such reasonable duties, as depositories of public moneys and financial agents of the government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the government. And every association so designated as receiver or depository of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the government for internal revenue, or for loans or stocks."

Under the foregoing provision the Secretary of the Treasury made a contract with the Chatham & Phenix National Bank as follows:

"Treasury Department,

"Washington, July 18, 1913.

"The Collection of Interest on Public Deposits.

'Cashier Chatham and Phenix National Bank, New York, N. Y.:

"With reference to the announcement of the Secretary of the Treasury, under date of April 30, 1913, that, beginning with June 1, 1913, all government depositaries both active and inactive, will be required to pay interest at the rate of 2 per cent. per annum on average monthly balances, payable on January 1st and July 1st of each year, by authority of the Secretary of the Treasury the regulations for the computation and collection of this interest will be as follows:

"The balance on which interest will be required will include the total of the balances to the credit of the Treasurer of the United States, postmasters, United States courts and clerks of courts, and United States disbursing officers, if there be any.

"Each bank will furnish the Treasurer with a statement of its daily balances at the end of each month; the total of those daily balances, divided by 30, will give the average balance held for the month, and the total of these six average balances, divided by 6, will give the average monthly balance for the six months.

"Interest will be computed on this average monthly balance for the full period of six months, or on the average for any part of the period for which the balance is held. The interest may be deposited with the Treasurer or any Assistant Treasurer of the United States or any active designated depositary bank."

The contention that this regulation or contract does not contemplate the payment of the interest to the United States, but to whomsoever it may be due, does not impress us. Obviously the Secretary of the Treasury requires payment of it to him and the United States attorney appears in this case as *amicus curiæ*, contending that the interest does belong to the United States. If the Secretary of the Treasury could by virtue of section 5153 require the depositary to pay interest at the rate of 2 per cent. to the United States upon its authorized balance, including moneys deposited by courts, as a condition of being appointed a depositary, as to which we express no opinion, the court cannot because of such regulation require the depositary to pay interest to the clerk or to the trust company. Interest is payable only by contract or by statute or by way of damages in actions of tort. There was no contract between the bank and the clerk for the payment of interest on such deposits and he has received none; nor is there any statute requiring it to be paid nor is this claim one for damages.

The court below is directed to strike out of the order the provision requiring the bank to pay 2 per cent. interest to the trust company, and, as so modified, the order is affirmed.

LEHIGH VALLEY COAL CO. v. LAZUASKINE.

(Circuit Court of Appeals, Second Circuit. January 15, 1919.)

No. 113.

COURTS ⇨325—JURISDICTION OF FEDERAL COURT—WAIVER OF OBJECTION—
SUBSTITUTION OF PLAINTIFFS.

Filing of an answer by defendant, a Pennsylvania corporation, in an action in a federal court in New York by an administrator, who was a citizen of New York, *held* not a waiver of the right to object to the jurisdiction, where the court over its objection permitted the substitution of a different plaintiff, who was an alien resident of Pennsylvania.

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

Action at law by Victa Lazuaschine against the Lehigh Valley Coal Company. Judgment for plaintiff, and defendant brings error. Reversed.

For opinion below, see 241 Fed. 595.

Allan McCulloh, of New York City (William W. Green and Edw. W. Walker, both of New York City, of counsel), for plaintiff in error.
James Burke, Jr., of Port Richmond, N. Y., for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge. Although this writ brings up the whole record of a trial, in an action for death by wrongful act, we shall consider only the question of jurisdiction.

One Roman, as administrator of Lazuaschine, deceased, brought action in the state court, showing that decedent came to his death in Pennsylvania, and claiming damages pursuant to the statute of that state. Roman is a citizen and resident of New York, and defendant, being a corporation of Pennsylvania, removed the case. No objection was made to jurisdiction, and none existed.

The case was reached for trial, and after a jury was impaneled, it was pointed out that Roman, as administrator, had no cause of action, because by the Pennsylvania statute, since Lazuaschine left him surviving a widow, all right of suit had vested in her as such widow. Thereupon counsel moved to substitute the widow as plaintiff, and amend the pleadings to conform, which motion was opposed by defendant. At this, the court of its own motion called the widow, Victa Lazuaschine, as a witness, who swore that she was an alien and a resident of Pennsylvania, that her deceased husband also had been such resident and an alien, and that Roman's suit had been brought with her knowledge and consent, and for the benefit of herself and children by the decedent. It also appeared that Roman had procured letters of administration, in Kings County, N. Y., on the estate of the alien resident of Pennsylvania.

Thereupon the court caused a juror to be withdrawn, terminated the trial, considered the motion for substitution and amendment, and

some days later granted it. Due objection and exception to all these acts of the court appear in the bill of exceptions.

A repleader was then had, and an amended complaint served, in the name of Victa Lazuskine, as plaintiff, to which defendant answered, "saving and reserving to itself any and all manner of objections" theretofore taken to the "power or jurisdiction" of the court to "direct the substitution of Victa Lazuskine," and without "waiving its right to object to the maintenance of this action by said "Victa Lazuskine."

The issue thus framed by amended pleadings having been called for trial, defendant repeated all its former objections to the action of the court, again excepted to unfavorable rulings, and further objected "to the impaneling of a jury or proceeding with the trial * * * on the further ground" that Victa Lazuskine was shown by the amended pleadings to have been, "at the time when the action was commenced and at the time of the substitution," an alien and a resident of Pennsylvania. This was overruled, and exception noted. The trial proceeded, plaintiff had a verdict, and defendant brought this writ.

That Roman, as administrator, had no right to sue, is too plain for argument. *Haughy v. Pittsburgh Co.*, 210 Pa. 367, 59 Atl. 1112. To be sure, the court had, or might have had, jurisdiction over the subject-matter of a claim for death by wrongful act, arising under a Pennsylvania statute; but it does not follow therefrom that all other limitations on jurisdiction were to be disregarded. It was thought below that our decisions in *Lehigh, etc., Co. v. Yensavage*, 218 Fed. 547, 134 C. C. A. 275, and *Lehigh, etc., Co. v. Washko*, 231 Fed. 42, 145 C. C. A. 230, justified a holding that because defendant, when answering Roman's complaint, had raised no objection to jurisdiction, therefore it committed "a waiver of objection to suit in this district." But there was no valid objection to jurisdiction over Roman's claim; the obvious objection to his recovering anything had nothing to do with jurisdiction.

If evidence had shown a previously unsuspected right in defendant to avoid suit in the District Court by Roman, it would then have been incumbent on defendant to ask leave to withdraw its general appearance, and assert its newly discovered right, because the privilege of suit in a defendant's own district may be waived by appearance without reservation of rights. Such was our ruling in the cases cited, but we fail to find in them anything to the effect that a general appearance to the complaint of one plaintiff waives all right not to be sued by another plaintiff.

Such is the result of the holding complained of. Having failed in its endeavor to prevent the substitution of the widow, defendant was ordered to plead to that widow's complaint; it complied, saving all rights created by its motions, objections, and exceptions, made and taken as soon as the record contained any notice or knowledge of the facts on which alone it could act; and when the widow's case came on for trial the same objections, etc., were again presented, counsel stating on the record: "We appear specially, for the purpose of raising these objections and taking an exception." Short of refusing to try on

the merits at all, it is difficult to see how the points could have been more acutely exhibited. That no defendant is required to go to such lengths is admitted.

It being clear that the District Court for the Eastern District of New York has no jurisdiction of this suit by an alien resident of Pennsylvania against a Pennsylvania corporation, it was error to create such a suit. For this reason, the judgment is reversed, and the cause remanded, with directions to vacate the order of substitution and grant a new trial.

As to the propriety of the substitution, aside from its effect on jurisdiction, we express no opinion.

REDERIAKTIEBOLAGET TRANSATLANTIC et al. v. EKLUND et al.
THE BALTIC.

(Circuit Court of Appeals, Fifth Circuit. February 14, 1919.)

No. 3273.

1. SEAMEN ⇨23—RIGHT TO HALF PAYMENT—PRIOR DEMAND AND PAYMENT.
Under Seamen's Act, § 4 (Comp. St. § 8322), demand by a seaman, on arrival at a port, for payment of a specific sum, less than half of what he had earned, and payment thereof, does not stand in the way of another demand therefor, within less than five days thereafter, for payment of half of wages earned.
2. SEAMEN ⇨23—WAGES—RIGHT TO HALF PAYMENTS—ADVANCES—AGREEMENT TO PAY OTHERS.
In determining amount of wages paid, relative to right under Seamen's Act, § 4 (Comp. St. § 8322), to demand payment of half of wages earned, advances in foreign ports and amounts of allotments which shipowner had agreed to pay to members of seaman's family in a foreign country, from his wages, are to be considered as payments.
3. SEAMEN ⇨26—WAGES—LIBEL—COSTS.
Failure to comply with rightful demand of seamen for payment of half of wages earned, releasing them and entitling them to full payment, by provision of Seamen's Act, § 4 (Comp. St. § 8322), they should be adjudged costs on libel therefor.

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

Libel by Ragnar Eklund and others against the steamship Baltic; the Rederiaktiebolaget Transatlantic, claimant. Decree for libelants, and claimant and others appeal. Reversed in part and modified and affirmed in part.

W. W. Young, of New Orleans, La. (Terriberry, Rice & Young, of New Orleans, La., on the brief), for appellants.

W. J. Waguespack and Herbert W. Waguespack, both of New Orleans, La., for appellees.

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

WALKER, Circuit Judge. On a libel by eight seamen against the steamship Baltic, a decree was rendered in favor of the libelants for the amounts of wages earned by them, though the court concluded that the demand of the seamen, which was not complied with, was not one they were entitled to make, and adjudged the costs against them.

[1] After the arrival of the ship in New Orleans, and within less than five days before the making of the demand for the payment of half the wages earned, a demand of each of the seamen for the payment of a specified amount was complied with, except as to three of the seamen hereinafter referred to. The amounts so demanded and paid to the other five seamen were less than half the wages they had earned. The compliance with the earlier demand did not keep the later demand from being one the seamen were entitled to make. Under the terms of section 4 of the Seamen's Act of March 4, 1915 (38 Stat. 1165, c. 153 [Comp. St. § 8322]), it is only a demand for the payment of one-half part of the wages earned which stands in the way of the making of another such demand within five days thereafter.

[2, 3] Before the making of the demand for the payment of half the wages earned, more than that much had been paid on the wages of three of the seamen, Forsberg, Johannesson, and Sjo. The payments previously made on the wages of those seamen included the amounts of allotments out of their wages which the shipowner had agreed to pay to members of their families in Sweden. Advances, though made in foreign ports, are subject to be deducted in ascertaining the amount of wages earned. *Sandberg v. McDonald*, 248 U. S. 185, 39 Sup. Ct. 84, 63 L. Ed. —. Amounts which the shipowner has obligated itself to pay to a third party as part of a seaman's wages stand on the same footing as payments on his wages to the seaman himself. It follows that the demand did not entitle the three seamen mentioned to receive anything. So far as the decree appealed from is in their favor, it is reversed.

The failure to comply with the demand for the payment of half the wages earned released the other five seamen, and entitled them to full payment of wages earned. So far as the decree is in their favor, it is modified, by adjudging the costs also in their favor, and, as so modified, it is affirmed as to them.

Reversed in part; modified and affirmed in part.

JACKSON LIGHT & TRACTION CO. v. LEE.

(Circuit Court of Appeals, Fifth Circuit. March 4, 1919.)

No. 3288.

STREET RAILROADS ⇨114(9)—NEGLIGENCE—EVIDENCE.

A verdict finding a street railroad company liable on the ground of negligence for the death of plaintiff's intestate, who was killed by a car when driving an automobile on the track, *held* sustained by conflicting evidence.

In Error to the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Action by C. A. Lee, administrator of the estate of Percy L. Johnson, deceased, against the Jackson Light & Traction Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Ben H. Wells, of Jackson, Miss., for plaintiff in error.

J. A. Teat, of Jackson, Miss., for defendant in error.

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

FOSTER, District Judge. This is an action for damages for the death of defendant in error's intestate. The case went to the jury, and resulted in a verdict for defendant in error in the sum of \$10,000. Error is assigned to the refusal of the District Court to direct a verdict in favor of plaintiff in error, and to the overruling of a motion for a new trial. No other errors are assigned.

The deceased was killed in a collision between a Ford automobile which he was driving and a street car belonging to the plaintiff in error. The record contains the testimony of at least five witnesses tending to show that, on the day the accident occurred, a fair was being held in Jackson, Miss., and the streets were crowded with automobiles and people; that the deceased was driving his automobile on Capitol street, and other automobiles were parked on the side of the street, headed into the curb, and extending out into the roadway; that in order to pass them it was necessary for the deceased to drive on the street car track; that he did so at the moment when the street car was approaching him at a rapid rate, witnesses estimating the speed to be 10 to 15 miles an hour, but at the moment of impact the automobile was stopped, or almost stopped, practically standing still. On the other hand, there is evidence tending to show that, at the time of the accident, deceased was drunk, and was driving his automobile in a reckless manner, and carelessly collided with the street car.

The doctrine of the last clear chance was invoked by the defendant in error, and the court charged the jury fully and fairly on every phase of the case. The charge was as favorable to the one side as to the other, and was applicable to the evidence both for and against both sides. The evidence is conflicting, but the witnesses were not impeached or discredited on either side, and the questions of negligence

and proximate causes were for the jury upon all the facts and circumstances of the case. We find no error in the court's declining to direct a verdict as requested.

With regard to the second assignment of error, it is elemental that in federal courts the granting or refusal of a new trial is a matter of discretion with the lower court. Error cannot be assigned thereto.

The judgment is affirmed.

BATTS, Circuit Judge (acquiescing). The verdict of the jury should, in my judgment, have been for defendant. I think the trial judge should have granted a new trial. But there was evidence upon which the verdict of the jury could have been based. It cannot be held that the trial judge abused his discretion.

I am not, therefore, warranted in a dissent from the judgment of affirmance.

STANLEY WORKS v. TWISTED WIRE & STEEL CO.

(Circuit Court of Appeals, Second Circuit. January 15, 1919.)

No. 126.

1. PATENTS \Leftrightarrow 328—VALIDITY AND INFRINGEMENT—BOX STRAPPING.

The Howe reissue patent, No. 13,765 (original No. 1,043,771), for box strapping, is not invalid, as containing new matter, was not anticipated, and discloses invention, evidenced in part by its great commercial success in an old art; also *held* infringed.

2. TRADE-MARKS AND TRADE-NAMES \Leftrightarrow 75—UNFAIR COMPETITION.

Evidence, which does not show that the public was deceived by believing defendant's product to be that of complainant, does not warrant a finding of unfair competition.

3. WORDS AND PHRASES—"BOX STRAPPING."

"Box strapping," used by manufacturers and merchants, consists of metal strips intended to reinforce the ends of heavy wooden packing cases to prevent them from breaking open.

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

Suit in equity by the Stanley Works against the Twisted Wire & Steel Company. Decree for plaintiff, sustaining the charge of infringement of patent and denying the relief for unfair competition. Both plaintiff and defendant appeal. Affirmed.

Mitchell & Allyn, of New York City (Robert C. Mitchell and Louis W. Southgate, both of New York City, of counsel), for plaintiff.

Charles G. Hensley, of New York City, for defendant.

Before ROGERS and MANTON, Circuit Judges, and AUGUSTUS N. HAND, District Judge.

MANTON, Circuit Judge. Since both parties appeal from the decree entered herein, we shall refer to the parties as they were referred to in the district court, to wit, plaintiff and defendant.

[1] The plaintiff in this bill in equity charged infringement of re-

issue letters patent granted to it July 7, 1914, No. 13,765, for an improvement in box strapping invented by Leon S. Howe. The bill further charged unfair competition. The District Judge sustained the patent, held that there was infringement, and dismissed the charge of unfair competition. The defendant denied that there was invention or infringement, but says that the patent in suit is invalid, because it claims, not a patentable combination, but a mere aggregation of old elements. It further claims that the reissue patent is invalid because it shows new matter. The defendant further contends that the District Judge correctly held that there was no unfair competition in the trade by it.

[3] Box strapping, used by manufacturers and merchants, consists of metal strips intended to reinforce the ends of heavy wooden packing cases, to prevent them from breaking open. Ordinarily, these strips are nailed around each end of the packing case, and made to tightly embrace the case, so as to perform the intended function. As packages are frequently pushed and hauled over and about the floors of warehouses, railroad cars, or on the decks of ships, it is essential that the sharp edges of the strapping, and the nails which are used to hold it, be so guarded and protected as to avoid their catching in the floor, and thus prevent the strapping being torn from the case.

The patent in suit is intended to give practical effect to the idea that, by producing a strapping which could be applied by nails driven obliquely therethrough, the oblique driving of each successive nail would take up the slack between it and the last driven, and that such accumulative tightening would cause the strapping to hug tightly to the box, thereby avoiding the danger of the box breaking open. The inventor arranged to corrugate the median portion of the strap transversely, so as to form a central web portion having alternate ridges and furrows, the latter forming effective nail-receiving pockets, and the former constituting effective nail-holder shoulders or abutments; the idea being that a nail held obliquely could be safely driven without danger of glancing, the puncturing blows being utilized to take up the slack. The effect of corrugating the median portion is to increase the overall thickness of the web portion, so that, to the extent the overall thickness is increased, so also would the depth of the pockets and the height of the nail-holding ridges or abutments be increased, without respect to the actual thickness of the metal employed. The corrugation of the metal maintains the initial thickness, and thus affords a sufficient resistance to puncture by the nail to enable the blows to perform the slack taking-up function before the strap is actually punctured, and it is claimed that by reason thereof comparatively thin sheet metal can be used for relatively wide strapping. By driving the nail obliquely, it enters the wood obliquely, and it is claimed that this, so driven, will continue further to take up the slack, insuring that the strapping will be caused to hug snugly upon the box. The side border of the strapping is left uncorrugated transversely, and thus avoids the danger of the sudden taking up of the slack, which would be caused by the stretch of the strapping longitudinally, and thus defeat the whole purpose of the invention. The transversely corrugated central web,

with its uncorrugated and nonstretchable borders, comprise the central idea of the invention. The furrows thus formed and the raised bearings guard and protect against the nail heads striking the floor when they are driven fully down.

The plaintiff in his claims sets forth:

4. A metallic box strap for packing cases and the like, comprising a strip, transverse corrugations formed along the median portion thereof to produce substantially roughened surfaces on each face of the strip, and to increase the overall thickness thereof along said median portion, the shoulders formed thereby being arranged to hold the point of a nail to prevent slippage thereof, whereby said nail may be driven at an angle relatively to said strip, to take up slack therein in the act of applying the same; that part of the strip at opposite edges of said corrugated portion being relatively smooth to prevent stretching the central corrugated portion of said strip.

5. A metallic box strap for packing cases and the like, comprising a strip, transverse corrugations formed along the median portion thereof to produce substantially roughened surfaces on each face of the strip, and to increase the overall thickness thereof along said median portion, the shoulders formed by said corrugations being arranged to hold the point of a nail to prevent slippage thereof, whereby said nail may be driven at an angle relatively to said strip to take up slack therein in the act of supplying the same; that part of the strip at the opposite edges of said corrugated portion being relatively smooth and provided with raised bearings.

7. A metallic box strap for packing cases and the like, comprising a strip, transverse corrugations formed along the median portion thereof to produce substantially roughened surfaces on each face of the strip, and to increase the overall thickness thereof along said median portion, the shoulders formed by said corrugations being arranged to hold the point of a nail to prevent slippage thereof, whereby said nail may be driven at an angle relatively to said strip to take up slack therein in the act of applying the same; that part of the strip at the opposite edges of said corrugated portion being relatively smooth and provided with raised bearings, said bearings being sufficiently raised to extend above the adjacent corrugated median portion of the strip sufficiently to guard the head of a nail driven through said median portion.

Howe's application was filed and the reissue patent granted before the acts of infringement began. The defendant does not charge the plaintiff with laches, and an examination of the application and the specifications, together with the claims of the reissue patent indicates that the patentee has been more definite in the reissue patent than what was disclosed by him in the original patent. The drawings are the same, except that in Figure 2 the transverse corrugations are illustrated definitely, instead of conventionally, as in the original patent. The object of permitting a reissue to be granted was intended to make the patent more specific, providing no new matter was introduced. There was no new matter introduced in the reissue patent; the original patent embodying a rather full disclosure of the basic idea of this invention, namely, the transversely corrugated median portion or web, plus the nonstretchable borders. Box strapping seems to have been old in the art, and when the plaintiff entered the field, in order to meet with success, it was obliged to show trade advantages over the prior forms. For instance, box strapping with raised bearings on one surface formed by embossment one way, was old; the bearings being provided for the sole purpose of holding the sharp edges of the strapping away from the floor. The idea of providing a means for preventing the point of the nail from glancing out of a vertical position is

old; but this invention provides a construction which makes safe the puncturing of the material by a nail placed obliquely anywhere throughout the length of the strap with hammer blows incidental to puncturing the metal and the subsequent blows incidental to driving the nail into the wood, all operating to take up objectionable slack behind the nail. By transversely corrugating thin metal along the median line, forming relatively deep pockets and correspondingly high abutments, which provide a height even greater than the thickness of the stock, whereby the point of a nail, obliquely held, could be placed practically anywhere throughout the length of the strapping to avoid nails or knots in the packing case, so that, when the nail was struck, it would not glance, but would have the effect of taking up slack before puncture would occur, and later, when the nail was driven in the wood by oblique driving, it tended to further draw the strap taut. In addition thereto, the borders of the strap were not transversely corrugated, but provided a nonstretchable border which, with the driving of the nails, would be drawn taut. The placing of this invention upon the market has resulted in an unusual commercial success, which is now frequently considered as evidence of invention. *Washburn, etc., Co. v. Norwood*, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154; *Benjamin, etc., Co. v. Northwestern, etc., Co.*, 251 Fed. 288, — C. C. A. —.

This record shows that, when the plaintiff first engaged in manufacturing this strapping, it was then and prior thereto engaged in manufacturing box strapping in a limited way, using only its by-product from its rolling mills, or, as the witness Parsons described it, a by-product which it classified as waste. The annual sales of this patented product grew from 22,373,700 feet in 1913, to 100,281,800 feet in 1917. This speaks with great force for its novelty and utility. *Barry v. Harpoon Mfg. Co.*, 209 Fed. 207, 126 C. C. A. 301. This phenomenal success, with the advantages given to merchants and manufacturers who require a metal strapping in their business, leaves no doubt in our mind that invention is clearly shown.

The chief structure of the prior art relied upon by the defendant, is the Bowler strapping, covered by the Bowler patent, No. 458,510. This patent expired in 1896. It provided a central web portion, with closely spaced minute score lines cut into the sheet metal stock, usually in one surface only; the object being to hold the nail from slipping either way. The result of scoring was to weaken the thin sheet metal stock, so that the nail would penetrate more easily than it otherwise would. The corrugating process of the patent in suit is opposed to the scoring or cutting process. Corrugation preserves the initial resistance to puncture the sheet metal, and the blows used in puncturing the metal take up the slack in the strap. The alternate ridges and pockets, with the height and depth respectively obtained, make secure the anchoring of the point of the nail, so that it would not glance when driven obliquely. The exhibits indicate that the ridges and depth of the pockets make the height several times as great as the actual thickness of the material.

In the Bowler patent, while it shows the strapping transversely scored along its middle portion, it contributes no useful function thereto.

Bowler first anchors the strapping with two nails at extended intervals, and provides for intermediate nails between the two anchored points, so that the two side bars of the strapping would be spread apart by the intermediate nails. This is illustrated in the patent drawing of Bowler. The nails in Bowler's are driven vertically, and not obliquely, thus losing the opportunity of taking up slack in the manner intended by the patent in suit. It further appears that the Bowler strapping was used on small boxes, such as orange boxes. On the other hand, the defendants have virtually substituted the Howe strapping, describing it by sample which is marked Exhibit 10, which, as claimed by the plaintiff, is the infringing structure.

The infringement of the patent in suit is plain, and needs no further comment. The abandonment of the manufacture of the Bowler "duplex" strapping and the substitution of this type (Plaintiff's Exhibit 10) makes clear, we think, the claim of infringement.

[2] The District Judge held that there was no proof warranting a finding by him of unfair competition, and that this cause of action is not made out. We are satisfied that the evidence does not warrant a finding that the public has cared anything about the source of plaintiff's goods, or has been deceived by believing that the merchandise of defendant's manufacture is that of the plaintiff. We approve these conclusions. *Crescent Tool Co. v. Kilborn & Bishop Co.*, 247 Fed. 299, 159 C. C. A. 393; *Shredded Wheat Co. v. Humphrey Cornell Co.*, 250 Fed. 960, — C. C. A. —.

The decree is in all respects affirmed.

UNITED STATES v. JAMES et al.

(District Court, E. D. Texas, Beaumont Division. December 17, 1918.)

1. INTOXICATING LIQUORS ⇌17—POLICE POWERS OF STATES—PROHIBITION OF MANUFACTURE.

Section 1 of the state-wide prohibition law of Texas, prohibiting the manufacture of liquors within the state, except for medicinal, etc., purposes, is within the police powers of the state, and not in conflict with the federal Constitution.

2. INTOXICATING LIQUORS ⇌17—PROHIBITION OF MANUFACTURE—CONSTITUTIONALITY OF STATUTE.

Const. Tex. art. 16, § 20, requiring the Legislature to enact a law permitting counties and their subdivisions to determine from time to time by majority vote whether the sale of liquors shall be prohibited within their limits, does not by implication limit the plenary power of the Legislature to deal with the manufacture of liquors within the state, and section 1 of the state-wide prohibition law of Texas, prohibiting such manufacture, is valid.

3. CONSTITUTIONAL LAW ⇌26—STATE CONSTITUTION—LIMITATION OF POWERS OF LEGISLATURE.

Under the decisions of the Supreme Court of Texas, a constitutional limitation upon the powers of the Legislature must be found in the language of the Constitution, by either an expressed or implied prohibition, and cannot be declared by the courts, because of what they may deem its spirit.

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

Criminal prosecution by the United States against Carl James, Boyd Smith, and Harvey Ainsworth. On demurrers to indictment. Overruled.

Clarence Merritt, of McKinney, Tex., and J. B. Dailey, of Beaumont, Tex., for the United States.

W. R. Blain, of Beaumont, Tex., for defendants.

HUTCHESON, District Judge. Demurrers to indictment charging defendants with violation of that part of the act of March 3, 1917, known as the Reed Amendment (39 Stat. 1069, c. 162, § 5 [Comp. St. 1918, § 8739a]), 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 the defendants did transport and cause to be transported intoxicating liquors in interstate commerce from the state of Louisiana into the state of Texas, which intoxicating liquors were not to be used for scientific, sacramental, medicinal, or mechanical purposes: the manufacture of intoxicating liquors for beverage purposes in the state of Texas being then and there by its laws prohibited.

The law of the state of Texas relied on by the government as prohibiting the manufacture of intoxicating liquors is section 1, chapter 24, of the Acts of the Thirty-Fifth Legislature, passed at the fourth called session thereof; that section being a part of what is popularly known as "state-wide prohibition statute"—section 1 thereof being as follows:

"Section 1. The manufacture of spirituous, vinous, or malt liquors or medicated bitters capable of producing intoxication—except for medicinal, scientific, mechanical, and sacramental purposes—is hereby prohibited within this state."

This section clearly and unequivocally declares the prohibition, and unless some section either of the Constitution of the United States or of the state of Texas gives point to the demurrers to strike it down, it is valid and effective to accomplish the purpose.

Discussion or consideration of the first branch of the inquiry, that of federal constitutional limitation, has been completely foreclosed by the decisions of the Supreme Court of the United States, both as to the power of Congress to pass legislation in aid of state prohibition and as to the unlimited power of the states themselves to deal with liquor as they please, even to the extent of prohibiting its personal possession and use. Whatever doubt may have existed as to the power of Congress to pass the Reed Amendment has been finally and fully set at rest by the decision of the Supreme Court in the case of *Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U. S. p. 325, 37 Sup. Ct. 180, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845, followed by *Seaboard Air Line Railway v. North Carolina*, 245 U. S. 303, 38 Sup. Ct. 96, 62 L. Ed. 299. Though these cases are specific affirma-

tions of the validity of the Webb-Kenyon Law (Act March 1, 1913, c. 90, 37 Stat. 699 [Comp. St. § 8739]), they as certainly establish the validity of the Reed Amendment, because they concern, not merely a specific legislative act, but the principle upon which it rests.

[1] If the matter were at all open to question, it might serve a useful purpose to collect and discuss some of the leading authorities on the plenary power of the state to deal with the subject of intoxicating liquors; but the law has been so recently summarized with such brevity and comprehensiveness by the Supreme Court of the United States in the case of *Crane v. Campbell*, 245 U. S. 307, 38 Sup. Ct. 99, 62 L. Ed. 304, in which case a state prohibition against having possession of liquor for one's own use and benefit was sustained, that a quotation from that case will best serve to dispose of the federal branch of the question:

"It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a state has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guaranties of the Fourteenth Amendment. *Bartemeyer v. Iowa*, 18 Wall. 129 [21 L. Ed. 929]; *Beer Company v. Massachusetts*, 97 U. S. 25, 33 [24 L. Ed. 989]; *Mugler v. Kansas*, 123 U. S. 623, 662 [8 Sup. Ct. 273, 31 L. Ed. 205]; *Crowley v. Christensen*, 137 U. S. 86, 91 [11 Sup. Ct. 13, 34 L. Ed. 620]; *Purity Extract Co. v. Lynch*, 226 U. S. 192, 200 [33 Sup. Ct. 44, 57 L. Ed. 184]; *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311, 320, 321 [37 Sup. Ct. 180, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845]; *Seaboard Air Line Ry. v. North Carolina*, ante [245 U. S.] 298 [38 Sup. Ct. 96, 62 L. Ed. 299].

"As the state has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective. *Booth v. Illinois*, 184 U. S. 425 [22 Sup. Ct. 425, 46 L. Ed. 623]; *Silz v. Hesterberg*, 211 U. S. 31 [29 Sup. Ct. 10, 53 L. Ed. 75]; *Murphy v. California*, 225 U. S. 623 [32 Sup. Ct. 697, 56 L. Ed. 1229]; and *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 364 [36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455]. And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose.

"We further think it clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no state may abridge. A contrary view would be incompatible with the undoubted power to prevent manufacture, gift, sale, purchase or transportation of such articles—the only feasible ways of getting them. An assured right of possession would necessarily imply some adequate method to obtain not subject to destruction at the will of the state."

It will be noted that by this decision not only is the general point of federal limitation disposed of against them, but the precise point raised by the defendants' demurrers of the inherent right to personal possession for one's own use.

[2] It thus appearing that the demurrers are not supported by any federal limitation, it is evident that the ruling question in the case springs out of the contention of the defendants that the Constitution of the state of Texas has imposed limitations on the Legislature which the act of the Thirty-Fifth Legislature contravenes, and that there is therefore no existent valid prohibition by the laws of Texas of

the manufacture of liquor in this state. If this contention is sound, the demurrers are good, and the defendants must be discharged. If not sound, the demurrers must be overruled.

It is the well-settled rule of the Texas courts in the construction of constitutional limitations that—

“Except in the particulars wherein it is restrained by the Constitution of the United States, the legislative department may exercise all legislative power which is not forbidden, expressly or by implication, by the provisions of the Constitution of the state of Texas.” *Lytle v. Halff*, 75 Tex. 132, 12 S. W. 610; *Brown v. City of Galveston*, 97 Tex. 1, 75 S. W. 488.

In *Lytle v. Halff*, Judge Stayton says:

“An intention to restrict the power of a state Legislature, and especially in reference to such a matter, further than this is done by express limitations, is not to be presumed, and, when it is claimed that this is done by implication, those so claiming ought to be able to point out the provision or provisions of the Constitution which require such implication to give effect to the will of the people evidenced by the entire instrument.”

The defendants, recognizing the necessity of pointing out the limitation upon which they rely, and the Constitution containing no express limitations on the legislative power in the matter of liquor legislation, point as their reliance to the implied limitation which they say springs from section 20 of article 16 of the Constitution, known as the “local option” provision of the Constitution, which in terms is as follows:

“Sec. 20. *Sale of Liquors*.—The Legislature shall, at its first session, enact a law whereby the qualified voters of any county, justice's precinct, town, city (or such subdivision of a county as may be designated by the commissioners' court of said county) may, by a majority vote, determine from time to time whether the sale of intoxicating liquors shall be prohibited within the prescribed limits.” (Declared adopted September 22, 1891.)

They argue that, the Constitution having provided for local or self-determination on the part of counties, or subdivisions thereof, from time to time, as to whether the sale of intoxicating liquors shall be prohibited within their limits, the implication necessarily arises that the power of prohibition has been withdrawn from the Legislature. In addition to the reasons with which they support their argument, they point to the opinion of the Court of Criminal Appeals, the court of last resort in criminal matters in the state of Texas, in the case of *Ex parte Myer*, 207 S. W. 100, not yet officially reported, in which case the relator, charged with selling liquor in violation of section 2 of chapter 24 of the Acts of the 35th Legislature, was discharged; the court holding that that section of the act prohibiting the sale of the liquor was void, because in contravention of section 20 of article 16 of the Constitution of the state of Texas.

The government in its indictment in this case, recognizing the force, if not of the reasoning, at least, of the authority of that opinion, has not undertaken to indict under that section of the act which was declared void in that case, but has limited its allegations to the issue of the prohibition of manufacture, as provided in section 1, and contends here that, while it may be conceded that section 2 of the act is void,

the Legislature having definitely subdivided and classified the subjects of prohibition in separate and distinct sections, and having by the last section of the act declared that it must be considered separable, so that the validity of one section should not affect the rest. Neither the argument of defendants, nor the decision of the Court of Criminal Appeals, has any force against the present indictment. The Reed Amendment, under which the government prosecutes, is framed in the alternative, or disjunctive, and as clearly prohibits transportation into a state where manufacture is prohibited as where the prohibition is of the sale, and if the contention of the government is correct that the state of Texas has made a valid prohibition of manufacture, the demurrers must fail, even though it be conceded, as it must be in this court, in view of the ruling of the Court of Criminal Appeals, that there is no valid prohibition in the state of the sale of liquor. We thus reach the simple question:

"Does the delegation to the qualified voters of a county, or subdivision thereof, of the right to determine the question of prohibition of the sale of intoxicating liquors within its limits, confer upon it the right to also determine whether the manufacture of liquor shall be prohibited in its limits?"

Nowhere in section 20 does the word "manufacture" appear, and an affirmative answer to the question can only be given if it be held that the power to prohibit the sale necessarily involved the power to prohibit or authorize the manufacture. Apart from the principle of statutory construction, already adverted to, that every intendment must be indulged in favor of legislative power, common sense and common experience unite in declaring that, not only is the power to prohibit the manufacture not a necessary content of the power to prohibit the sale, but that the two subjects are independent of each other, and so wholly distinct and separate in their physical incidents and character as that not even the most strained construction could extend the word "sale" to include or embrace the word "manufacture."

[3] The argument of the defendants is the lame one that the spirit of the constitutional enactment was to confer upon political subdivisions general power over the handling and disposition of liquor, and that, if the power be conceded to the Legislature to prohibit the manufacture, that power will indirectly, by reducing the subjects of sale, infringe upon the power of political subdivisions over the matter of sale. In the first place, the argument that the spirit of the Constitution confers on counties or subdivisions thereof any other power than its words express is not impressive. This court does not recognize in counsel for defendants such spiritual kinship with the framers of the Constitution as to entitle them to announce with confidence what spirit was intended to be breathed into the body of that act; and in the second place, this attempt to find a constitutional limitation in the spirit as opposed to the language of the law received complete refutation in *Brown v. City of Galveston*, 97 Tex. 1, 75 S. W. 488, in which case Judge Brown met the same character of contention as follows:

"The doctrine is in conflict with the well-settled principle of constitutional construction that the power of the Legislature can be restrained only by a prohibition expressed or implied from some provision or provisions of the Con-

stitution itself. *Lytle v. Halff & Bro.*, before cited; *Harris County v. Stewart*, 91 Tex. 143 [41 S. W. 650].

"The doctrine rests upon a basis which is opposed to the well-settled rule of construction that a law which is passed by the Legislature of a state cannot be set aside by the courts because it is in conflict with the principles of natural justice, nor because of its conflict with the spirit of the Constitution. *Cooley*, Const. Lim. 205. That author says: 'Nor are the courts at liberty to declare an act void because, in their opinion, it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words.'"

These expressions of the Supreme Court of Texas in the construction of the state Constitution are not only in themselves sound, but are authoritative and binding on this court, and must control and determine the disposition of this case.

There being, then, no express words in the constitutional limitation invoked by the defendants conferring upon counties the power to determine the question of manufacture, and no words which in their reasonable content will embrace or include such power, the argument that the spirit of the Constitution is violated by the legislative act can have no weight or force, and it must be held that, the Constitution being silent on the subject, the Legislature has plenary power to prohibit the manufacture of liquor, and that, having so done, the provisions of the Reed Amendment are applicable.

The indictment, therefore, charges an offense, and the demurrers must be overruled, which is accordingly now done.

NORTH AMERICAN CONST. CO. V. DES MOINES CITY RY. CO.

(District Court, S. D. Iowa, C. D. March 18, 1919.)

1. FRANCHISES ⇨1—NATURE—"CONTRACT."

A franchise is a contract.

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

2. CONTRACTS ⇨143—POWER OF COURT.

A court cannot make a contract for individuals or corporations, nor modify one made by them, but only construe it.

3. CARRIERS ⇨12(9)—FARES—REGULATION—FRANCHISE.

The franchise of the Des Moines City Railway Company, being definite as to rates for fares, without any provision as to change thereof, though providing for payment by company, from fares collected, of cost of operation, taxes, 5 per cent. on bonded indebtedness, and 6 per cent. on other indebtedness, and the setting aside of a depreciation fund, and also providing for "first-class" service, with persons, and, in case of their disagreement, arbitration, to determine the service to be rendered, there can, in case of insufficient income, be no increase of fares, but class of service must yield.

In Equity. Suit by the North American Construction Company against the Des Moines City Railway Company. On application of receivers for construction of franchise. Opinion rendered.

Carr, Carr & Cox, of Des Moines, Iowa, for plaintiff.
W. H. McHenry and Sargent & Gamble, all of Des Moines, Iowa,
and Wm. Chamberlain, of Cedar Rapids, Iowa, for defendant.
H. W. Byers, of Des Moines, Iowa, for intervener.

WADE, District Judge. [1] A franchise is a contract. There is no question about the authority of the city to make a contract with the street railway company for service, and for rates to be charged for such service. There is some doubt as to the power to fix rates for gas and electricity by contract, but this doubt arises out of the fact that the Legislature has conferred upon cities the power to regulate rates of lighting companies, but has not conferred any such power as to street railway service. The only way that a city in Iowa can fix a rate for street railway service is by contract.

[2] The parties to this controversy agree that the franchise in this case constitutes a valid contract. No one claims that the court has any power to change this contract, or modify it in any particular. It is elementary that a court has no power to make contracts for individuals or corporations, nor to modify them when made. The only power the court has in relation to controversies of this kind is to construe a contract when its meaning is in doubt. That is the only question before the court in this case. The receivers claim that the franchise, taken as a whole, means one thing as to fares; the city claims that it means something else. This contract was made in 1915. It is to be regretted that, so soon after its execution, the parties should differ as to what it means.

Section 17 of the contract is definite as to rates for fare, and, if it stood alone, of course there would be no controversy about it; but the receivers claim that the provisions of section 17, as to fares, must be construed in connection with section 7, which provides definitely for the payment from the fares collected of certain amounts, consisting "of all costs of operation, including taxes and interest, at not to exceed 5 per cent. on the company's indebtedness represented by bonds, and not to exceed 6 per cent. on the remainder of such indebtedness, and the setting aside of a depreciation fund," after the expiration of three-year rehabilitation period.

Here it is important to consider certain elementary propositions, which should be understood, not only by the parties, but by the public, who are most directly interested in this contract. This corporation, at the time this contract was made, had certain outstanding capital stock; it also owed certain debts, some of which were represented by bonds, and some of which were ordinary obligations. It was also required by the contract that the company should make further expenditures in the way of extensions and betterments.

The total amount of the indebtedness of the company, which now totals \$6,388,872.88, was agreed upon by the city and the corporation. To meet the interest upon this indebtedness, the operating expenses, taxes, and depreciation, of course, the corporation had no money, and would have no money, except as it received it from fares collected. The amount which would be received from fares, could only be ap-

proximated, and the amount of cost for operation could only be estimated, and of course, in the last year and a half, conditions with reference to the cost of operation have changed, so that anything contemplated at that time as the cost of operation proves to be entirely inadequate. For instance, it is stated by counsel that the increased cost of labor alone, under present wages, adds \$174,000 per year to the expense of operation.

The contract specifically provides that the company shall pay (from fares collected, because there was no other source of income): (1) The cost of operation; (2) taxes; (3) 5 per cent. on the company's indebtedness represented by bonds; (4) 6 per cent. on the remainder of the indebtedness; and (5) a depreciation fund, which is to be fixed each year, with reference to replacement, renewals, and maintenance of equipment, etc. The contract also provides for what is termed "first-class" service.

It is the contention of the receivers, and for the purpose of this hearing only this contention is assumed to be true, that the income from fares will not pay the cost of operation, taxes, interest, and depreciation, and continue present service. It is here apparent, of course, that, if this contention is true, fares will have to be increased or service reduced. It will be observed that there is no claim that there should be any income to pay any dividend upon any of the capital stock, under present conditions, and under the terms of the contract; the contention simply being that, under the specific terms of the contract, the cost of operation, taxes, and depreciation must be met from the fares, and that they are not sufficient to pay them.

Under these circumstances the receivers contend that the contract contemplates that the service must be kept up, and therefore that the fares must be increased. It is the contention of the city that, if there must be a change in either the fares or the service, the change must be in the service, and that the fares cannot be increased. Evidence has been introduced as to the preliminary negotiations leading up to the adoption of the franchise. Provisions of the ordinance are pointed out, emphasizing the fact that "the first and primary purpose in making this contract is to secure to the public first-class modern street car service."

It is contended that the dominant element in the contract is the service, and that the fares are secondary, and therefore that, if either one must yield, it is the provision as to fares. With this contention I cannot agree. While the contract emphasizes the matter of service, the court cannot close its eyes to the fact, which is a matter of common knowledge, that in controversies over franchises for street railways the thing most prominent in the mind of the people (one of the parties to this contract) is rates of fare. Fares touch the people most directly, and I have no doubt, from all the evidence before the court, that so far as the people of Des Moines are concerned they assumed that the fare was definitely and finally determined by this franchise. In all the discussions, so far as the evidence discloses, there was no suggestion that at any time the fares might be increased. Upon different occasions, during the discussion of the franchise, when statements were made ex-

pressing the fact that fares were definitely fixed for the period of the franchise, no suggestion to the contrary was made by any one.

It is true, as contended by the receivers, that it was contemplated at the time that under this contract there should be income enough from fares to pay for the cost of the service, and such cost was definitely fixed and limited as aforesaid. Four things were clearly fixed in the minds of the parties: (1) The indebtedness upon which interest should be paid; (2) the rate of such interest; (3) the fares; and (4) the service.

[3] As between the fares and the service, looking at the language of the franchise, as to which is it most inflexible? The service in the nature of things could not be defined, except in general terms. Two supervisors were agreed upon, one representing the city and one the company, and in their hands was placed to a large extent the determination of the service to be rendered; and then a further provision is made that, in case of disagreement between the supervisors, the question upon which they do not agree shall be submitted to arbitration.

Of course, the people of Des Moines cannot have service which will not be paid for out of the fares. The receivers are asking no profits for the corporation—not a dollar upon its stock; they are simply claiming that the service demanded by the city of Des Moines cannot, under present changed conditions, be rendered from the present income. If this claim is true, of course, it is most unfortunate; and yet these parties have made a contract, and the court cannot modify its provisions. That this construction is necessary is apparent from the word "subject," in section 7, in relation to the extent and character of service. The language is as follows:

"As a guaranty of the service provided for in this section, it is agreed that no dividends on the outstanding stock of the company shall be considered or allowed in determining the quality, quantity, or kind of service the company is bound and obligated to furnish under this ordinance; it being understood and agreed that, subject to the payment of all costs of operation, including taxes and interest at not to exceed five (5%) per cent. on the company's indebtedness represented by bonds, and not to exceed six (6%) per cent. of the remainder of such indebtedness, and the setting aside of a depreciation fund as provided in section XXII of this ordinance, the city is entitled to have, and the company is bound to render, the first-class service as defined in this section."

The language, "it being understood and agreed that, subject to the payment of all the costs of operation, * * * the city is entitled to have, and the company is bound to render, the first-class service as defined in this section," is most significant. The service is made "subject" to having money from the income to render the service, and whatever service can be rendered from the income, after paying the fixed charges specified in the contract, must be held to be "first-class," within the meaning of the contract.

That the contract did not contemplate change of fares is further emphasized by the omission from the contract of any method of fixing higher fares. If it was in the minds of the parties that conditions might develop where fares would have to be adjusted to meet deficiency, the parties certainly would have agreed upon some method of fixing the increased fares. Of course, it is suggested that the fares would have to be fixed with reference to the deficiency; but here was a schedule

of fares, and it would be important to all parties to have determined whether the increase in fares should be in the 5-cent fare, or the six tickets for 25 cents, or in the fare of children, or in the fare of school pupils. If fares were to be increased, the company alone, so far as the contract specifies, would have the duty of fixing the increase, and inasmuch as the city has no power to regulate rates the council would have no supervision or control in the matter.

It is quite apparent that the contract was made in the absence of any contemplation of the existence of present conditions. It is apparent that everybody had in mind a continuance approximately of conditions existing at the time the contract was made. The new conditions may render it absolutely impossible for the people to get, under this contract, what they expected in the way of service; but the people are bound by the contract, as well as the company, and when they get that service which can be paid for under the provisions of the contract, they must of course be content.

It may be appropriate here to quote from the opinion of Judge Westenhaver in the recent case of Columbus Power & Light Co. v. City of Columbus (D. C.) 253 Fed. 499:

"It cannot be denied, on the showing made, that the present war has greatly increased the cost of street railway operation. The award of the National War Labor Board in the wage controversy cannot be regarded otherwise than binding on the company, and the increase of wages granted by the company pursuant thereto cannot, in any fair sense, be considered as its voluntary act. It is also undoubtedly true, on the showing made, that complainant cannot, under existing conditions finance any improvements required to meet new demands for heat, light, and power, or for increased street railway facilities, and its failure so to do must injure the interests of the defendant and its inhabitants as much as it injures the complainant.

"Prolonged operation under these conditions would seem to be a manifest impossibility, and must result in impairing the street railway service and grievously harming the people and business of the city. These considerations do not, for the reasons already stated, present any ground upon which a court can grant relief, for it has power only to declare the law and apply it. A sound public policy forbids usurpation by the courts of governmental power lodged in other departments of the government. No power inheres in a court, either to make contracts for parties, or to absolve them from the effect of their contracts, provided the parties are competent in law to contract, and no fraud intervenes in the making thereof.

"In view of these well-recognized limitations of the court's power, I can only suggest that the present emergency, likely as it is to become much graver in the near future, calls urgently for some kind of accommodation or temporary compromise between the parties."

The facts relating to the income and expenditure of the company are not before the court. These are matters which will have to be considered by the supervisors in relation to the matter of service; but the court may justly express surprise that there should be any dispute upon these matters. Section 20 of the contract requires that the company shall keep open its books at all reasonable times, showing "full, true, and accurate accounts of all moneys expended and liabilities incurred in connection with said business." The company is also required to furnish to the city supervisor "monthly reports of its car mileage and earnings, and expenses of operation, investments in renewals, bet-

terments, and additions, and such other statements and reports as the city supervisor or the city council may from time to time request," and the city supervisor at all times has full access to every paper, document, or voucher of the company.

It is apparent that the city and the citizens of Des Moines should have as full knowledge every month of the income and expenditures of this company as has the company itself, and in the interest of harmony, and avoidance of controversy and suspicion, the city and the public should take advantage of these rights which it has under its contract. If the deficiency between the earnings and the expenditures are such as claimed, an unfortunate situation is presented; but it is one with which the courts cannot deal. It must be solved by the people of Des Moines.

THE OLD RELIABLE et al.

(District Court, N. D. West Virginia. March 6, 1919.)

No. 880.

TOWAGE Ⓒ—11(10)—DAMAGE TO TOW—NEGLIGENCE OF TUG—ABANDONING TOW.

A steamer, which contracted to tow two barges up the Ohio river, held liable for damage to barges and cargo, caused by their being left at an intermediate point, where, after nine days, they were broken loose by a rise in the river and carried down stream.

In Admiralty. Suit by the Little Kanawha Log & Tie Company against the steamer Old Reliable. Decree for libellant.

Dorr Casto and Reese Blizzard, both of Parkersburg, W. Va., for libellant.

Lowrie C. Barton, of Pittsburg, Pa., and George W. Johnson, of Parkersburg, W. Va., for claimants.

DAYTON, District Judge. The controversy here grows out of a verbal towing contract. As frequently occurs touching such contracts, distinct disagreements exist as to what the terms of the contract were. The cause was referred to John F. Laird, appointed a commissioner for the purpose, to take the evidence and report with all convenient speed thereon. He has fulfilled this duty and made a report, to which both sides have filed exceptions, I have very carefully read and studied the voluminous volume of testimony returned by him, upon which he has based his findings of fact. I am fully in accord with his findings, and convinced that the exceptions of both sides should be overruled. As to the law governing, fully recognizing the principle that a tug is not an insurer of the tow in its charge, but only required to exercise reasonable care, and only liable for negligence in such exercise, yet it is enough to say here that, establishing the contract to have been to deliver the two barges to McKeesport, Pa., and not to Sistersville, W. Va., as claimed by claimants, which the evidence in my judgment demands should be done, the negligence of the tug in substantial-

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

ly abandoning these barges and leaving them at Sistersville for days, with no proper care and indifferently moored and tied up, becomes very apparent and fully proven. I adopt the report of the commissioner and direct it to be made a part hereof, and decree will be entered in accord therewith.

Commissioner Laird's Report.

I find the facts as follows:

About October 1, 1917, the steamer Old Reliable, by its officers and agents, made a contract with libelant to tow four barges loaded with railroad ties up the Ohio river to McKeesport, Pa. One was to be towed from New Martinsville, W. Va., and the other three, numbered 68, 131, and 111, respectively, were to be towed from Parkersburg, W. Va., to said city of McKeesport, Pa. That the said steamer, shortly after October 1, 1917, towed said barge from New Martinsville, W. Va., to said city of McKeesport, Pa., and delivered it as per contract, for which said service libelant paid said steamer.

On October 20, 1917, said steamer Old Reliable came to Parkersburg, W. Va., and after obtaining a check for \$81 on account in order to purchase coal, received from libelant said two loaded barges, 68 and 131, which said barges said steamer proceeded to tow up said Ohio river, leaving Parkersburg, W. Va., October 21, 1917, about 7 o'clock a. m. On October 22, 1917, about 3 o'clock a. m., said steamer arrived at Sistersville, W. Va., where its officers and agents undertook to land the said two barges and moor them to the river bank. This was done, and said two loaded barges remained at said landing at Sistersville, W. Va., until October 30, 1917, when a rise in the Ohio river caused them to break from their moorings and drift down the river with the current. Barge 131 was caught at Raven Rock, W. Va., where libelant, after notice to said steamer, the owners and claimants thereof, caused same to be unloaded and placed the ties contained therein on board of railroad cars and thus shipped them to their destination. That said barge 131, however, was beached and totally wrecked near Raven Rock, W. Va.

Barge 68 floated down the Ohio river until it reached Parkersburg, W. Va., where it collided with one of the piers of the Baltimore & Ohio Railroad bridge and was wrecked: the cargo of ties with which it had been loaded being thrown into the river and almost all of them were lost. A few were salvaged. At the time of its loss, said Barge 68 contained 2,335 No. 1 cross-ties and 290 No. 2 cross-ties, and said No. 1 ties were worth at their point of destination, as per contract, 93 cents each, and said No. 2 ties were worth 83 cents each at said point.

Barge 111 was never received by said steamboat Old Reliable, its officers, agents and claimants, but remained at libelant's landing at the port of Parkersburg, W. Va., from October 20, 1917, to February, 1918, where it was frozen up in the ice of the Little Kanawha river, and then by reason of a rise in the river the said barge was carried down stream to the mouth of the Little Kanawha river, where it remained for a time in an ice gorge, and at which place libelant unloaded the ties therefrom and shipped them by rail to McKeesport, Pa. That said barge was afterwards carried out in the Ohio river with the ice and floated down the river to Pomeroy, Ohio, where it was caught.

Prior to its departure from Parkersburg, W. Va., with said barges 131 and 68, libelant loaned to said steamer some barge chains, two ratchets, two joints of siphon pipe, one three-piece swing, one 2½-inch siphon, also two 150-foot lines to be used in tying said barges at their point of destination. Said steamer Old Reliable returned all of said borrowed property (except said two lines) to the Parkersburg wharf boat May 22, 1918.

The steamer Old Reliable, claimants and defendants, offered testimony tending to prove that the contract was that they were to tow said barges to "pool water" at Sistersville, W. Va., and that they did so, and tied said barges at said port, as per an agreement with one G. W. Justice; that said barges were received there by libelant's agent, E. B. Frazier, and that their responsibility for said barges ceased at that time; that said barges were unseaworthy and said tie lines loaned to them by libelant were in poor condition; that said

barges could not have been safely towed at that time (October 22, 1917), on account of the strong current in the Ohio river; that dam 17 in said river is situated near Raven Rock, W. Va., and it, together with several other dams between Parkersburg, W. Va., and Pittsburgh, Pa., were down, causing a strong current in the river; and, further, that said steamer Old Reliable did not have power sufficient to propel both of said loaded barges up said river against said current.

It was further shown by the records of the United States engineer's office at Wheeling, W. Va., that dam No. 18 in the Ohio river, near Parkersburg, W. Va., was down from October 21, 1917, to November 5, 1917, and that the stages of water in the river were as follows:

October 21	.....	12.0 feet.
" 22	.....	11.9 "
" 23	.....	11.3 "
" 24	.....	10.5 "
" 25	.....	11.0 "
" 26	.....	14.7 "
" 27	.....	18.3 "

Dam No. 17 was also down, and the stages of water were as follows:

October 21	.....	11.3 feet.
" 22	.....	11.1 "
" 23	.....	10.5 "
" 24	.....	9.8 "
" 25	.....	10.1 "
" 26	.....	13.4 "
" 27	.....	16.6 "

Dam No. 16, near Raven Rock, W. Va., was also down, and the stages of water were as follows:

October 21	.....	12.8 feet.
" 22	.....	12.8 "
" 23	.....	12.3 "
" 24	.....	11.1 "
" 25	.....	11.6 "
" 26	.....	16.3 "
" 27	.....	20.0 "
" 28	.....	20.1 "
" 29	.....	19.5 "
" 30	.....	20.8 "

Claimants and defendants further showed that said steamer Old Reliable left the landing at Sistersville W. Va., October 22, 1917, at 3:30 a. m., with a gasoline barge in tow, and arrived at Pittsburgh, Pa., October 24, 1917, at 1 p. m., and after doing some work on the river in that vicinity came back down the Ohio river, arriving at Sistersville, W. Va., October 27, 1917, at 12:30 a. m., and went on down the river from that point to Catlettsburg, Ky.

The proctors for libellant claim under the said contract that, as a part of said property was lost in transitu, the steamer Old Reliable is liable for the value of said property, the cross-ties, at the port of destination, and the undersigned, after a careful examination of the evidence, finds that the foregoing is the correct view; that said steamer, the claimants and defendants, are liable for the loss of said ties and said barge 68, also for the value of said barge 68, and also the value of the barge 131; that they are also liable for salvage or said barge 131, also 249 ties out of barge 68, also the cost of unloading and loading said ties out of barge 131, also for the value of said two tie lines, and also for the sum of \$81, cash advanced by libellant to said steamer, claimants and defendants, to purchase coal at Parkersburg, W. Va.

The undersigned ascertains and fixes the value of said two barges, 68 and 131, at the time of their loss in October, 1917, at \$400 each, and finds that said barge 68 contained 2,335 No. 1 railroad ties of the value of 93 cents each, also 290 No. 2 ties of the value of 83 cents each at the point of destination, McKeesport, Pa.; that 249 of said ties, worth 93 cents each, were salvaged; that the cost of salvage was 25 cents per tie.

I find that the salvage of barge 131, loaded with ties, was \$50; that the

cost of unloading and reloading said ties from said barge was \$312.48 and \$191.14, respectively; that said steamer Old Reliable, claimants and defendants, are liable for said two tie lines not returned, amounting to \$50, also for said sum of \$81 advanced by libelant to enable said steamer Old Reliable to purchase coal at Parkersburg, W. Va.; that therefore the following is a correct statement of the account between the libelant and said steamer Old Reliable, claimants and defendants:

The Steamboat Old Reliable to Little Kanawha Log & Tie Co., Dr.

1917.			
Oct. 30.	To 2,335 #1 ties @ 93¢ each.....	\$2,171.55	
	To 290 #2 ties @ 83¢ each.....	240.70	
			\$2,412.25
	Less 249 ties salvaged, of the value of 93 cents each \$231.57		
	Cost of salvage, 25 cents each.....	62.25	169.32
			\$2,242.83
	Value of barge 68.....		400.00
			\$2,642.83
	To salvage of barge No. 131.....	\$ 50.00	
	To cost of unloading ties from same.....	312.48	
	To cost reloading.....	191.14	
	To value of barge 131.....	400.00	953.62
			\$3,596.45
	To 2 250-foot lines.....	\$ 50.00	
	Cash advanced for coal.....	81.00	131.00
			\$3,727.45

Total due libelant from Old Reliable, claimants.....\$3,727.45

The undersigned disallows all items and charges in libelant's account relative to barge 111, the unloading and reloading of same, and other expenses connected therewith; also disallows all other charges made by said libelant against the steamboat Old Reliable in libelant's supplemental and amendatory libel, filed April 29, 1918.

WORTH BROS. CO. v. LEDERER, Collector of Internal Revenue.

(District Court, E. D. Pennsylvania. February 28, 1919.)

No. 5738.

INTERNAL REVENUE \Leftrightarrow 9—"MANUFACTURE OF SHELLS."

A steel company, which manufactured billets for shells, piercing the billets, so as to make rough forgings, held engaged in manufacture of shells, within Act Sept. 8, 1916, § 301 (Comp. St. 1918, § 6336¼b), imposing an excise tax on such business, though the rough forging required much more work before shells were completed.

At Law. Action by the Worth Bros. Company against Ephraim Lederer, Collector of Internal Revenue. Judgment for defendant.

Joseph D. McCoy and A. H. Wintersteen, both of Philadelphia, Pa., for plaintiff.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa., and Wm. L. Frierson, Asst. Atty. Gen., for defendant.

THOMPSON, District Judge. A trial was had in this case by the court without a jury under a stipulation of the parties. The plaintiff, Worth Bros. Company, brought suit against the defendant, the collector of internal revenue for the First district of Pennsylvania, to recover taxes paid under protest, amounting to \$74,857.70, with interest from July 25, 1917, and levied and assessed against the plaintiff and collected under the provisions of section 301 of title III of the Act of September 8, 1916, c. 463, 39 Stat. 781 (Comp. St. 1918, § 6336¼b). The section under which the tax was imposed is as follows:

"Sec. 301. (1) That every person manufacturing (a) gunpowder and other explosives, excepting blasting powder and dynamite used for industrial purposes; (b) cartridges, loaded and unloaded, caps or primers, exclusive of those used for industrial purposes; (c) projectiles, shells, or torpedoes of any kind, including schrapnel, loaded or unloaded, or fuses, or complete rounds of ammunition; (d) firearms of any kind and appendages, including small arms, cannon, machine guns, rifles, and bayonets; (e) electric motor boats, submarine or submersible vessels or boats; or (f) any part of any of the articles mentioned in (b), (c), (d), or (e)—shall pay for each taxable year, in addition to the income tax imposed by title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States: Provided, however, that no person shall pay such tax upon net profits received during the year nineteen hundred and sixteen derived from the sale and delivery of the articles enumerated in this section under contracts executed and fully performed by such person prior to January first, nineteen hundred and sixteen."

The plaintiff is a corporation of Pennsylvania engaged at Coatesville in the manufacture of iron and steel. The Midvale Steel Company entered into a contract with the French government to manufacture and sell to it a large quantity of high explosive shells of four sizes—220-millimeter, 270-millimeter, 280-millimeter, and 293-millimeter.

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

The type of explosive shells contracted for by the French government is a composite structure, consisting of the following distinct parts:

(1) The steel shell body in one piece, cylindrical in shape, nosed in at the top, so that with the nose fuse it comes to a point with what is called the ogival head.

(2) A copper driving band set into an inset groove near the base of the shell body, and projecting slightly beyond it, to engage lands or rifling in the bore of the gun.

(3) A nose timing fuse, which is a highly complicated work of mechanism, which is screwed into the throat of the shell body.

(4) A high explosive charge, to be contained in the shell body.

The shell as a whole is a very carefully manufactured and highly finished piece of mechanism, the parts of which must be adjusted to each other with the greatest accuracy and care. The steel of which the shell body is composed must be within such limits of tensile strength as to withstand the shock of fire, but to burst when the charge content is exploded. Its weight, when finished, must be, within a certain tolerance, exact; its exterior and interior must be absolutely centered or true to the longitudinal axis of the shell. The thickness and weight of the material must be so distributed as to have such uniformity of balance as to give uniformity and steadiness in flight. Beginning with the steel ingot, which was the first form in which, under the contract with the French government, its inspectors passed upon the material as it progressed towards completion, its manufacture comprised 34 steps. The Midvale Steel Company ordered from the plaintiff steel forgings, which represented the fifth step in the manufacture subject to French governmental inspection, and the plaintiff manufactured the shell forgings at its plant at Coatesville.

The tax in controversy was levied and collected from the plaintiff upon its profits in the sale of the manufactured shell forgings, upon the claim that the profits accrued in the manufacture of parts of shells.

The plaintiff's plant consisted of blast furnaces, an open hearth steel plant, steel plate mills, a blooming mill, at which they produced pig iron, steel ingots, plates for all purposes, steel blooms, forge blooms, bars, skelp, tubes, and shell forgings. The main production of the plant was steel plates.

Under the order of the Midvale Steel Company the shell forgings in controversy were to be manufactured according to the specifications of the French government, which were part of its contract with the Midvale Steel Company. In order to equip the plaintiff's plant for the work, it was necessary to, and the plaintiff did, install special machinery adapted for forgings of the character required, at a cost of about \$2,000,000. The stages of the work done by the plaintiff were as follows:

(1) Smelting the ore in the blast furnace into pig iron, without, however, running it into the moulds which would form what are commercially known as "pigs."

(2) In its molten state transferring it with a ladle into an open hearth furnace, where it was converted into steel, and tapped out of the furnace, and conveyed into moulds in the form of ingots.

(3) Heating the steel ingot to the proper temperature for rolling, when it was rolled in the blooming mill into rounds or blooms.

(4) The rounds or blooms were then cut with a hot saw into billets of sufficient length, diameter, and weight to produce the required shell forging. At this point the French inspectors inspected each individual billet, to determine whether there were defects in the steel, such as piping or blow holes. After acceptance of the billets so tested, they were chipped to determine whether surface defects existed. At this stage the steel billet, which was the material which was to become the shell forging, is cylindrical in shape, of approximately two-thirds of the outside diameter of the shell forging to be produced, and approximately one-third of its length.

(5) The billet was then taken to the forge shop, heated from two to three hours in a continuous furnace, and placed in the container or die of a hydraulic piercing press. It was pierced, while hot, by a piercing bar entering one end and pushing its way to within sufficient distance of the other end to leave a closed end or base. During this process the metal, being heated to about 2,100 degrees, is viscous, so that the metal is pushed up the sides of the die or container. The product of this process was a cylindrical forging, hollow, with one closed and one open end.

(6) The forging was then taken to a horizontal hydraulic bench and drawn, while the metal was hot, so as to increase its length and conform its inside and outside diameter to the required size of the forging ordered by the Midvale Steel Company.

The product of manufacture by the plaintiff was a rough steel forging, cylindrical in shape, hollow, having one closed end. In order to fit it for delivery to the French government, it was necessary for it to go through a large number of heating, forging, and machining processes before it became a finished, completed, shell body. These processes were carried on after delivery to the Midvale Steel Company at its plant, and were 29 in number. Without going into detail as to each process, they were as follows:

- (1) Slicing excess length off the open end.
- (2) Centering over a mandrel by the inside surface and drilling a hole in the base for working upon a lathe.
- (3) Rough-machining the outside approximately concentric with the bore.
- (4) Finish boring in a boring lathe, to make the inside concentric with the outside.
- (5) Recentering the base, in order to take the next step of
- (6) Finish—turning, to bring the inside and outside surfaces concentric.
- (7) Cutting or facing the base or outside of the closed end, to bring it to the proper thickness.
- (8) Slicing the excess length off the open end, to make the forging accurate in length.
- (9) Hand-grinding off any roughness left on boring or turning the interior.

(10) A very important step in bringing the upper end of the cylindrical forging to the pointed form of a shell body. This step is known as "nosing." It consisted in heating the shell in a furnace having circular doors for a proper distance back from the open end, and then placing it in a forging press with a conical or ogival shaped die, so that it assumed the contour of a Gothic arch at the top. This forging process while the metal was hot caused the pressing in of the metal, so as to produce a graduated thickness, increasing as the diameter of the pointed end decreased.

(11) Annealing, which consists in heating and slowly cooling the metal, making it soft and tough.

(12) Sand-blasting the exterior of the shell, to remove the scale produced by the former heating process.

(13) Heating above the "critical temperature," and quenching the heat in a volume of water, for the purpose of hardening the metal.

(14) Heating in a gas furnace, to remove the excess brittleness associated with the hardness; the object being to give the shell the proper degree of toughness and hardness, to enable it to withstand the impact of the discharge in the gun, and to be shattered by the force of the high explosive content upon reaching its objective point.

(15) Testing for hardness of the metal by a Brindell testing machine. This test is to determine uniformity of hardness of the metal of the shell.

(16) Sand-blasting inside and outside, to get off the rough scale of the heat treatment.

(17) Cutting or facing off in length at the nose to its assigned length, and boring and threading the throat or aperture in the open end of the shell. The threading is for the purpose of screwing into place the fuse, and a shoulder is left in the interior for a gas check seat. The thread is cut above the seat.

(18) Cutting the threads accurately by means of a hand tap or cutter.

(19) Placing the shell on two horizontal machine-ground bars of steel and rolling it along, to determine through counteracting weights on the interior the balance of the shell, and, if the weight is found to be properly distributed, recentering the base to correspond. This step is necessary in order to procure accurate flight of the shell.

(20) After recentering, re-turning the shell, so as to bring it to accurate cylindrical shape.

(21) The shell having been balanced up and re-turned, turning the cylindrical body to finished size.

(22) Turning the ogival head to its finished size.

(23) Grinding the bourrelet. The French shell is made with a diameter at the rear of the head which is slightly larger than the body back of it, and that maximum diameter is called the "bourrelet." Its diameter is made to fit the top of the lands or ribs of the rifling of the gun. This maximum diameter at the head, corresponding with that of the projecting copper band encircling the shell body near its base, causes the projectile to fit the lands, and gives the remainder of the body of the shell a clearance, avoiding friction.

(24) Cutting the band seat. This is an inset groove cut around the body of the shell near its base, into which the copper band is hammered.

(25) Facing the base to the length which will give the final weight that the shell must have.

(26) Boring the throat, below the shoulder which had been left therein, to remove any roughness.

(27) Subjecting the shell to interior hydrostatic pressure—(1) to determine whether there is any leak in the base which would permit the gas from the powder, when it is discharged, finding its way into the cavity of the shell and prematurely bursting it; (2) to determine whether there are any cracks due to the heat treatment; (3) to determine whether the steel is of the necessary tensile strength to withstand the shock of fire.

(28) Giving the shell a bath of oakite to prevent rusting.

(29) Testing in a sound-proof room, to determine by the ring whether it is cracked.

The remaining processes have to do with fitting the copper band upon the shell.

It has been thought necessary to recite in detail the various steps required in the manufacture of the finished shell body, in order to fully demonstrate the difference in physical characteristics and fabrication between the rough steel forging delivered to the Midvale Steel Company and the finished shell body when ready for delivery to the French government.

In the rough steel forging was contained all of the material that was finally contained in the completed shell body without the copper band; but a large part of the exterior and interior metal was removed by machining, to make it conform in size, weight, and finish to specifications for the completed product. In case of 220-millimeter shells, for example, the forgings delivered by the plaintiff were approximately in outside diameter, $9\frac{3}{8}$ inches; inside diameter, 7 inches; length, $32\frac{3}{4}$ inches; weight, 351 pounds. The 220-millimeter shells, after fabrication had been completed by the Midvale Steel Company, were approximately of the following dimensions and weight: outside diameter, 8.60 inches; inside diameter, 7.36 inches; length, 29.53 inches; weight 160 pounds.

The forgings had to be subjected to processes of cutting to proper length, latheing, and boring to proper inside and outside diameter, forging to produce the ogival head, annealing, hardening, machining to proper contour, machining and hand-finishing the threads, shoulder, and throat, and finishing by sand-blasting and other processes to render the surface smooth and clear of scale and roughness. Measured in dollars, the plaintiff did about 40 per cent., and the Midvale Steel Company about 60 per cent., of the work on the shell bodies supplied to the French government by the Midvale Steel Company.

After leaving the plaintiff's plant, the metal was increased in tensile strength from 85,000 pounds to a minimum of 113,780 pounds.

The question is whether the manufacturing done by the plaintiff

brings it within the terms of section 301 of the title under which the tax was assessed and collected, which provides:

"(1) That every person manufacturing * * * (c) * * * shells * * * of any kind, * * * loaded or unloaded, * * * or (f) any part of the articles mentioned in * * * (c) * * * shall pay for each taxable year * * * an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States."

In view of the physical changes through the application of labor, skill, and science in manufacturing necessary to develop the shell forging into the finished shell body, it cannot be contended that the shell forging delivered to the Midvale Steel Company was a "part" of a shell, in the sense of being adapted and ready for assembling with other parts to make a complete shell. It could not be used as a shell body until it underwent at least a large part of the steps of manufacture which the Midvale Steel Company put upon it. If "manufacturing" is used in the sense of completing manufacture, the plaintiff was not manufacturing shell bodies, which were at the completion of its work parts of shells.

It should be borne in mind, however, that the tax is laid, not as a tax upon the shell, or any part of the shell, but is laid as an excise tax upon the business or occupation of manufacturing shells, or any parts of shells, the amount of the tax to be measured by the entire net profits received from the sale of such articles manufactured in the conduct of that business or occupation. That was the construction put upon section 27 of the War Revenue Act of 1898 (Act June 13, 1898, c. 448, 30 Stat. 464), imposing a tax upon persons carrying on the business of refining sugar equivalent to one-fourth of 1 per cent. on the gross amount of their receipts in excess of \$250,000, in the case of Spreckle Sugar Refining Co. v. McClain, 192 U. S. 397, at page 411, 24 Sup. Ct. 376, 48 L. Ed. 496. As the tax is laid upon the business or occupation of manufacturing, the inquiry therefore is whether "any person manufacturing" includes only such persons manufacturing as bring the article manufactured to the finished condition, where it is adapted for use as a part of a shell, or whether the term includes any person manufacturing the article in any one or more of the successive steps substantially necessary to bring it to that condition.

If the former construction is to prevail, at which of the steps does the manufacture begin? If it is held that it does not begin until the manufacturer who brings it to its finished state commences his work, it would follow that, if the process of manufacture were distributed among a number of manufacturers, each doing a part of the manufacturing, the payment of the tax would be confined to that manufacturer who contributed such final steps as would bring the article to its completed state of adaptability to the purpose intended. I do not think the language of the section justifies an interpretation which would lead to nullifying its purpose, or would lead to a different measure of liability for the tax assessed against different manufacturers, or against the same manufacturer of different lots of shells, de-

pendent upon what part of the prior stages of manufacture might be done under contract or otherwise by others.

I think the language of the act is broad enough to clearly show that Congress intended to impose an excise tax upon the occupation or business of manufacturing in all or any of its stages, from the first step to the last of the manufacture which produces the shell, or any part of it, from the raw material composing it to its completed state, but that manufacturing must be held to have begun only when the material as such had been so changed by manufacture as to exhibit its intended use in, and application exclusively to, the manufacture of the final product.

In the present case ore was material for making pig iron, pig iron for making open hearth steel ingots, ingots for making blooms or rounds, and blooms or rounds for making billets, and the billets continued to be material, so far as manufacturing shell bodies was concerned, while in the form of billets. Each of these steps was a manufacturing one, but the manufactured article had not yet been adapted and applied to its final use for a shell body.

It is true that, under the Midvale Steel Company's contract, the specifications of which were to be adhered to by the plaintiff, the chemical composition of the steel was prescribed, and it was subject to the inspection of the representatives of the French government. There is nothing in the case, however, to show that the ingots, the blooms or rounds, or the billets were not of such composition as to be used generally in the trade for other purposes. When, however, in the next step the heated billet was forged by the piercing process, it became a hollow forging, closed at its base and open at its top, and destined to become a shell body. There was further progress towards that destination in the next stop of manufacture, when the pierced forging was drawn into a shell forging. The article then manufactured was peculiarly adapted and exclusively intended by further manufacture to become a shell body, and had no other use to which it was peculiarly adapted.

It is true there was evidence to show that such of the forgings as were rejected were sold by the plaintiff and other manufacturers to be used for other purposes. The plaintiff sold some to the Cameron Machine Company, which built machines for slitting paper and fabric from wide weaves into narrow strips. In its manufactured machines it uses a steel cylinder, against which a cutter runs, and it purchased the rejected steel forgings by the ton at scrap steel prices, cut them into cross-sections, making rings ranging from 8 inches to 14 inches in breadth, and machined them inside and out, to adapt them to the purposes of its machines. Sales of the rejected forgings at scrap prices were also made to the Larkin Packer Company, of Oklahoma, the closed ends cut off, and the forgings manufactured into drive shoes for oil well casings and couplings for castings. There was also evidence tending to show that the forgings might be converted into gas containers, but no evidence of actual sales or use for that purpose.

It appeared, however, in the use for cylinders for cutting machines, and the use for drive shoes and couplings for oil well casings, the features which adapted the forgings to those purposes were the qualities of the steel and the hollow cylindrical form of the shell forgings, which permitted them to be cut into suitable lengths, but that one essential feature of the forgings, the closed end, was entirely superfluous to the purpose for which the purchasers used the forgings. It is apparent, therefore, that the use to which the rejected forgings were put was one to which they could be fitted, but to which as a whole they were not peculiarly adapted in their manufactured state, and it is apparent that they were not sold by the ton as scrap metal at a profit as a manufactured article. With the piercing process, then, commenced the application of what had been a steel billet to the special use and purpose of producing a shell body. The plaintiff then became engaged in manufacturing shell bodies, and, when its part in the manufacturing was completed, it sold to the Midvale Steel Company partially manufactured shell bodies.

In view of the purpose of Congress to tax the business of manufacturing, and to include within the scope of such business all manufacturing regardless of whether the manufacturer was engaged in carrying the manufacture to completion or through some of its stages, the profits received "from the sale or disposition of such articles manufactured" is held to include profits from the sale or disposition of those partially, as well as those completely, manufactured. If the tax were laid upon the manufactured article as it is, for example, under title IV, chapter Eight F, section 6309³/₄a et seq., Compiled Statutes 1918, Compact Edition, or were laid upon an article as customs duties are charged upon commodities upon their being imported into the United States, the conclusion would no doubt be, as contended for the plaintiff, that only the manufacturer selling the finished article would be liable for the tax.

That rule has been settled beyond dispute by the multitude of decisions cited on behalf of the plaintiff, where the courts have ruled that a manufactured article does not become such until its manufacture is complete; that is, it must be so changed from the material of which it is composed by the application of labor, skill, and science as to be put into a form that is suitable for use and adapted with a design to be used as such article. The rule has been applied in the classification of articles of merchandise imported and subject to customs duties, or upon which drawback is allowed. There are decisions as to what constitutes a manufactured article, what constitutes a part of a manufactured article, what constitutes a partially manufactured article, what constitutes a manufacture of certain material, and what constitutes a wholly manufactured article, dependent upon the terms of the law under which a tax is laid upon the article itself, or under which a drawback or other privilege is allowed.

I cannot perceive that these cases have any bearing upon the question arising in this case, unless the terms of the act imply that the tax is to be imposed only upon the business of manufacturing to comple-

tion shells, or parts of shells, and there is no such limitation in its terms. The clear purpose of the act is, through taxation of the business or occupation of manufacturing munitions of war, to reach the profits of all those engaged in such manufacture, whether engaged in manufacturing to completion, or engaged in any part of such manufacturing.

The plaintiff was, therefore, a person within the terms of the act manufacturing parts of shells, and was liable to payment of the tax.

It is with some reluctance that the conclusions herein set forth have been reached, in view of the contrary ruling of Judge Thomson, of the Western District, in his charge to the jury in a recent case. However, after very careful consideration of the questions involved, and with due deference to the opinion of so learned and careful a judge, I am forced to the opposite conclusion.

Rulings on Plaintiff's Requests for Findings of Fact.

1. The several facts in detail contained in the stipulation of agreed upon facts.

This stipulation is filed of record, and it is so found.

2. That the forgings manufactured by the plaintiff, at the stage of their development when delivered to the Midvale Steel Company by the plaintiff, were marketable otherwise than for finishing as shells, and, as matter of fact, large numbers of rejected forgings were sold by the plaintiff to the Larkin Packer Company, of Oklahoma, for development by the latter into shoes for gas wells; and these forgings were also marketable for use in the manufacture of slitting and rebinding machines, and many of a similar fabrication were actually bought by the Cameron Machine Company, of Brooklyn, from other manufacturers, and effectively used in the manufacture by said company of such slitting and rebinding machines.

It is so found, in connection with findings heretofore stated and discussed.

3. The processes through which the material went after leaving the plaintiff's hands, before being finished for practical use, were 29 in number.

It is so found, in connection with the findings heretofore stated and discussed.

Rulings on Plaintiff's Requests for Conclusions of Law.

1. That the forgings, the net profits from the manufacture of which are involved in this suit, were not any of the articles, or parts of the articles, made taxable by section 301 of title III of the act of Congress of September 8, 1916, commonly known as the Munitions Manufacturers Tax Act.

This request is declined.

2. That the plaintiff is entitled to a finding that there is due from the defendant to it the amount of its claim, \$74,857.07, with interest from July 25, 1917. See, on the question of interest, *Klock Produce Co. v. Hartson, Collector* (D. C.) 212 Fed. 758; *State Line & S. R.*

Co. v. Davis (D. C.) 228 Fed. 246; Home v. Parrish, 229 U. S. 494, 497, 33 Sup. Ct. 944, 57 L. Ed. 1296.

This request is declined.

Rulings on Defendant's Requests for Finding of Fact.

1. During the taxable year 1916 the Midvale Steel Company was under contract to sell and deliver to the French government 394,000 high explosive shells of four different sizes, to be manufactured according to specifications, which were made a part of the contract.

It is so found.

2. The product thus contracted for consisted of two pieces: (1) A shell forged or drawn from steel and finished by the necessary machining and finishing processes; and (2) a copper band fitted around the shell, for the purpose of guiding it through the rifling of the gun. But the Midvale Steel Company did not undertake to furnish the fuses and explosives which were to be thereafter put in the shells. In other words the contract called for unloaded shells.

It is so found.

3. It was provided by the contract that the French government should "have the right of having one or more inspectors at each of the factories where the shells hereby contracted for and their component parts are being manufactured, for the purpose of observing the manufacture thereof and of testing the same at any time before delivery."

It is so found.

4. The specifications made a part of the contract include specifications as to the composition and manufacture of the steel to be used, the forging or drawing of the shell from the steel, the machining and finishing of the shell, and the making and fitting of the copper band.

It is so found.

5. In the manufacture of some of the shells the Midvale Steel Company did all the work, beginning with the manufacture of the steel. But as to others it contracted with the plaintiff to furnish the material, manufacture the steel, and forge and draw the shells. This was done according to the specifications above referred to and under inspection of the French government. When the shells were thus forged and drawn, they were delivered by the plaintiff to the Midvale Steel Company, and that company did all necessary machining and finishing on them, and fitted the copper bands around them, and thus further proceeded with and completed the manufacture of the product contracted for.

It is so found.

6. The actual cost of the work done by plaintiff was about 40 per cent. of the cost of all the work done on the shells, and the cost of the work done by the Midvale Steel Company was about 60 per cent.

It is so found.

7. The plaintiff's profit, during the taxable year 1916, on the materials furnished and the work done by it as aforesaid, was \$598,856.52.

It is so found.

8. The unloaded shell delivered by the Midvale Steel Company to the French government was the forged or drawn shell delivered to the former by the plaintiff after being subjected to the necessary machining and finishing processes and having a copper band fitted around it.

It is so found.

9. In order to make these forgings, the plaintiff had to provide special machinery at a cost of about \$2,000,000.

It is so found.

10. The forgings themselves, as delivered by the plaintiff, were specially designed and manufactured to be, when properly machined and finished, used as parts of completed shells. They were not adapted for any other practical use, and were not such articles or commodities as are kept in stock and held for sale commercially.

It is so found.

11. During the year 1916 there were a great many companies in the United States engaged in doing some part of the work necessary to the manufacture of shells, but not more than two or three, if that many, which began with the steel and did all the work necessary to complete the shell.

It is so found.

12. The plaintiff and the Midvale Steel Company are both owned and controlled by the Midvale Steel & Ordnance Company, a holding corporation.

It is so found.

Rulings on Defendant's Requests for Conclusions of Law.

1. The plaintiff was a person manufacturing explosive shells, or part of such shells, and the tax paid, and now sought to be recovered, was properly collected.

It is so found.

2. The plaintiff was a person manufacturing parts of shells, and the tax paid, and now sought to be recovered, was properly collected.

It is so found.

3. The plaintiff was a person manufacturing shells, and the tax paid and now sought to be recovered, was properly collected.

Under the undisputed facts in this case, this finding is immaterial, and is denied, except as to the conclusion that the tax paid, and now sought to be recovered, was properly collected.

Judgment may be entered for the defendant.

In re MAIMAN.

Claim of PARKER.

(District Court, D. Maine. February 28, 1919.)

No. 389.

BANKRUPTCY ⇨340—**PROVABLE DEBTS—PAYMENT OF NOTE OF BANKRUPT—EVIDENCE.**

A creditor *held* to have deposited collateral to secure a note of bankrupt, and afterward paid the note at bankrupt's request and for his benefit, and to be entitled to prove his claim therefor against the estate.

In Bankruptcy. In the matter of Morris Maiman, bankrupt. On review of order of referee allowing claim of James W. Parker. Affirmed.

Maurice E. Rosen, of Portland, Me., for petitioner.
George F. Gould, of Portland, Me., for claimant.

HALE, District Judge. In October, 1908, James W. Parker, Robert S. Thomes, Morris Maiman, and Moses Victorson were stockholders of the Coronet Manufacturing Company. They desired to advance the interests of the company, and, to that end, to put \$40,000 into it, each one of the four to put in \$10,000, and each to take the value of \$10,000 in capital stock of the company. Mr. Parker paid for his capital stock \$10,000 in cash. The others hired the money of the Chapman National Bank, each on his own \$10,000 note, secured by stock of the Coronet Manufacturing Company. The testimony shows that the vote, on the records of the company, was to sell 400 shares at par; each of the four taking 100 shares of capital stock, and paying for it in the manner described.

The \$10,000 necessary to pay for the Maiman stock was to be obtained by him from the Chapman National Bank by means of his own personal note, with the 100 shares of stock deposited therewith as collateral. The same method of payment was adopted by Mr. Thomes and Mr. Victorson.

We are concerned here only with the method by which Mr. Maiman procured his stock. According to an understanding between Mr. Maiman, Mr. Parker, and the Portland Trust Company, Mr. Maiman took up his note at the Chapman National Bank, with the money obtained through the Portland Trust Company, through the discount of his own note, with 100 shares of the capital stock of the Rufus Deering Company, owned by Mr. Parker. This stock had been deposited by Mr. Parker as collateral security. He had the interests of the company at heart, desired to make it a success, and pursued a similar method with reference to the shares of Mr. Thomes and Mr. Victorson. To secure Mr. Parker for the 100 shares of capital stock of the Rufus Deering Company, Mr. Maiman turned over to Mr. Parker 180 shares of the Coronet Manufacturing Company, all the shares he had. Mr. Parker put up the Rufus Deering Company's stock as collateral,

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

because the Portland Trust Company refused to take the Coronet stock as collateral. All the transactions are shown to have been with the knowledge of Maiman and at his request. Later the Portland Trust Company was taken over by the Fidelity Trust Company of Portland. Mr. Maiman gave his personal note to the Fidelity Trust Company for \$10,000, payable on demand. The Rufus Deering Company's stock was deposited therewith as collateral security for this note, under the same arrangement which had been made when Maiman obtained his loan from the Portland Trust Company. This note was afterwards paid by Parker, \$1,000 of it on November 30, 1917, and the balance of it in 1918.

Maiman was put into bankruptcy by his creditors. Parker proved his claim for the money paid upon said note to the amount, with interest, of \$10,094.50. This claim of Parker has been allowed by the referee. The allowance of it is challenged by one of the creditors, who now seeks to review the action of the referee.

The facts appear from the testimony of Mr. Parker and from other proofs. Mr. Parker is a man of the highest character and of the most undoubted probity. His testimony, with that of other witnesses, proves the facts upon which the referee's finding is based.

Without going further into the proofs, I am satisfied that the referee is correct in allowing the claim. The proofs satisfy me that the \$10,000 was paid by Mr. Parker with the knowledge and at the request of the bankrupt, and for his benefit. Clearly an action could have been maintained by Mr. Parker against Mr. Maiman; he having paid money which it was the clear duty of Maiman to pay, and for which Maiman got the benefit.

The learned counsel for the objecting creditor has raised certain questions of law, which would apply if, as he contends, Maiman were an accommodation maker of his note. The proofs, however, do not sustain this contention. They present no question of law which it is necessary further to discuss.

The action of the referee in allowing the claim for the sum of \$10,094.50 is affirmed.

DU PONT et al. v. DU PONT et al.*

(Circuit Court of Appeals, Third Circuit. March 6, 1919.)

No. 2382.

1. CORPORATIONS ⇨316(3)—OFFICERS—PURCHASE OF STOCK OF CORPORATION.

The fact that the members of a syndicate, formed to purchase the stock of a large stockholder in a corporation, were all officers and stockholders of the corporation, did not, per se, render the purchase inequitable or wrongful as against the corporation.

2. CORPORATIONS ⇨320(11)—OFFICERS—PURCHASE OF STOCK OF CORPORATION—EVIDENCE.

Evidence *held* insufficient to show that officers of a corporation, in purchasing stock of another stockholder and in borrowing money to pay therefor, made any improper use of their official connection with the company, or of its credit, which made them trustees ex maleficio of such stock for the corporation.

3. CORPORATIONS ⇨316(3)—PURCHASE OF STOCK BY OFFICERS—LEGALITY.

Action taken by the finance committee of a corporation on an offer by its president to sell to it part of his stock, to be distributed to important employes at cost, considered, and on the evidence, consisting of its minutes and the testimony of its members, in connection with their subsequent acts, *held* a rejection of the offer, and not a retention of it with the appointment of one of the members as agent to conduct further negotiations, and further, *held* that, if such agency was created, such member did all that was required of him in good faith as agent, or as an officer of the company, to carry the project through, and was not precluded from joining with other officers and stockholders, after the offer had been withdrawn by the president, in dealing with him on their own behalf for the purchase of any part or all of his stock.

4. CORPORATIONS ⇨393—STOCKHOLDERS—MANAGEMENT OF CORPORATE AFFAIRS—JUDICIAL SUPERVISION.

Whether a corporation, having the right and the legal power to take over a purchase of its stock by certain of its officers, shall exercise that right, is a question of corporate policy, to be determined by its stockholders, and not by a court.

5. CORPORATIONS ⇨393—MANAGEMENT OF CORPORATE AFFAIRS—JUDICIAL SUPERVISION.

A court of equity is not warranted in interfering with the management and policy of a corporation, as determined by a majority of its stockholders, unless it clearly appears that their action was not taken in good faith, in the interest of all stockholders.

6. CORPORATIONS ⇨197—STOCKHOLDERS' MEETINGS—RIGHT TO VOTE.

A stockholder is not disqualified from voting on a question of corporate policy merely because he is related to a person who favors or opposes such policy.

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

Suit in equity by Philip F. Du Pont and others against Pierre S. Du Pont and others. Decree for defendants, and complainants appeal. Affirmed.

For opinion below, see 251 Fed. 937.

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
256 F.—9 *Certiorari denied 249 U. S. —, 39 Sup. Ct. 402, 63 L. Ed. —.

William A. Glasgow, Jr., Frank P. Prichard, and Henry P. Brown, all of Philadelphia, Pa., and Robert Penington, of Wilmington, Del., for appellants.

George S. Graham, of New York City, George Wharton Pepper, of Philadelphia, Pa., William S. Hilles, of Wilmington, Del., and William H. Button, of New York City, for appellees.

Before BUFFINGTON and McPHERSON, Circuit Judges, and HAIGHT, District Judge.

BUFFINGTON, Circuit Judge. In the court below, Philip F. Du Pont, a citizen of Pennsylvania, filed a bill against the E. I. Du Pont de Nemours Powder Company, a corporate citizen of New Jersey, hereafter called the Powder Company, and 2 corporations and 13 individuals, corporate citizens of Delaware. Proofs were taken, and after final hearing the court entered a decree dismissing the bill. Thereupon the plaintiff took this appeal.

The bill was filed by Philip F. Du Pont, as a stockholder of the Powder Company, for and on behalf of himself and such stockholders as might intervene, and its purpose was to enforce a right of action alleged to be in the Powder Company, against the 13 individuals named, and which right of action the Powder Company would not maintain, because it was under the domination of said defendants, or some of them. It will thus be seen that the real plaintiff in the cause is the Powder Company, and the real defendants are the other defendants, who, as is alleged, are liable to the Powder Company on the cause of action which Philip F. Du Pont here seeks to enforce. We shall therefore treat the case as, in reality, one brought by the Powder Company against these other defendants.

[1] Such being the real status of the case, our first inquiry naturally is: What is the alleged cause of action of the Powder Company against these individuals? In that regard the individuals may be grouped in two classes: One composed of six men, to wit, Raskob, who was treasurer of the Powder Company and a director, Carpenter, a director, and four Du Ponts, viz. Alexis, Irénée, Lamnot, and Pierre, all of whom were directors as well as administrative officers of said company. These six men, hereinafter called the syndicate, bought the stock of the Powder Company, hereinafter called the Coleman stock. The second class is the Du Pont Securities Company, hereinafter called the Security Company, a Delaware corporation formed by the syndicate for the purpose of financing the purchase and thereafter holding the Coleman stock after its purchase by the syndicate. The third group is composed of Harry F. Brown, William Coyne, Harry G. Hoskell, John P. Laffey, and the two Du Ponts, Eugene and Henry F., all of whom were directors of said company, and who, as well as the syndicate members, acquired from the syndicate shares of stock in the Security Company above referred to.

Turning first to the right of action of the Powder Company against the members of the syndicate, we note that in February, 1915, John J. Raskob was the treasurer of the Powder Company, and as such treasurer, and generally under the directions and contract of the board

of directors and its finance committee, had charge and control of the deposits of the Powder Company. Raskob was also a director of the company. At that time Coleman Du Pont owned 13,899 shares of preferred and 63,214 shares of its common stock, about one-fifth of the total issue. On February 13, 1915, he wrote the following letter to Pierre S. Du Pont, one of the defendants:

"Dear Pierre: I got a little too gay last week, and have been on the 'blink' for five or six days, but am getting along all right now.

"The more I have thought of the stock question, the more I believe, with what little information I have, that the common stock should reach 250 and may reach 300. If this is true, the men who are now at the helm and actually doing things should make the profit as between to-day's figure and that figure; it will be by far the best thing that can happen to the company. So clear I am that this is the right time to get them interested that I am willing, figuring as surely as I can that this stock will go much higher, to let go for the benefit of the men who are working, which, of course, means the benefit of the company, 20,000, 30,000, or even 40,000 shares at to-day's market which I assume is about 200. As to the details of working this out I am entirely willing to leave this to you and Lew.

"If much time is desired, the price should be higher. If the arrangement for cash payment is made through banks, there should be no increased price. In order to get time when we purchased the company originally, what we gave to be allowed time amounted to, I believe, over 100 per cent. increased price, this because the element of chance must necessarily come in.

"Of course, I am only using my best judgment in this matter, but I am willing and strongly urge that the heads of departments and younger members of the family become most interested in the common stock."

This letter was shown to Raskob by Pierre Du Pont on February 17th, and what follows is thus stated in his testimony by Raskob:

"Mr. Du Pont handed me this letter, and said to read the letter over, and he would like to talk with me about it. I did read the letter over, and later in the day had a conference with him. We talked over the matter of the purchase of certain shares of common stock, from Mr. Coleman Du Pont. Later on Mr. Irénée Du Pont, Mr. Lamot Du Pont, Mr. Carpenter, Mr. Pierre Du Pont, and I had a conference. I think Mr. Felix Du Pont was not at that conference, but was at a later one. The result of those several conferences was a decision that six of us would endeavor to purchase a substantial block of Mr. Coleman Du Pont's stock, and we directed that a telegram be sent to him through Mr. L. L. Dunham, his secretary, to ascertain whether Mr. Coleman Du Pont would be willing to pool the voting of the balance of his stock, in case we bought a portion of it. The reply that Mr. Dunham gave us was that Mr. Du Pont was unwilling to commit himself to pooling the vote, as I recall it. That resulted in our inquiring as to whether he would be willing to sell his total holdings, to which he replied he would. These negotiations were, of course, conducted through Mr. Dunham. We then sent a telegram to Mr. Coleman Du Pont, making him an offer for his entire preferred stock holding at \$80 per share."

On receipt of Coleman's offer to sell, Raskob, on behalf of the syndicate, on February 19, 1915, went to New York to see Morgan & Co., and ascertain whether they would furnish the money, over and above the amount they could get Coleman Du Pont to take notes for, which would be necessary to buy the Coleman stock. Morgan & Co. having agreed to do so, Raskob told Pierre Du Pont that night what he had done in New York, and the next day the syndicate met in Wilmington and determined to buy all of Coleman's stock, in pursuance of which telegraph and phone messages were exchanged that day

between Coleman Du Pont and Pierre Du Pont, whereby the former agreed to sell and Pierre to buy all of Coleman's preferred stock at \$85 and all his common stock at \$200; \$8,000,000 to be paid to Coleman in cash, and \$5,831,865 in seven-year notes.

The purchase having been arranged with Coleman, Raskob and Pierre Du Pont went to New York on February 23d, saw Morgan & Co., who, for an agreed commission of \$160,000, undertook to furnish the \$8,000,000 cash required to pay Coleman. Papers were thereafter drawn in fulfillment of this arrangement, and on March 2d Raskob and Pierre Du Pont again went to New York and closed the \$8,000,000 loan arrangement made with Morgan & Co., and delivered to the Bankers' Trust Company—which Morgan & Co. had designated to do the financing, trusteeship, etc., of the matter—the stipulated security, and received in return the \$8,000,000 Morgan & Co. had agreed to furnish.

Without now entering into details of the preceding matters, the outcome was that the Coleman stock was acquired by the Security Company and the stock of the Security Company was held by the syndicate. On behalf of the plaintiffs, it is contended that the acquisition of this stock by the syndicate was in fraud of the Powder Company, was in violation of their several duties as its officers, and that the purchase was effected by the syndicate members taking an unfair and unlawful advantage of their position as officers and by an unfair and unlawful use of the credit, good will, and money of the Powder Company. Standing aside for the present, Pierre Du Pont, as to whom there are individual facts and circumstances hereafter discussed, and confining ourselves to the other members of the syndicate, Raskob, Carpenter, Alexis, Irénée, and Lamnot Du Pont, let us inquire whether, as officers of the company, the proofs establish they have, in the purchase of the Coleman stock, been guilty of wrongdoing.

In the first place, it will be noted that Coleman Du Pont was the president of this company, and his ownership of this large block of stock had never been considered as a menace to the company. Of Coleman's right to sell to any officer of the company, and of the right of any officer of the company to buy such stock, there can be no question, and unless, therefore, some facts exist which make it inequitable as against the Powder Company and its stockholders for such officers to buy said stock, it is clear that there was no inequity, per se, in these five defendants buying this Coleman stock. For example, the proof shows that the next largest stockholders of the Powder Company were Alfred Du Pont and William Du Pont. Both were directors, vice presidents, and members of the executive committee. Now, it is clear that, if Coleman had made his offer of February 13th to Alfred Du Pont singly, or to Alfred and William jointly, their official relations to the Powder Company would not have prevented them singly or jointly buying Coleman's stock, although such purchase would have given him or them the potential power incident to such increased stock ownership.

We use this simply to emphasize the position that the fact of the syndicate buyers of this Coleman stock being officers of the Powder

Company did not, per se, qualify or take away the right officers of any company have to buy, in large or small quantity, its stock. It is manifest, therefore, that disability on their part to buy the stock must be found, if it exists, in the fact that they made some wrongful use of their position or influence as officers, or such wrongful use of the money, property, or credit of the company, as made it inequitable for them to acquire and hold stock which the company should hold or wished to buy for itself; or, to put it in another form, the facts of their being officers of the company and their bad faith as officers in buying the stock were such as to warrant the court in decreeing them trustees ex maleficio of the stock, and therefore liable to turn the stock over to the company, if it so desired. Do the proofs measure up to that standard?

[2] Now, it is quite apparent that, if the five officers whom we are now considering had had the money to have paid Coleman Du Pont cash for his stock, or if, instead of Coleman accepting notes for substantially six-thirtieths of this stock, he had taken their notes for the whole of the purchase money, there could have been no just charge made of any fraud, bad faith, or breach of duty on the part of these five men, for, so far as those five are concerned, there is no evidence whatever of anything which, at the date Coleman made his offer, qualified their right to buy his stock. And so far as Coleman Du Pont and nearly \$6,000,000 of this purchase money, this was just what this syndicate was able to do and did do without in any way making use of the credit of the company, or in any way using or misusing their position as officers. And in point of fact the security Coleman took and extended over seven years was not only on a lesser margin of stock depreciation, but his notes were not secured by the personal guaranties of the syndicate members, which, as we shall see, were given to Morgan & Co. in the case of the remaining \$8,000,000 of the purchase money.

We next turn to the steps taken and the notes given by the syndicate, from the proceeds of which were raised the \$8,000,000 cash paid to Coleman for his stock; in raising this sum, was the credit of the Powder Company used, or was any misuse made by any of these five men of their official relation to the company? While, of course, they are to be held responsible for what was done by each member or members of the syndicate in their behalf, we are relieved from any detail discussion of the proofs, so far as four members of the syndicate, viz. Carpenter and Alexis, Irénée, and Lammot Du Pont, are concerned; for as to them there is no proof of their personally taking any part in obtaining the \$8,000,000 through Morgan & Co.

Assuming, however, that they are responsible for the acts of Raskob and Pierre Du Pont, who acted in their behalf in getting the \$8,000,000, we turn to the proofs of what was done by Raskob and Pierre Du Pont in getting this \$8,000,000 of purchase money. Was the credit of the Powder Company used by Raskob and Pierre to obtain the \$8,000,000 in New York? Did Raskob or Pierre misuse their official connection with the company to obtain this loan? In this inquiry we note that the arrangement for the loan was made by Raskob;

he alone visited New York, made all the arrangements and he was the treasurer of the company. He reported back to his fellow syndicate members. Now, Raskob was treasurer of the company; he had a general supervision of its treasury, credits, and resources; he was in a position to misuse, and if any misuse was made he was peculiarly in a financial position of trust which enabled him, above all others in the company, to make such misuse. The Powder Company was handling vast sums; the likelihood was that it would handle larger sums; the selection of depositories for those funds and the distribution of funds in the particular banks were all discretionary matters, which put it into the powers of a treasurer to so manipulate and use the funds of the Powder Company as to enable him, if so minded, to obtain personal favor and benefits from those depositories which as an individual he could not obtain.

We have no disposition to minimize or gloss over the high measure of duty incumbent on a man in such a trusted position, and knowing, as these four men, Carpenter and Alexis, Irénée, and Lammot Du Pont, did, as officers of the company, that Raskob had this potential power of wrongdoing by virtue of his treasurership, we are justified in holding these four men responsible for any misuse Raskob made of the official power they knew he had. On the other hand, if Raskob made no misuse of his company's credit or his official position, we see no reason why the fact that his company trusted him should cripple his right, or the right of those associated with him, to buy stock in his own company, and thereby increase the personal interest he and they would have in increasing its prosperity.

Turning, then, to the proofs, let us inquire whether there is proof that Raskob misused, or indeed used at all, the credit of the Powder Company in obtaining the \$8,000,000 from Morgan & Co. Now, the proofs affirmatively show that the only dealings Raskob had in making arrangements for the loan were with the banking house of Morgan & Co. in New York. We shall hereafter discuss the close relationship that existed between that firm and the Powder Company. For the present, it suffices to say that Morgan & Co. had given huge contracts for powder to the company. It knew the extent of the company's present business and its prospective business, and in that way was well aware of the value of the company's business and stock. As payments on these powder contracts were made to Morgan & Co. by the European governments concerned, it credited the payments to the Powder Company and notified the Powder Company of such credits, and the latter thereafter then checked out such parts of said deposits as it saw fit. So far as the evidence shows, the relations between the Powder Company and Morgan & Co. were that Morgan & Co. gave the Powder Company contracts for powder and far in excess of any deposits the Powder Company kept with the firm. Morgan & Co. treated the Powder Company just as it did other companies having contracts with the Allies, namely, it credited incoming payments and notified the manufacturer.

It would seem, therefore, that the relations between the Powder Company and Morgan & Co. were the ordinary ones existing with

other companies, that Morgan & Co. were not seeking or liable to have any favors from the Powder Company in the way of deposits, and that, if favor was to be exercised, the party that granted the favor was Morgan & Co., in giving these large contracts to the Powder Company. Moreover, the proofs are positive and uncontradicted that the arrangement made between Raskob and Mr. Porter, one of the members of Morgan & Co., was wholly and entirely on the business basis of the worth of the loan, that Morgan & Co. were paid a broker's commission of 2 per cent. for taking the loan, and that the loan was made on the security given, and not on any present or prospective favors to be done by the Powder Company, by Raskob, its treasurer, or any other officer. In that regard, Henry P. Davison, a partner of Morgan & Co., testified:

"Q. Will you tell the court what you took into account in making that loan and upon what credit that loan was made? A. We took into account the parties interested in the loan; that is, the personnel, and the character of the obligation, and the character of the security. We took into account the character of the people who applied for the loan and the character of the collateral. * * *

"Q. Was there any other consideration or interest moving you to make that loan than the personal character of the men who guaranteed the loan and the collateral which they offered? A. The terms on which the loan was presented; nothing else.

"Q. And the terms? A. Yes; nothing else.

"Q. Did the question of the Powder Company having a deposit with your firm enter into this subject in any degree? A. It did not.

"Q. Did the making of this loan to these gentlemen as individuals impair in any manner the credit of the company for making loans on its own account with you? A. It did not. * * *

"Q. Was there any understanding, agreement, or arrangement, express or implied, with anybody connected with these gentlemen with reference to making a deposit account with your firm? A. Not so far as I have ever known. * * *

"Q. State whether or not this loan was made upon the credit of these men and their collateral, or upon their credit and standing as officers of the Powder Company? A. We regarded this as entirely an individual matter. It was an unusual transaction, but we had a general knowledge of the situation, and we understood that these men had this opportunity to buy this stock and very materially increase their personal holdings. It was a personal matter so far as we were concerned; we treated it personally and regarded it as such.

"Q. Then it was absolutely a personal matter as between your firm and them? A. Entirely.

"Q. Did the making of this loan to these gentlemen in any way affect the credit of the Powder Company that you know of? A. None whatever, except as it indicated to us the appreciation that the officers themselves had of the company.

"Q. And that would increase rather than diminish? A. That would be the effect that it would have upon us."

Indeed, the solid self-sufficiency of the Morgan loan is shown, not only by the undisputed testimony of a number of bankers whose testimony was in substance to the same effect as Davison's, but by the attitude of Coleman Du Pont. The proof shows that the excess margin of the stock given to him as collateral for his \$6,000,000 notes was less than in the Morgan loan. In addition, Coleman gave a credit for 7 years, Morgan & Co. only 18 months, and Coleman had no personal guaranty, while Morgan & Co. had the individual guaranty for

separate portions of the loan in varying amounts from each of the syndicate members which in the aggregate equaled the loan, and the proof is that their individual property was in excess of the amounts so guaranteed. Indeed, the inherent worth of the loan is shown by the fact that it so commended itself to banks amongst which it was distributed that Morgan & Co. were only able to keep for themselves but a small part of the loan, and the attractiveness of the loan to persons who had no connection with the parties or transactions whatever is evidenced by the fact that a bank with absolutely no possible connection with the whole transaction, and without solicitation, asked for and took \$150,000 of it. In that regard Clark, the president of the American Exchange National Bank of New York, testified:

"Q. To what extent did you participate in this [loan]? A. In the first instance, \$600,000, and later on \$150,000 more.

"Q. How did you come to take \$150,000 more? A. I mentioned the question of the loan to some of our correspondents, and they thought so well of it that they asked if I would not get some for them, and I asked for an additional \$150,000.

"Q. Upon what did you, representing your bank, take this loan, or participate in this loan? A. On the strength of the collateral and personal knowledge of the men behind it.

"Q. Through whom did you come to participate in this loan? A. Messrs. Morgan & Co.

"Q. Had either John J. Raskob or Pierre S. Du Pont anything to do with placing the loan with you? A. No.

"Q. Had they spoken to you about taking it all? A. No.

"Q. Was there any arrangement with your bank in any way or shape, directly or indirectly, in regard to bank balance, or the maintaining of a bank balance, on the part of the Du Pont Powder Company? A. No.

"Q. Was the borrowing credit of the E. I. Du Pont de Nemours Powder Company affected in any way by this loan made to these gentlemen? A. Absolutely not.

"Q. Was the credit increased—was the credit of the company affected in any way? A. It was strengthened. * * *

"XQ. What had you known of the past operations of the company? A. The company had banked with us for a great many years. From time to time we had seen their statement, and noted the growth, the most wonderful growth."

The intrinsic worth of the loan, that it was taken by banks on that basis, and not on account of the offices Raskob and his associates filled, that the credit or resources of the company were not used by the syndicate, these and other convincing facts are proved by the testimony of numerous witnesses, and there is no evidence to the contrary. In that aspect we quote the testimony of Levi L. Rue, president of the Philadelphia National Bank, who said:

"Q. Did your bank participate in this \$8,500,000 loan that was made? A. We did.

"Q. Through whom did you participate in this loan? A. J. P. Morgan & Co., New York.

"Q. Had you anything to do with either Pierre S. Du Pont or John J. Raskob in the negotiation of that loan or arranging to participate? A. None whatever.

"Q. Upon what did you make the loan, so far as your bank was concerned? A. *On our faith in the integrity and worth of the promisors and the collateral, which they gave.*

"Q. Was there any other consideration that entered into it? A. None whatever.

"Q. Was there any promise or suggestion of any balances or anything to be kept in your bank in connection with it? A. None whatever.

"Q. Did the making of this loan to these gentlemen in any way impair the borrowing capacity of the company itself? A. It rather increased it, because in our judgment it strengthened the credit of the company, because it showed the faith of the officials themselves in the corporation by their purchasing its stock."

The testimony of Leroy W. Baldwin, president of the Empire Trust Company of New York, was:

"Q. I ask you to look at this paper and say whether or not your company participated in that loan. A. We did.

"Q. Through whom did you participate in that loan? A. J. P. Morgan & Co.

"Q. Did either Mr. Pierre S. Du Pont or John J. Raskob come to see you or talk with you about participating in that loan? A. No.

"Q. On what did you participate or permit your company to join in the making of that loan? A. *Because we considered it a good loan and it was presented by Morgan & Co.*

"Q. Was there any arrangement made by anybody with you with reference to the deposits of the Powder Company in your trust company in connection with this loan? A. There was not.

"Q. Had the deposits in your company anything to do with the making of this loan? A. No; it had not.

"Q. Was the credit of the Powder Company injured or helped by the making of this loan? A. I have never given it a thought. It was not injured."

George F. Baker, Jr., vice president of the First National Bank of New York, testified:

"Q. Did your bank participate in the loan made to the Du Pont Securities Company upon the collateral mentioned in that note and the guaranty of the persons who signed the annexed agreement? A. We did.

"Q. Through whom did you come to participate in that loan? A. Messrs. J. P. Morgan & Co.

"Q. Did either Pierre S. Du Pont or Mr. J. J. Raskob have anything to do with your participating in that loan? A. No.

"Q. Upon what did your banking institution extend or participate in this loan? A. Do you mean upon what credit?

"Q. Yes. A. Upon what security we had there?

"Q. Yes. A. Upon the security of the stock that was their collateral and upon our impression of the worth of the guarantors.

"Q. Is the Powder Company a depositor in your bank? A. It was.

"Q. I mean at that time? A. Yes.

"Q. Did the question of the deposits in any way come up or be connected with the making of this loan? A. No; not at all.

"Q. Had the keeping or the maintenance of any size of deposit anything to do with participation in this loan on your part? A. A comparison between the size of the deposit and the amount that we loaned would make it appear that the deposit had nothing to do with it.

"Q. This was not a loan to the Powder Company, was it? A. No.

"Q. If it was a loan made to the Du Pont Securities Company, with the guarantors' collateral, was it not? A. Yes.

"By Mr. Johnson: That is leading.

"By Mr. Graham: Q. Was there any agreement or understanding made by anybody in connection with this loan concerning the deposits that were to be kept or maintained in the First National Bank of New York? A. Not at all.

"Q. Would the making of this loan to the Du Pont Securities Company, with the indorsement of these gentlemen, upon this collateral, in any wise affect the borrowing credit of the Powder Company? A. Not at all.

"Q. How much of the loan did your bank take? A. Seventeen hundred thousand dollars.

"Q. One million seven hundred thousand dollars? A. Yes, sir.

"Q. Do you happen to know how much the deposits were in your bank? A. For about four years previous—I looked it up before I came here—they were about \$20,000 a month, and they ran up to about \$60,000, and I think they were about that on the day that we made the loan.

"Q. Sixty thousand dollars? A. Yes."

The Bankers' Trust Company of New York, at the request of Morgan & Co., acted as trustees in taking the loan from the syndicate and distributing it among the banks in the proportions directed by Morgan & Co. The testimony of Seward Prosser, the president of the trust company, in that regard, was:

"Q. Do you recall this loan of \$8,500,000 that was made to the Du Pont Securities Company? A. I do.

"Q. How did that loan come to your institution—from whom? A. J. P. Morgan & Co.

"Q. Did Pierre S. Du Pont or John J. Raskob, or any of his associates, have anything to do with bringing it to your company? A. No.

"Q. What was your company's relation to the loan? What was their position? A. We were a participant in the loan, and we acted as trustee for the securities, and we also cleared the transaction on behalf of the Morgans.

"Q. Did you ever see that exhibit before? A. This is the original note. I have seen it before.

"Q. And this is the original guaranty that accompanied that note? A. It appears to be; yes.

"Q. Please tell the court in what way you cleared that loan for the Morgans. A. The Morgan firm asked us to clear the transaction, as we were the trustees. They gave us the names of the people who had accepted participations, and advised us, when we split the loan up in accordance with their instructions, to send participation receipts to the institutions who had participated after we had received their remittances.

"Q. Did the participation receipt recite this note and the collateral? A. I do not recall that it recited that note verbatim, but it recited all the salient points necessary for a lender to know to understand the transaction.

"Q. What number of shares of stock were pledged behind this loan? A. I cannot recall.

"Q. Can you refresh your memory from the original paper? A. 54,591 shares common and 14,599 shares preferred.

"Q. What did the loan mark the stock down to, and what percentage of margin had you on the loan? A. My recollection is that, taking the common stock at 135, we had then a margin of 50 per cent. on the loan. In other words, we had the amount of the loan and a margin of 50 per cent. in excess of that.

"Q. Did you make any inquiry into the standing of those who guaranteed the loan? A. Yes, to this extent: I talked with Mr. Raskob and with Mr. Pierre Du Pont. My recollection of the conversation is that Mr. Du Pont said that the guarantors to that loan in his judgment were worth \$10,000,000 and that the amount of their respective guaranties was appropriate to their means.

"Q. You say your trust company participated in the loan? A. Yes.

"Q. To what extent? A. I think it was something over \$1,700,000.

"Q. Was your company one of the depositories of the Powder Company? A. Yes.

"Q. Did the fact of the deposit of the Powder Company in your company have any connection whatever with the making of this loan, so far as you were concerned? A. None whatever.

"Q. Upon what was this loan made, so far as you and your banking house were concerned? A. It was made on the belief that the collateral to the loan was adequate and that the people who guaranteed it made it still safer. We believed in them personally.

"Q. Was there any agreement of any kind made by anybody, or did you understand or hear of any agreement, to maintain deposits in any of the participating banks? A. I never heard of any such suggestion.

"Q. Did any such idea or suggestion enter into the extension of this credit? A. None whatever.

"Q. Was the borrowing credit of the Powder Company in any way affected by the making of this loan to the Securities Company, with these guarantors and upon this collateral? A. Not at all. As a matter of fact they had no borrowing arrangement with us. The Bankers' Trust Company not being a commercial bank, they do not have such arrangements.

"Q. Do you know Mr. Porter, of J. P. Morgan & Co.? A. Very well.

"Q. Did you have any interview with Mr. Porter about this matter? A. Yes.

"Q. What instructions did Mr. Porter give you, if any, or what information did he give you, if any? A. My recollection is I had one discussion with Mr. Porter while this loan was pending, in which I told him my belief that the loan was excellent and should be made. Subsequently I had a talk with him when Mr. Raskob was present, when they gave me the details of the transaction and requested that our counsel get all the trust matters in correct shape, and Mr. Porter handed me a list of the participants and asked us to clear the transaction.

"Q. In that conversation between you and Mr. Porter, was anything said about bank deposits being made with any of the participants? A. No.

"Q. Was anything said upon that subject? A. No suggestion."

The testimony of Albert H. Wiggins, president of the Chase National Bank of New York, was:

"Q. Did your bank take any of the participating receipts in connection with this loan of \$8,500,000 to the Du Pont Securities Company of Delaware? A. It did.

"Q. How much did your bank take? A. \$500,000.

"Q. Upon what did your bank extend its credit of \$500,000 and take this participation in the loan? A. Upon the value of the collateral as we believed it, and upon the standing and reputation of the guarantors.

"Q. Did anything else enter into the taking of this loan besides those two things? A. No, sir.

"Q. Was the Powder Company a depositor with your bank? A. It was.

"Q. Do you recall, or can you recall, about what the deposits were at that time? A. I have no idea.

"Q. Did the fact of the Powder Company being a depositor in your bank affect your judgment in any way, or influence you in any way in taking this loan? A. No, sir.

"Q. Did this extension of this loan, or participation in this loan, affect the borrowing credit of the Powder Company in any way? A. No, sir.

"Q. Who brought the matter to your attention as a bank? A. J. P. Morgan & Co.

"Q. Did it, or not, come to you in any way through Pierre S. Du Pont or John J. Raskob? A. It did not.

"Q. Was there any promise, agreement, or understanding of any kind made by anybody in connection with this loan, with respect to deposits or maintenance of deposits in your bank? A. There was not."

Gilbert G. Thorne, vice president of the National Park Bank, testified as follows:

"Q. Did your bank participate in this loan of \$8,500,000 made to the Du Pont Securities Company of Delaware? A. Yes.

"Q. To what extent did they participate? A. \$375,000.

"Q. Did you pass upon this participation? A. Yes; I took the loan.

"Q. Upon what did your bank extend this credit and take this participation in this loan? A. Upon the fact that it was presented, first of all, by J. P. Morgan & Co., and then by the value of the security as it was represented to

us, and then by what we were told subsequently as to the value of the indorsers or the guarantors.

"Q. Through whom did you become a participant in this loan? A. Through J. P. Morgan & Co.

"Q. Did either Pierre S. Du Pont or John J. Raskob ask you to become a participant in the loan? A. No, sir.

"Q. Was the Powder Company a depositor with your bank? A. Yes.

"Q. Did the fact of the Powder Company being a depositor in your bank influence or affect your judgment with reference to the making of this loan? A. Not at all."

The testimony of Robert G. Hudson, Jr., vice president of the National Bank of Commerce of New York, is as follows:

"Q. Did your bank take any part of this loan of \$8,500,000, made through Morgan & Co. to the Du Pont Securities Company of Delaware? A. It did.

"Q. How much? A. \$250,000.

"Q. How much did you become interested in the loan; through whom? A. J. P. Morgan & Co.

"Q. Did you become interested in it in any manner through Pierre S. Du Pont or John J. Raskob? A. No, sir.

"Q. Was the Powder Company a depositor with your bank? A. It was.

"Q. Do you know, or not, as to what the amount of deposits were at the time of this loan? A. I do not.

"Q. Did the question of the deposits of the Powder Company in any manner affect your judgment or influence you with reference to this loan? A. Not at all.

"Q. Upon what did your bank extend the credit of \$250,000 in this participation? A. Based on the collateral and the character and standing of the men that guaranteed it.

"Q. Was there any agreement that you heard of from anybody, with reference to deposits or the maintenance of deposits by the Powder Company in your bank, or in any of the other participating banks? A. There was not."

And finally Richard H. Higgins, vice president of the Chatham & Phoenix National Bank, testified as follows:

"Q. Did your bank participate in this loan of \$8,500,000 through Morgan & Co. to the Delaware Securities Corporation? A. Yes, sir.

"Q. To what extent? A. Our limit, \$300,000.

"Q. Did you pass upon this loan? A. Together with the president, yes.

"Q. Through whom did you become a participant? A. J. P. Morgan & Co.

"Q. Did either Pierre S. Du Pont or John J. Raskob, or any of their associates, ask you to become a participant? A. No, sir.

"Q. Was the Powder Company at that time a depositor in your bank? A. Yes.

"Q. Did the fact of the Powder Company being a depositor in your bank affect your judgment or that of the president in passing upon this loan? A. Not at all.

"Q. Was there any agreement or any understanding, expressed or implied, made anybody with reference to the maintenance of deposits in your bank as a condition or circumstance connected with this loan? A. No.

"Q. Upon what did your bank extend credit in this participation? A. On account of the collateral, the price that the collateral was put into the loan, on account of the character of the men who guaranteed the loan in their respective proportions, and on account of the fact that J. P. Morgan & Co. was handling all of the details and investigated it."

Without citing further proofs and facts as to the intrinsic and self-recommending value of the loan, we may add that, while necessarily its worth was enhanced by the relation of the syndicate to the company, yet that enhancing value was an incident which attaches to

every stockholder who has a large part in the executive work of a successful company. If, for example, William Du Pont, occupying, as he did, the important place of a vice president in this company, had desired to purchase a large block of Coleman's stock, and had offered the purchased stock as part of his security for a loan to enable him to raise the purchase money, the very fact that he was a trusted officer of the company whose stock he was buying, that he had full knowledge of its affairs, and was already largely increasing his holdings, in and of itself would naturally reassure the lender and strengthen his confidence in the value of the stock of the company which he was taking as security. And, indeed, the bona fide purchase of stock in a company by those concerned in its management strengthens confidence in the company, as Mr. Davison testified in this case. But this fact, in and of itself, cannot and should not preclude one active in the management of a company from buying stock in his company, from obtaining money to buy it, or compel him to forego that additional confidence inspired in the lender by the fact that his purchase of his own company's stock had a financial weight that the purchase of the same stock by a stranger to the company might not have.

Under the proofs in this case, we are clear that, while the value of the Powder Company's stock was, in the nature of things, strengthened in the eyes of the lenders by the fact that these men, who were connected with the company, were purchasers, and to that extent their official position was a makeweight in the eyes of the lender, yet we are satisfied from the proofs that it was a mere incident, and not the real basis, on which the loan was made. And we are further satisfied from the proofs that the credit of the Powder Company was not used or its borrowing power diminished by the purchase of the stock or the loan which made the purchase possible. On the contrary, the proof, as we have seen, is that the purchase, instead of lessening, tended to increase, the credit of the Powder Company in banking circles. Taking the proofs as a whole, we are clear, therefore, they fail to show any reason why Raskob, Carpenter, and Alexis, Irénée, and Lammot Du Pont did not have, and were not free to exercise, the same right that any other person concerned in the management of the Powder Company had to buy stock in the company, and that in raising the funds to pay for the Coleman stock they made no use or misuse of the Powder Company's credit or resources, or of their position as officers. Whatever may have been the facts, whether they knew of any facts, circumstances, or relations in reference to Coleman's stock, or any part of it, or of any negotiations the executive committee had theretofore had with Coleman as to a part of this stock and to which we shall hereafter refer, certain it is that there is no proof in the case which shows that these five men, or either of them, had notice or knowledge of such matters. Such being the case, we are not only justified, but indeed constrained, to find that, so far as they are concerned, there is no proof of facts which would warrant the court, if they alone were involved, in depriving them of the

benefits of a purchase they had a right to make personally and did make personally.

[3] But the case does not end with, or depend on, their isolated and personal relations to the sale. Their purchase was not a purchase of segregated shares for individual ownership, but was a joint one for a common purpose and a common ownership, and that joint purchase is now the subject of equitable scrutiny in a court of equity. And inasmuch as the syndicate was formed, the common purpose outlined, and the purchase made by Pierre Du Pont, its sixth member, and inasmuch as the individual rights of Pierre cannot well be disassociated from the other members of the syndicate, and as they have jointly united in submitting their purchase to the judgment of their fellow stockholders, as a joint undertaking, we shall consider the case on the basis of treating the syndicate as a whole, and therefore charging it with notice of all prior matters which affected the rights and equities of the Powder Company, and which were known to, or participated in by, Pierre Du Pont, the sixth member of the syndicate. Such being the test, let us examine the proofs on the basis that Pierre Du Pont alone, instead of the syndicate, was the buyer of the Coleman stock, and from that status ascertain whether, at the time Pierre made the purchase, any fact, circumstance, relation, or obligation existed which forbade his doing so, or if the purchase, when made, obligated Pierre, and enabled the Powder Company, to regard the purchase as made for it. In following this course, we adopt the suggestion of plaintiff's counsel, who themselves have stated the issue here involved as follows:

"If a director and officer of a corporation, in the course of a negotiation with which he is intrusted, for the purchase by the corporation for a special purpose of a large portion of the stock of one of the stockholders, receives a general offer by that stockholder to sell all the latter's stock, can such director and officer form a small syndicate of himself and a few other officers, and purchase the stock for their own benefit, without reporting the offer to the company and giving it the opportunity to purchase?"

The answer to this question involves a study of the testimony as a whole, and to such task we now address ourselves.

In December, 1914, Coleman Du Pont was then, as we have also seen, and he continued to be on February 13th, when he made the offer which we have above considered, the president of the Powder Company and its largest stockholder, owning, at that time, all the stock, viz. 13,899 shares of preferred and 63,214 shares of common stock, which he subsequently sold to the syndicate. The proofs are that about that time Coleman went to the Mayo Hospital in Minnesota to undergo a serious operation, and the correspondence shows there were apprehensions as to its outcome. The Powder Company had in hand and in view tremendous operations growing out of the war, and Mr. Du Pont was deeply interested in strengthening the company by increasing the stock interest of the men on whom it depended to carry this great work through successfully. This policy was one the company had itself followed by awarding as a bonus to its employes, the

right to purchase shares of its stock which the company bought for such bonus purpose or issued from its treasury stock. Coleman's plan to thus sell to the company some of his own stock for distribution among its employes was approved by Alfred Du Pont, who was a vice president, a member of the board of directors and of the finance committee, and who, next to Coleman, was the largest shareholder of the company. It was, as appeared from the proofs, likewise discussed by Coleman with Pierre S. Du Pont, who was also a vice president, director, and member of the finance committee, and he also approved thereof. It would also appear from the proofs that, prior to his going to Minnesota, Coleman had been spoken to by some of the other leading men of the company as to whether he would sell some of his stock, and he was anxious to give them an early answer, and it is also clear, from the references here and there in the correspondence, that Coleman was somewhat apprehensive that some of its leading men might leave the service of the company. At all events, Coleman, Alfred, and Pierre all concurred in the general desirability of the company acquiring stock from Coleman, not for the company itself, but for the express purpose of enabling certain of its employes to buy it. Indeed, there was no talk or suggestion at that time of the company buying any of this stock for investment, profit, or for any other purpose than the one above indicated, and it is quite clear, also, that Coleman had no thought of selling to the company, but his whole purpose was to attract leading men in the company to buy the stock at a price he regarded as under its value, and thus strengthen the company and the 57,000 shares of stock which he would still own.

Before leaving for Minnesota, Coleman, on December 7, 1914, wrote Pierre as follows:

"Dear Sir: As you know, I have always felt those in responsible positions in our company should be encouraged to become importantly interested in the common stock, and I have, as you know, always thought well of the common stock and put a higher figure on it than you have. I think it well worth 185 to-day, and think it will go to 190 or 200 before the year 1915 is many months old. This ownership of common stock by the leading men is of so much importance to the company that as a member of the finance committee (the company having cash away beyond its requirements) I would recommend the funds needed to carry the stock for these men be advanced by the treasury.

"I am willing to sell for the purpose 20,000 shares at \$160 per share ex dividend, payable in say 30 or 60 days. To guide me I should like to have a suggestion from the finance committee, or a committee appointed by them, as to how it should be distributed. Inasmuch as important men associated with us have asked me to sell them some stock, I should like to have a prompt answer from the finance committee to enable me to reply.

"If the important stockholders in Hercules Powder Company think well of the plan, make a similar offer to president of Hercules Powder Company, except the number of shares will be much smaller, say 4,000, and I think and hope you gentlemen feel the important stockholders in that company should recommend to the directors of that company that the Hercules Company advance the cash needed as the company can spare it to enable the directors and those they suggest) to secure this stock. The same, with much reduced number of shares, 700 or 800, to the president of the Atlas Company.

"I attach a copy of letter I was going to write to president of the Hercules and Atlas Companies, but before sending same would appreciate any suggestions you gentlemen care to make."

Pierre subsequently told Alfred Du Pont of the fact of Coleman's offer and his plan for the Powder Company, and also for the Hercules Company, who at the time approved of the purchase of the stock and its distribution among the principal men of the company, but desired to consider further as to the price. The testimony of Alfred in that regard was:

"Q. You say you learned as to the sale of Mr. T. C. Du Pont's stock, or part of it, through some suggestion from Mr. P. S. Du Pont. Where was it you heard it? A. In my office in the Du Pont Building.

"Q. What took place there? A. Mr. P. S. Du Pont informed me that he had received a letter, or that he had received information, from Mr. T. C. Du Pont to the effect that he desired to sell 20,000 shares of his stock to the Powder Company at \$160 a share ex dividend, for the purpose of redistributing this stock among some of the company's more important employés.

"Q. Did you consider the matter with Mr. Pierre Du Pont then? A. I discussed it for a few minutes.

"Q. Did you reach any conclusion? A. No conclusion, other than I agreed with him. * * *

"Q. What was said by you and what was said by P. S. Du Pont as to the question of the advisability of the purchase? What was said by you in that meeting with P. S. Du Pont, and what was said by him as to the advisability of making the purchase? A. He said that he thought it would be an excellent thing to make the purchase.

"Q. What did you say? A. I said I thought so, too, so far as purchasing the stock and redistributing it among employés. The only question I wished to consider was upon the price; that it involved a large investment on the part of the company."

Thereafter Alfred evidently gave further consideration to the question of price, which, as we see, involved an outlay of \$3,200,000, and decided the price asked—\$160—was too high, and that no decision as to the price should be given until the finance committee met. This conclusion he embodied on December 14, 1914, in a letter to Pierre as follows:

"Dear Sir: After giving the question of purchasing a certain large block of Du Pont common further consideration, I believe that 160, the price you talked of, is too high, 150 would be purchasing it on a 6 per cent. basis, and 160 a 5 per cent. This is too low a rate for the company to invest its spare funds, and furthermore, if it were offered to any of our employés, it would not be sufficiently attractive at that price. I see no objection to the company's purchasing this stock, but the question of price is one of grave importance, owing to the large investment. I would suggest that no decision as to the actual price be given the present owner until the finance committee has had ample time to think the matter over and discuss it together.

"Yours truly,

Alfred I. Du Pont, Vice President."

In a subsequent letter to Pierre, dated December 21st, Alfred called attention to the mistake made in stating the stock at 150 would yield 6 per cent., and says 150 should read 133, and then adds:

"I doubt whether the investment of the company's surplus earnings by the finance committee on a basis even as high as 6 per cent. could be justified. In other words, if the company is unable to invest its surplus earnings at a rate better than the stockholders might themselves, they might contend that these earnings should be distributed in the form of a dividend."

As noted in Coleman's letter, he desired an early answer, and instead of the offer going over until December 30th, as Alfred suggested,

it was brought up at a finance committee meeting on December 23d. This change of meeting day was evidently made to comply with Coleman's suggestion in a letter he wrote on December 14th, for it appears that Pierre, having received Coleman's letter of December 7th, made for Coleman a schedule of the employés for whom the stock purchase was to be made. In that regard, Pierre testified:

"A. At the time of the original interview I suggested to T. C. Du Pont that I make a memorandum of the *principal men in the company who would be recognized* in suggesting distribution of the stock to the employés. I made that memorandum and handed it to him; and from that memorandum it appears that the allotment of stock to the executive committee by T. C. Du Pont, plus three times the annual salary of the men receiving \$500 per month or more added up to 20,700 shares."

Thereupon Coleman enlarged his offer of 20,000 to 20,700 shares by his letter of December 14th, as follows:

"Dear Sir: I have given a great deal of thought to my letter of December 7th as to the distribution of this stock, and my judgment is that each member of the executive committee be allowed 1,500 shares; that the men whose salary is \$500 a month and over will be allowed to subscribe for three times the amount of their salaries. This makes a total, according to the memorandum you left with me, of 20,700 shares. I am willing to furnish the other 700, or the company can do this, as in your judgment seems advisable.

"I suggest you make this announcement some time prior to the 23d of this month, as I think it has some advantage. As I am going away to-day, and do not know how long I will be gone, I have left the matter in Mr. L. L. Dunham's hands. He can come to Wilmington and see you upon receipt of telegram from you."

This letter was written on December 14th, but there is no testimony on Alfred's part that prior to the meeting of the finance committee, on December 23d, this letter was shown to him, or that he knew of the change Coleman had made from 20,000 to 20,700 shares, or that Coleman had left the matter in charge of L. L. Dunham. Up to December 23d there is practically no dispute as to what was done, or what was the attitude of Alfred and Pierre toward Coleman's offer. The matter was brought up at the meeting of the finance committee on December 23d, which meeting was attended by Alfred, Pierre, and William. As the present phase of the case largely turns on conflicting oral testimony as to what took place at this meeting, it should be noted that we have written evidence in the minutes of the meeting—evidence of substance, when men's recollections differ as to events. Turning first to the written evidence, we find the minute of the finance committee. It reads as follows:

"Purchase of Common Stock Owned by Mr. T. C. Du Pont.

"Mr. P. S. Du Pont presented a letter from Mr. T. C. Du Pont, offering to sell 20,700 shares of common stock of this company at \$160 per share. After discussion it was moved and carried (Mr. P. S. Du Pont voting in the negative) that Mr. P. S. Du Pont be instructed to advise Mr. L. L. Dunham, attorney for Mr. T. C. Du Pont, that we do not feel justified in paying more than \$125 per share for this stock."

The proof is that the resolution referred to was made by Alfred Du Pont. The minute is attested by the signature of Alfred, Pierre

and William, and as to its legality by J. P. Laffey, the counsel of the Powder Company. There is some testimony to the effect that the minute was not wholly correct, and in that regard, and as to what occurred at the meeting, we quote the testimony of the three men present. Alfred's account is as follows:

"Q. Did you offer that resolution? A. I offered the resolution, but it is not correct, as I remember it.

"Q. Did you write it out yourself? A. No; I did not.

"Q. How was it offered by you? A. I offered it orally.

"Q. Was there a stenographer there to take it down? A. A stenographer, the secretary of the committee, took it down. * * *

"Q. What words, if any, which you embraced in the resolution, as you offered it, are lacking from the resolution as it appears on this minute book? A. The words should have been 'at this time,' or 'at the present time.'

"Q. Those words were included in the resolution as offered by you? A. So far as I remember, they were.

"Q. Did you have any conversation with Mr. P. S. Du Pont relative to the question of what he should say to Mr. Dunham when he reported the action of the finance committee? A. At that meeting?

"Q. Then or thereafter? A. I suggested, after the resolution had been passed, that in conveying this information to suggest to Mr. T. C. Du Pont that, if he should keep the offer open a month or two longer, we might be able to increase the price offered for the stock.

"Q. You told Mr. P. S. Du Pont that? A. I did.

"Q. Who was Mr. Dunham? A. Mr. Dunham was Mr. T. C. Du Pont's representative and secretary. * * *

"Q. When did you first discover that the resolution as it appeared on the minute book lacked the words 'at this particular time,' or 'at the present time'? A. I do not remember.

"Q. Was it immediately after the meeting, or some time thereafter? A. Some months afterwards."

The testimony of William Du Pont was:

"Q. You say that you were present at a meeting of the finance committee in which the suggestion of Mr. T. Coleman Du Pont as to the sale of 20,700 shares of stock of the company was considered? A. I was present at the meeting when that was considered. * * *

"Q. Please state what attitude or position Mr. Pierre S. Du Pont took on that subject of the purchase. If you can do so, give us what Mr. Pierre S. Du Pont stated as to his view about it. A. I think he advocated the purchase of the stock. I am not sure.

"Q. State what Mr. Alfred I. Du Pont stated as his view about it, and when you stated as your view? A. Mr. Alfred I. Du Pont advocated the purchase of the stock at a certain price.

"Q. What was that price? A. \$125 a share.

"Q. What was your attitude? A. That was my attitude, too.

"Q. Was a resolution offered at the meeting to which you refer on that subject? A. I believe there was.

"Q. Who offered it? A. I think it was offered by Mr. Alfred I. Du Pont.

"Q. Was it verbal? A. Verbally offered.

"Q. I call your attention to the minutes of the meeting of December 23d, and read to you the resolution as appears there as follows: 'Mr. P. S. Du Pont presented a letter from Mr. T. C. Du Pont, offering to sell 20,700 shares of common stock of this company at \$160 per share. After discussion, it was moved and carried (Mr. P. S. Du Pont voting in the negative) that Mr. P. S. Du Pont be instructed to advise Mr. L. L. Dunham, attorney for Mr. T. C. Du Pont, that we do not feel justified in paying more than \$125 per share for this stock.' Does that resolution correctly set forth what took place at that meeting with reference to the presentation by Mr. P. S. Du Pont of a letter

on that subject? A. I do not remember any letter was presented; that is to say, there was no letter given to the board to read.

"Q. Did you see any letter? A. I did not see any letter.

"Q. I read you further: 'After discussion, it was moved and carried (Mr. P. S. Du Pont voting in the negative) that Mr. P. S. Du Pont be instructed to advise Mr. L. L. Dunham, attorney for Mr. T. C. Du Pont, that we do not feel justified in paying more than \$125 per share for this stock.' Does that resolution correctly recite what was the action taken by the committee at that time? If not, in what way? A. It is partially correct, but the word 'now' is left out, as I remember it, or 'at this time.'

"Q. You mean at what part of the resolution would that come? A. After the offer of \$125 per share.

"Q. 'That we do not feel justified in paying more than \$125 per share now?' A. 'That we do not feel justified in paying more than \$125 per share for this stock now.' That is my recollection of it, or 'at this time.'"

On cross-examination he testified further:

"XQ. How did you learn the nature and character of the offer made by Mr. T. C. Du Pont of the stock at that time to the finance committee or to the company? A. From statements made by Mr. P. S. Du Pont.

"XQ. Will you say that those letters were not produced at that finance committee meeting from T. C. Du Pont? A. There was no letter put on the table at that meeting.

"XQ. Were they not produced and commented upon? A. I do not understand what you mean by produced.

"XQ. The word is a simple English word. I will have to ask you to say whether they were produced there at the meeting in your sight or presence at all? A. I saw no letter or letters from Mr. T. C. Du Pont. I do not say Mr. P. S. Du Pont might not have had them, but he did not produce them in the sense you mean, by putting them down on the table for members of the finance committee to read or look at.

"XQ. Did you ask to see them? A. I cannot say I did. I do not recall.

"XQ. This was a transaction involving upward of \$3,000,000, was it not? A. It might have been.

"XQ. Do you not know whether it did or not? A. Yes.

"XQ. Did it? A. Yes.

"XQ. And you did not look at the offer that was made by the man who presented this to the finance committee? A. There was no paper placed on the table for any member of the finance committee to read or look at. If it had been placed there, I would have looked at it.

"XQ. I ask you whether you did not see the letter? A. I did not.

"XQ. At any time? A. At no time.

"XQ. You were content with the statement made by Mr. P. S. Du Pont of what was in the letters? A. Yes.

"XQ. And you understood from his statement that that was an offer to the company of 20,700 shares to be distributed among employes, for the purpose of more importantly connecting them with the corporation, and along that line of policy, did you not? A. I believe so.

"XQ. And that it was not an offer of the sale of stock to the company, but an offer of stock to be used to distribute among the employes, out of which the company would receive no profit. That you understood, did you not? A. I think it was an offer of sale of stock to the company, to be bought by the company and distributed to employes.

"XQ. But the company was not to profit by it? It was to go to employes at the price paid for it? A. It might be."

The testimony of Pierre as to the minutes and the meeting is:

"Q. Were you present at the meeting of the finance committee on December 23, 1914? A. I was.

"Q. (Minutes of meeting of finance committee held December 23, 1914, handed to witness.) Is that the signature of Mr. Alfred I. Du Pont? A. Yes.

"Q. Who were present at that meeting? A. Alfred I. Du Pont, William Du Pont, and myself, members of the committee, and Mr. Fisher as secretary."

"Q. The minutes recite that you presented two letters of T. C. Du Pont for the consideration of the committee. Were those letters presented at that meeting? A. My recollection is that they were at the meeting.

"Q. Were the contents of the letters discussed at that meeting? A. They were.

"Q. I call your attention to the resolution which was adopted, and I wish you to say whether or not that resolution is correct as it there appears—whether the minutes present a correct statement of the resolution as it was offered, voted on, and adopted? A. That is correct as it stands.

"Q. Mr. Alfred I. Du Pont says that there are some words omitted at the end, 'now,' or 'at the present time.' What is your recollection as to whether or not such words were embodied in that minute? A. My recollection is that the minute is correct as it stands; that there were no words 'at this time,' or the equivalent.

"Q. And you signed these minutes as correct at that time? A. I did.

"Q. About how long after, do you remember, the meeting, were the minutes presented to you for your signature? A. Within a week or ten days.

"Q. Who prepared the minutes and presented them for signature? A. Mr. Fisher was the secretary of the meeting. So far as I remember he prepared the minutes.

"Q. Mr. Alfred I. Du Pont says that at that meeting, after the adoption of this resolution, he said to you, 'In reporting this, try and have T. C. Du Pont keep it open for a month or two.' Was anything of that kind said to you at that meeting? A. I have no such recollection. I am sure I had no such instruction.

"Q. At that meeting state to the court what your position in regard to this resolution was, and what was the position of Mr. Alfred I. Du Pont and Mr. William Du Pont. A. I stated that I believed the plan of selling this stock to the employes was a very good one, to have them interested in the company. I advocated the purchase or the financing of the purchase of the stock by the company for the employes, and also advocated the paying of \$160 a share, the offered price. Mr. Alfred I. Du Pont took the opposite view, that \$160 a share was too much for the company to pay, and was too much to attract the employes, calling attention to the fact that \$160 a share was too low a rate of return, in view of the dividend of 8 per cent., which was then being paid. He expressed his opinion that the investment would not be attractive, either to the company or to the employes, at less than 6½ per cent. basis, and therefore he suggested \$125 a share as being a limit of the price to be paid. Mr. William Du Pont assented to that idea, as I remember, but he did not express himself quite as freely as Mr. Alfred I. Du Pont, but he assented to Mr. Alfred I. Du Pont's ideas.

"Q. Was this proposal of T. C. Du Pont confined to the Powder Company, or was it coupled with a proposal to the Atlas and other companies at the time? A. He made a similar proposal to the Atlas and Hercules Companies. These proposals are referred to in his letter of December 7th, or the one of the 14th.

"Q. Do you know whether or not his proposal was accepted and acted upon by each of those companies? A. I believe that they were."

In addition to the oral testimony, there is the written evidence of the minute itself, which reads as follows:

"Purchase of Common Stock Owned by Mr. T. C. Du Pont.

"Mr. P. S. Du Pont presented a letter from Mr. T. C. Du Pont, offering to sell 20,700 shares of common stock of this company at \$160 per share. After discussion, it was moved and carried (Mr. P. S. Du Pont voting in the negative) that Mr. P. S. Du Pont be instructed to advise Mr. L. L. Dunham, attorney for Mr. T. C. Du Pont, that we do not feel justified in paying more than \$125 per share for this stock."

Two members of the finance committee, Alfred and William, being adverse to the proposition, under the by-laws or rules of the Powder

Company, the subject-matter would not come before the board of directors for consideration or action otherwise than that the negative action of the finance committee would be reported to the board meeting. Such report was formulated December 24th, and was reported to the meeting of the board of directors held December 30th, and was as follows:

"Purchase of Common Stock.—An offer was received from Mr. T. C. Du Pont to sell 20,700 shares of the common stock of this company at \$160 per share. The committee expressed the feeling that we are not justified in paying more than \$125 per share for this stock, and asked Mr. P. S. Du Pont to take the matter up with Mr. T. C. Du Pont further."

It will be noticed, in passing, that the members of the finance committee, as recorded, instructed Pierre Du Pont to notify Dunham, the attorney of Coleman Du Pont, and its report to the board of directors requested Pierre to take up the matter further with Coleman Du Pont himself. The action of the board of directors on this report was embodied in the resolution in its minutes as follows:

"Resolved, that the action taken by the finance committee from November 19 to December 23, 1914, inclusive, be approved, ratified and confirmed."

At this point we stop to observe that, laying aside, for the present, the large mass of testimony as to subsequent events confirmatory or contradictory of the two parties, final analysis shows that the oral and written testimony, above quoted, summarize the basic questions on which the right of action of the Powder Company, attempted to be enforced in this bill, must, in final analysis, depend. Those questions may be summarized as follows:

First. Was Coleman's offer to sell to the Powder Company itself, or to the company for the benefit of certain persons in the Powder Company employ?

Second. Was the action of the finance committee an acceptance, rejection, or retention of Coleman's offer?

Third. Was the action of the board of directors, in approving, ratifying, and confirming the action of the finance committee, an acceptance, rejection, or retention of Coleman's offer?

That there was no acceptance of the offer is conceded by every one. The matter then resolves itself into the further question: Was there a rejection by the Powder Company of the offer? For, if there was, then the foundation on which this bill rests disappears. Or, lastly, if there was neither rejection nor acceptance, but an attempted retention of Coleman's offer by the Powder Company, for the purpose of carrying out the specific purpose of resale to certain employes of the Powder Company, were the circumstances surrounding such retention such as to constitute Pierre Du Pont an agent of the company to negotiate further in regard to such offer. That, as we have said, there was an acceptance of Coleman's offer no one contends. Was there a rejection? The defendant says there was; the plaintiffs say not. What, then, is the proof in that regard? That there is a variance in the proofs in regard to this phase in the case is apparent, but that this means there is a willful misrepresentation on either side we do not believe, and our closer study of the proof, the situation and viewpoint of the

different participants, satisfies us that such differences as do exist are attributable to such different viewpoints, the relation they bore to the matter, and the natural tendency of us all to remember and emphasize, particularly in the after-light of later events, the things, words, or events which confirm our present views.

Starting with the meeting of the finance committee on December 23d, we have the acknowledged situation of an offer of Coleman made to the company and a meeting of the finance committee called at the request of Alfred Du Pont to consider that offer. We find nothing whatever in the testimony to warrant the belief that either Pierre, William, or Alfred Du Pont went to that meeting with any other purpose than considering the offer of Coleman. It was an offer that would naturally have both concerned all of them as large stockholders and interested them as officers of the company. The situation was a grave one. Coleman was the largest stockholder of the company, he was on the eve of a grave surgical operation, he had been approached to sell his stock, he feared some of the leading men of the company might be drawn away from it, and he was anxious to hold them. That Pierre was anxious to accept Coleman's offer then, that he voted against the resolution that was finally offered, that when he purchased Coleman's stock in February, 1915, he carried out, in substance, the plan which Coleman, in December, wanted carried out, namely, the acquisition of large portions of Coleman's stock by leading men in the company, shows conclusively that, tested by Pierre's motives, wishes, and subsequent acts, we are justified in finding that, when Pierre entered that conference, when he voted against Alfred's motion, and when he testified that he was in favor of the acceptance of Coleman's offer, such was the fact.

Such being the case, what motive would Pierre have for withholding from Alfred and William the full terms of Coleman's letter? The only pertinent fact alleged to have been withheld was Coleman's belief that the stock he offered at \$160 he regarded as worth \$180 or better. Pierre had every reason to tell his associates of this fact. He was urging the acceptance of Coleman's offer at \$160. On the other hand, Alfred and William were contending \$125, or at most \$133, was its full value. Coleman's letter would, so far as Alfred and William had confidence in Coleman's judgment and the fairness of his offer as a benefit to the company, have strengthened Pierre's wish to accept the offer. What motive could Pierre have then had in suppressing Coleman's view? We can readily see how Coleman's view would, in point of fact, have no weight in deciding this matter, other than to show the utter hopelessness of Alfred and William bringing to the price of \$125 or \$133, the price they contended for stock, which Coleman was offering at \$160, and which he regarded as worth \$180, or even \$200, and whose then belief subsequent events more than justified. Indeed, it is quite evident that this estimate of Coleman's was a mere surmise, and that the data on which he formed that surmise was equally open to Coleman, to Alfred, to William and to Pierre, as officers of the company, all conversant with its present and prospective work, with its book values and its contracts. The data from which Coleman judg-

ed was open to them all, and as officers and business men they formed their own estimates, Alfred and William at \$125, Pierre at \$160, and Coleman at a higher figure.

It requires no minute reading between the lines to see the fundamental difference between Alfred's and William's views, who based their value of the stock on dividends then being paid, while Coleman looked to the future possibilities of contracts and expansion, which was known to Alfred and William and did not affect their estimate of present values. It is therefore quite apparent to us that Pierre was anxious to see Coleman's offer accepted, that the formal recording of his vote favoring such acceptance, that the absence of any object he could have had in suppressing Coleman's prediction of higher value, of the fact both the Atlas and Hercules Companies accepted Coleman's offers for their employés, made to them in the same letter, and there is no proof that any suppression of Coleman's letters was made when Hercules and Atlas took action; all of these considerations lead us to the conclusion that we find no motive for Pierre's withholding the letter, and when we couple this with the fact that Alfred himself made the motion which recited that "Mr. P. S. Du Pont presented a letter from Mr. T. C. Du Pont, offering to sell 20,700 shares of common stock of this company at \$160 per share," that he subsequently verified such minute by signing the same, and that the doings of the finance committee were reported to the directors in the statement that "an offer was received from Mr. T. C. Du Pont to sell 20,700 shares of the common stock of this company at \$160 per share," we are justified in feeling no concealment of these letters was made by Pierre.

Moreover, we must not overlook the fact that the proofs show that Coleman's offer in his letter of December 7th was only for 20,000 shares of stock, and this the offer which Pierre told Alfred about, and about which Alfred wrote in his letter to Pierre of December 14th. But, as we have seen, Pierre testified that at Coleman's request he (Pierre) prepared a list which showed that 20,700 shares would have to be provided to carry out his plan, and that on December 14th he received the letter from Coleman, changing his offer to 20,700 and requesting an early answer be given to Mr. Dunham, his secretary—two elements that were not embodied in the letter of December 7th. There is no proof by Alfred that Pierre laid this second letter before the meeting of the finance committee on December 23d, and as the motion made by Alfred at that meeting recites that Coleman's offer was 20,700 shares. and instructs Pierre to give notice, not to Coleman, but to Dunham, it would seem that the statement in the minutes that a letter was presented probably records what happened.

Moreover, the minutes, and the absence from the minutes of any copy of the letter, and the testimony that Pierre informed his colleagues on the committee of the fact of the offer, but did not produce the letters themselves, suggests that, if such was the course of the procedure, it points toward the conclusion that the action of the committee was intended to be a declination of the offer. For let us suppose these three experienced business men had before them an offer for \$3,200,000 of stock made by a sick man, and which they wished to retain and re-

port to their board; would they not naturally have placed that offer on their minutes? On the other hand, if they felt the offer was so far beyond the value of the stock as they testified they then thought, and if they were ready to decide on that price and decline Coleman's price of \$160, it was quite natural for them to omit calling for the letter and placing it on the minutes. That no one called for the letter, that no one suggested putting it on the minutes, is in line with the contention that the purpose the committee had in view, and what Alfred's motion had in view, was a then declination of Coleman's offer. All the circumstances called for prompt action. In his offer of December 14th Coleman said:

"I am willing to sell for the purpose 20,000 shares at \$160 per share ex dividend, payable in say 30 or 60 days."

Having named no time for acceptance, Coleman's offer was liable to withdrawal at any time. He requested a speedy action, saying he had other offers, and that—

"Inasmuch as important men associated with us have asked me to sell them some stock, I should like to have a prompt answer from the finance committee to enable me to reply."

The letter of Alfred to Pierre on December 14th, "I would suggest that no decision as to the actual price be given to the present owners until the finance committee has had ample time to think the matter over and discuss it together," and in his second letter of the same date, "I presume that this matter will be discussed at our next finance meeting on December 30th," indicate that he recognized the propriety of some answer being given, and that a decision should be made at the next meeting of the finance committee. And the fact that action was taken up at a meeting a week earlier than the expected meeting of December 30th, and that whatever action was then taken was on the motion of Alfred, tends to show that the decision which in his letter of December 14th he suggested should be postponed to await the discussion of price, which he suggested should be done by the finance committee, and such price discussion having taken place with no change of view on his part, it would seem reasonable that, when he offered the resolution as recorded in the minutes, or that resolution with the words "now" or "at the present time" added, he offered that with a view to reaching a decision. If the company wished to consider the offer of Coleman further, it was sufficient to take no action. If they wished to make a counter offer to Coleman, it was open to embody such counter offer in a motion. If they were not prepared to reach a decision on Coleman's offer, and wished to report the matter to the board and get their view, it was open to them to so move and act. But the finance committee neither took action by motion in a counter offer to Coleman, nor a reference to the board of directors, but the motion by express reference did direct a communication with Dunham. Why communicate with Dunham? Why did Alfred select Dunham as the person to be notified? There is no proof that he had power to continue Coleman's offer; there is no proof of authority in him to consider a counter offer.

Why, then, did Alfred's motion select and draw Dunham into the matter? The fact that he was thus selected by Alfred is evidenced by the motion, and we can understand and carry out the intention of the Powder Company, then evidenced by the acts of its own officers and embodied in its own minutes, on no other rational theory but that the finance committee by that motion intended to decide on Coleman's pending offer and communicate that decision to Dunham. That they actually intended to do something, that they meant that what they did do should be notified to Dunham, and that what they did was of such moment that Pierre Du Pont had his vote recorded against the action of the committee, and all facts tending to deepen the conviction that the recorded action of the Powder Company taken by its finance committee acting through a majority of its members evidenced a decision of the Powder Company not to then accept Coleman's offer. And the fact that they directed information of its action in reporting their action to Dunham and in their report to the board of directors "the committee expressed the feeling that we are not justified in paying more than \$125 per share for this stock, and asked Mr. P. S. Du Pont to take the matter up with Mr. T. C. Du Pont further," and their making no allusion to Dunham, deepen the belief that the finance committee, the board, and therefore the company, regarded Coleman's offer at \$160 of 20,700 shares of the common stock of the company for distribution among certain of its officers as declined when Dunham was notified, and that, if anything further was to be done, it was by negotiations direct with Coleman. Indeed the suggestion in the report of its action to the board, "that it had asked Mr. P. S. Du Pont to take the matter up with Mr. T. C. Du Pont further," read in connection with the report that "the committee expressed the feeling that we are not justified in paying more than \$125 per share for this stock," can only be explained on the theory that when he notified Dunham, he did all the finance committee wished him to do.

Moreover, that a decision that the company could not accept Coleman's offer was a reasonable one, and one to which a majority of the finance committee might fairly come, and which they were then prepared to decide, is quite apparent from the proofs. The finance committee was not considering a purchase of this stock for the Powder Company; it was to go to certain officers of the company as an attractive investment, which they were obtaining at an attractive price. It was the viewpoint of the officers who were to get this stock that had to be considered. The company could not gain by the transaction, but it might lose or tie up a lot of its funds if the officers would not invest in the stock after the company took it. William Du Pont says he agreed with Alfred's view, and there was no doubt as to Alfred's unvarying position all through, that this purchase was for the benefit of the officers and the price would not attract them. As we have seen, Coleman's offer was made in a letter to Pierre dated December 7th. Evidently the price had been discussed between Alfred and Pierre, and the matter had been further considered by the former, and on December 14th he wrote Pierre:

"After giving the question of purchasing a certain large block of Du Pont common further consideration, I believe that 160, the price you talked of, is too high. 150 would be purchasing it on a 6 per cent. basis, and 160 a 5 per cent. This is too low a rate for the company to invest its spare funds, and furthermore, if it were offered to any of our employes, it would not be sufficiently attractive at that price. I see no objection to the company's purchasing this stock, but the question of price is one of grave importance, owing to the large investment."

A week later, in writing under date of December 21st, to correct the price of 150 and reduce it to 133, to put that price at 6 per cent., Alfred adds, in his letter already quoted, to his former position that the officers might not take the stock, and that the stockholders of the company might object to the acquisition of the stock at 133 saying:

"I doubt whether the investment of the company's surplus earnings by the finance committee on a basis even as high as 6 per cent. could be justified. In other words, if the company is unable to invest its surplus earnings at a rate better than the stockholders might themselves, they might contend that these earnings should be distributed in the form of a dividend. I presume that this matter will be discussed at our next finance meeting, on December 30th."

The views stated above Alfred still held and then expressed when the finance committee meeting was held. The proof in that regard is:

"A. I stated that the purchase of the stock for distribution among employes was in principle good, but the investment was so large that the finance committee, in my opinion, could not justify the investment of so large a sum unless on a 6 or 6½ per cent. basis, and inasmuch as the Du Pont common stock had been paying for some time but 8 per cent., and that at that particular time there was no immediate prospect of its being increased, that I suggested that the price was too high, \$160 a share, and suggested the price of \$125 a share as being more in conservation with the company's interests.

"Q. What did Mr. William Du Pont say about the advisability of the purchase? A. He agreed with me in that thought.

"Q. What did Mr. P. S. Du Pont say as to the advisability of making the purchase? A. He expressed a belief or opinion that the price of \$160 a share was a proper price for the company to pay."

It will thus be seen that when the meeting came off all three men still had their unchanged views. Pierre favored acceptance at \$160; Alfred and William stood on \$125, asserting their belief the dividends of 8 per cent. then paid by the company would not be increased. With these decided views held by experienced business men, all of whom were its leading executive officers and conversant with its affairs, it is quite evident that they were all in a position to answer Coleman's request that his offer at \$160 be promptly disposed of, and that the wide divergence of estimate of value between Alfred's and William's estimate of \$125, which Coleman as well as Pierre regarded as worth \$160, made such a wide split as showed all the parties that the nonacceptance of Coleman's offer was a foregone conclusion, since Alfred and William were in a majority on the finance committee. When, therefore, the committee reported its action to the board, its suggestion that it had "asked Mr. P. S. Du Pont to take the matter up with Mr. T. C. Du Pont further" was rather a courteous way of declining what Coleman regarded as a generous offer, tending to deepen the interest of its officers in the company; and, indeed, that no trust or

agency was then conferred on Pierre by the finance committee to negotiate further with Coleman in reference to his offer of 20,700 shares of common stock at \$160 is indicated, not only by a lack of corporate action at that time expressed in what was recorded, but assuming, for present purposes, that to it are added the words which Alfred says were omitted "at this time," or "at the present time," their addition does not lessen the general effect of the resolution. This resolution, reduced to writing, evidenced the action of the Powder Company by its executive committee, and it further embodied the instructions which Pierre Du Pont was to convey to Dunham, the attorney of Coleman.

There can be no question but that if, in pursuance of the instructions contained in that resolution, Pierre Du Pont or any other officer of the company had sent a copy of this resolution to Dunham, that such resolution would, in law and fact, have constituted a decision of the Powder Company declining Coleman's offer, and that the company could not, therefore, maintain any action based on the theory that, in law or equity the company itself, or the officers of the company for whom it was intended, had any claim or right to those 20,700 shares of Coleman's stock. Indeed, we do not understand that it is now contended that this resolution, standing alone, evidenced a retention of Coleman's offer for further consideration; but it is alleged that what was talked of at the meeting, and what was then said by Alfred Du Pont to Pierre, made the latter an agent of the company to continue negotiations for this stock with Coleman.

Turning to the proofs for the evidence of such agency, we find a sharp conflict of proof. On the one hand, Pierre as will appear from his testimony quoted at length above, says he had no such agency. In that respect he was asked:

"Q. Mr. Alfred I. Du Pont says that at that meeting, after the adoption of this resolution, he said to you, 'In reporting this, try and have T. C. Du Pont keep it open for a month or two.' Was anything of that kind said to you at that meeting? A. I have no such recollection. I am sure I had no such instructions."

Here, then, we are face to face with the crux of this part of the case. The finance committee had taken action on Coleman's offer. That action was embodied in its resolution; its action was to be communicated to Coleman's agent, Dunham, either as it was recorded, or in the wording contended for by the plaintiffs with "at this time," or "at the present time," added. If such resolution was modified or affected by any further or other action of the company, if any agency on behalf of the company was created, how was such agency created, how was it evidenced, and what were its terms? We say this question of Pierre's agency is basic, for it is manifest that, if he was not then constituted the agent of the company for some specified purpose in the premises, this case has no foundation in fact.

We turn, then, to the question: Was Pierre then made the agent of the company for further work, and, if so, what are the terms of the agency, and what were the duties imposed by the Powder Company? We begin this inquiry by noting that the subject-matter before this committee was one of large moment; it involved in money over

\$3,000,000; it concerned the policy of the company in deepening the interest of important officers of the organization. The meeting was convened for the purpose of reaching some conclusion, and it actually did reach some conclusion, which is evidenced by its written resolution. Such being the case, we are justified in expecting that, if the three officers then present thought anything further should be done by the company in regard to Coleman's offer, and that this company should have an agent to carry out such purpose, both the fact of the agency and the work intrusted to the agent would, in a matter of such moment, be evidenced by minute or resolution.

Turning to the minutes of the finance committee, we find, as we have seen, a total, and therefore a suggestive, silence on the subject of agency. These minutes have been subjected to the criticism incident to their importance as the storm center around which controversy lies. It has been urged that the words "at this time," or "at the agency time," be added; but even so the significant fact remains that in all these criticisms there is no suggestion that the minutes fail to record any action of the meeting that was taken on the subject of agency. And in that connection it will be noted that in all of the subsequent meetings, conversations, and contentions which took place in the two months following, and indeed until this bill was filed, there was no assertion on the part of any one that the Powder Company had created Pierre its agent at this meeting. That suggestion first appeared after the bill was filed. Let us turn, then, to the sequence of events, and from them ascertain whether the fact of such agency was then evidenced by the acts or declarations of any of the three members of the finance committee who alone knew of such agency, if it was then created. But, before taking up such examination, let us first see what Philip F. Du Pont, when he filed the bill, and what Alfred Du Pont and William Du Pont said on the subject of agency, when they gave their testimony.

An examination of the bill shows no assertion that the Powder Company constituted Pierre Du Pont its agent at this meeting of its finance committee to negotiate for this 20,700 shares of stock, nor is recovery sought, as we understand it, on the ground of breach of such agency. As we understand the bill, recovery is sought on the broad ground that Pierre Du Pont by virtue of his relation as an officer of the company and his dominating influence in its affairs and his alleged misuse of such position and relation—not, be it observed, by breach of any agency created at this finance committee meeting—acquired Coleman's stock. Moreover, the bill seeks to charge Pierre Du Pont, not for the 20,700 shares of common stock, which were alone the subject of the finance committee's meeting, and which Coleman was offering for the benefit of certain specified employes, but for 13,899 shares of preferred and 63,214 shares of common stock, the absolute ownership of which the company is alleged to be entitled to exercise without liability to offer them to employes. Indeed, the averments of the bill, which we quote, do not base a right of recovery on Pierre Du Pont being constituted the agent of the Powder Company at the meeting of the finance committee, in reference to the 20,700 shares of common stock which

were to be sold to the company for its employés, but such alleged agency is urged simply as an element to affect and restrict the power of Pierre as an officer of the company generally and prevent him from buying any stock of Coleman's whatever, preferred or common. Turning to the bill, we find the sole statement in reference to the meeting of the finance committee of December 23d:

That "it was thought that the price, to wit, \$160 per share, was too high, and the hope was felt by the members of the finance committee that the said Pierre Du Pont might secure a better proposition for the purchase of the stock from T. Coleman Du Pont."

It will thus be seen that the bill did not allege the Powder Company had constituted Pierre Du Pont its agent, at the meeting of the finance committee, but that the extent of its alleged action was a hope by the members of the committee that Pierre might secure a better proposition than the one the committee had formally acted upon by resolution. And it would seem that this is as far as the testimony of Alfred goes. In that regard he says:

"Q. Did you have any conversation with Mr. P. S. Du Pont relative to the question of what he should say to Mr. Dunham when he reported the action of the finance committee? A. At that meeting?

"Q. There or thereafter. A. I suggested, after the resolution had been passed, that in conveying this information to Mr. Dunham that he tell Mr. Dunham to suggest to Mr. T. C. Du Pont that, if he could keep the offer open a month or two longer, we might be able to increase the price offered for the stock."

From the above it will be seen that no committee action was taken as to further negotiation, and that what was said by Alfred was a mere suggestion made by Alfred to Pierre that he (Pierre) tell Dunham to suggest to Coleman that, if he could keep the offer open for a month or two, the Powder Company might be able to increase the \$125, it impliedly offered for the stock by Alfred's resolution. Whatever was said by Alfred is testified by him alone; Pierre testified he had no such instruction, and in William's account of the meeting he makes no allusion to having heard the suggestion Alfred made. Now, in view of the vague, indefinite, and conditional request testified to by Alfred alone, to the fact that William, the second member of the committee, does not mention any such suggestion in his testimony, and Pierre denies it, we are clear that any talk then had was not of a character that made Pierre the agent of the Powder Company, or William to regard it as such; and that no agency was then created by the company is apparent, as we shall see when shortly thereafter a situation arose when, if any agency had existed, Alfred would have called attention to the fact of such agency, but did not in fact do so.

As we have seen from his testimony, Alfred regarded the resolution as a counter offer of the Powder Company to Coleman of \$125 per share for his stock, when he said, "if he could keep the offer open a month or two longer, *we might be able to increase the price offered for the stock.*" And William Du Pont testified that, when Alfred and Pierre were at a later day discussing the previous action of the finance

committee, Alfred said the resolution had been a counter offer. The testimony of William in that regard is:

"Q. After that meeting of the finance committee, when was the first time that you heard any discussion or talk about the proposition of Mr. T. Coleman Du Pont? A. In February, the meeting held in February.

"Q. About what time in February, can you tell us? A. I should think it was the second Wednesday in February.

"Q. That would be about the 10th? A. I suppose so. Meetings of the finance committee were held on the second Wednesday of each month.

"Q. Who were present at that meeting of the finance committee in February that you speak of? A. Mr. P. S. Du Pont, Mr. Alfred I. Du Pont, and myself.

"Q. What reference was made to the offer of Mr. T. Coleman Du Pont at that time? A. Mr. Alfred I. Du Pont asked how the negotiations were coming on.

"Q. Whom did he ask? A. Mr. Pierre S. Du Pont.

"Q. What did he reply? A. As near as I recall, he replied that they were off.

"Q. Did Mr. Alfred I. Du Pont say anything to him about it further? A. He asked why they were off, and Mr. P. S. Du Pont replied, I think, through the action of the finance committee. I am not quite clear about what the words used were.

"Q. Was that the substance of it? A. That was the substance of it; yes.

"Q. Then what did Mr. Alfred Du Pont say, if anything? A. He said that was not his recollection. He asked me if it was my recollection. I said, 'No, it was not supposed to have been final.'

"Q. Did Mr. Alfred Du Pont tell him what he thought the finance committee's action was? A. Yes.

"Q. What did he tell him, if you recall, either in substance or words? A. I could not recall the words. He told him that the offer made before had not been a declination in any sense; simply *it had been a counter offer.*"

It will thus be seen that Alfred regarded the resolution as constituting a counter offer to Coleman, and that such offer kept Coleman's offer open and undisposed of. On the other hand, Pierre thought Coleman's offer had been rejected by the passage of Alfred's resolution by the finance committee on December 23d. These opposite positions of the two men, Alfred and Pierre, are very important, and the date, February 10th, is of even greater significance. Therefore, at the meeting of the finance committee on February 10th, William and Alfred, as officers of the company, were brought face to face with the fact that Pierre, whether rightly or wrongly, had construed the resolution as a refusal of Coleman's offer, and had, in pursuance thereof, called the matter off. Touching this point, Alfred Du Pont's testimony is:

"Q. On February 10th where and at what time did you have a conversation with Mr. P. S. Du Pont on the subject of this Coleman Du Pont stock? A. About 3 o'clock in the afternoon of February 10th, in the room where the finance committee was accustomed to meet.

"Q. That was in the Du Pont Building? A. Yes, sir.

"Q. Had there been a meeting of the finance committee? A. There had been a meeting of the finance committee, as I remember.

"Q. Who were present? A. Mr. P. S. Du Pont, Mr. William Du Pont, and myself.

"Q. This conversation was about 3 o'clock? A. About 3 o'clock; yes.

"Q. Was it after the meeting of the finance committee, or before? A. After the regular business had been discussed.

"Q. What took place as to what Mr. P. S. Du Pont said and what you said? A. As I was about to leave the room, I remarked to Mr. P. S. Du Pont, 'How

are the negotiations for the Coleman Du Pont stock progressing? He remarked to me, 'Why, they are all off.' I said, 'Since when?' I had not been informed that they had been called off. He said, 'They were called off shortly after you and Mr. William Du Pont turned down his offer in December.' I said, 'But the offer was not turned down.' I said, 'There was merely a difference of opinion as to price, and it was my understanding that you were to convey to T. C. Du Pont, through Mr. Dunham, the information of the fact that we believe the price that he demanded for the stock, of \$160 a share, to be excessive, and we suggested \$125 a share as a proper price for the stock at that time.' Mr. P. S. Du Pont said, 'That was not my understanding. My understanding was that you turned down Mr. T. C. Du Pont's offer definitely.' I appealed to Mr. William Du Pont, who was seated across the table, within a few feet of me, and I asked him whether his understanding was consistent with my own. He said it was. I then said to Mr. P. S. Du Pont, 'There seems to have been some misunderstanding as to the position taken by Mr. William Du Pont and myself as to the meeting in December, and I desire to have this matter cleared up.' I said, 'You have unintentionally misinformed Mr. T. C. Du Pont, and I suggest that Mr. William Du Pont and I write to Mr. T. C. Du Pont, setting forth our views.' Mr. P. S. Du Pont agreed that that would be an excellent course to pursue. Thereupon I asked Mr. P. S. Du Pont if he would kindly send me such correspondence as had passed between himself and Mr. Dunham or Mr. T. C. Du Pont in reference to the action of the finance committee on the date of December 23, 1914, so that I might be fully informed as to precisely what he said and before I, in turn, placed my view before Mr. T. C. Du Pont. He kindly said that he would do so. I also asked him if he would please send copies to Mr. William Du Pont, so that, in the event of his desiring to write to Mr. T. C. Du Pont, he would be fully informed and could do so. That was all that took place, as I remember, at that meeting.

"Q. On the 10th of February, 1915? A. 1915."

The testimony of William was that, when Alfred asked Pierre how the negotiations were coming on, the latter replied they were off "through the action of the finance committee," and that Alfred said in reply "that the offer made before had not been a declination in any sense, simply it had been a counter offer."

It will thus appear that at this meeting of the finance committee on February 10th the Powder Company was brought face to face with the information that the offer of Coleman had been called off, and that Pierre had called it off because of the resolution. Neither Alfred nor William then took the position that Pierre had been constituted an agent to continue the negotiations, but that the resolution was a counter offer, for if such agency had been created, and Pierre had failed to execute it, that meeting of the executive committee was the time to have the agency reasserted, or such agency assumed by some other member of the committee. But instead of treating the matter as one of agency growing out of Alfred's suggestion, all three men stood on the effect of Alfred's resolution; Pierre saying it was a declination, and Alfred and William that it was a counter offer.

But what followed is of even more significance. We have seen that neither William nor Alfred took the position that the latter's suggestion had created an agency. But the matter did not end there. As testified to by Alfred Du Pont, he then said to Pierre Du Pont:

"There seems to have been some misunderstanding as to the position taken by Mr. William Du Pont and myself as to the meeting in December, and I desire to have this matter cleared up. You have unintentionally misinformed

Mr. T. C. Du Pont, and I suggest that Mr. William Du Pont and I write to Mr. T. C. Du Pont, setting forth our views."

From this it will be quite evident that, if William or Alfred subsequently wrote such letters, we have a contemporaneous written record of what position the company then took acting through its officers. And this action becomes all the more important, because there is no evidence whatever that at that date Pierre, as we shall see by the correspondence between Coleman and Pierre—that neither of them had at that time, February 10th, any other thought or purpose in view than of Coleman selling the 20,700 shares of stock, and the company buying it for distribution among its officers. If, therefore, William or Alfred wanted to continue negotiations open with Coleman, the opportunity was open to them to do what they now knew Pierre had not done. In point of fact, William, who left Wilmington shortly after the meeting, did not write and did nothing; but Alfred did write Coleman, but his letter, dated February 16th, discloses three things:

First. His letter makes no mention or assertion of the Powder Company's having made Pierre its agent to continue negotiations at the finance committee meeting on December 23d.

Second. With information before him that Pierre had declined Coleman's offer, no suggestion is made that he had no authority to do so.

Third. The letter assumes a decision had been made at the meeting in reference to the offer, and that the purpose of the writer was to explain to Coleman why he had advocated "the finance committee's decision in the matter." The letter is as follows:

"Dear Sir: At a meeting of the finance committee, held some time in December, Mr. P. S. Du Pont brought to the attention of the committee your wish to dispose of 20,000 shares of common stock of the Powder Company at \$160 per share, with the suggestion that same be redistributed upon some liberal basis among the more important of the company's employés. The committee were in accord with your general idea, viz. the purchase from you of 20,000 shares of stock, and I believe were also a unit on the point of a redistribution of at least a portion of this stock to the company's employés, upon some plan to be subsequently defined. The one point, on which there seemed to be a difference of opinion, was the question of price. The position which I took on this point, and which I believe was similar to the one maintained by Mr. William Du Pont, was that in purchasing this stock at the price suggested by you, which would involve the expenditure of \$3,200,000 of the stockholders' funds, an investment of this size by the finance committee could not be defended on a return of less than approximately 6½ per cent., or at least better than 6 per cent., and for this reason the price of \$125, or an investment on a basis of, roughly, 6½ per cent., was suggested. It is my opinion that this principle should be the guiding one in any investment of the company's surplus funds, in lieu of a distribution of same.

"Again, in offering this stock for subscription to our employés, it should be made on an attractive basis, which, in my opinion, should not be less than 6½ per cent., and, as the company cannot afford to lose on a transaction of this kind, it was manifestly impossible for it to purchase stock at one figure and offer it to its employés at a lower one.

"I believe it is an excellent time to make an offer of this character to the employés at as low a figure as is consistent with the company's interests, in order that the employés may benefit by any increment in value, which the present conditions would seem to indicate as quite probable, and I furthermore believe that, if the company can purchase this stock from any outside

source, it would be better to acquire it in this manner, rather than issue its treasury stock for the above-mentioned purpose.

"I am setting my position before you clearly, for the reason that I have lately ascertained from Mr. P. S. Du Pont that he did not understand my position as I had intended to present it, and for this reason I feared that he had unintentionally conveyed to you a wrong impression as to my reasons for advocating the finance committee's decision in the matter."

From the letter, and the testimony of the parties as to what took place at the meeting of February 10th, we are justified in concluding that all that time Pierre insisted the matter was closed by the resolution, and Alfred in his letter assumed a decision had been made at the meeting of December 10th, and his only concern was that his position and reasons "for advocating the finance committee's decision in the matter" should be understood by Coleman. When we consider that this letter was written by one member of the finance committee to another, that there was no reason why, if Alfred felt Coleman's offer had not been decided upon, he should not have said the company would take it up or wished to consider it further, or if Pierre had been made an agent to negotiate further why Alfred should not have so told Coleman. The opportunity and indeed the duty of Alfred as an officer of the company to then and there state and urge his company's rights, if he then considered it had any such rights, was imperative; and the fact that Alfred did not on February 10th, when the occasion challenged such action, assert the agency of Pierre, and if the latter denied it, or declined to act as such, himself, as an officer of the company and a member of the executive committee, call the same to the attention of Coleman, when, as vice president, he wrote him on February 16th, are all facts and circumstances which strongly indicate that on February 10, 1915, all three members of the finance committee, for different reasons and from different views, all acted on the status that the offer of Coleman of the 20,700 shares was declined.

Such being the status of the Powder Company and Coleman in relation to such offer, as evidenced by the several acts or omissions of the three members of the finance committee on February 10th, let us inquire what was the status of the stock between Pierre and Coleman.

Taking up the testimony from that angle, let us view the situation from Pierre's and Coleman's standpoint. As we have said, in the fall of 1914 Coleman Du Pont was the largest stockholder of the Powder Company and had been and was its head. He was confronted by a serious personal situation, which might end his life in the operation in the hospital to which he was going. He had been solicited to sell his stock, by men prominent in the company. It has been the policy of the company for many years to purchase its own stock in order to enable its employes to become owners of such stock, and it is quite plain to read between the lines and see that Coleman, in addition to following out this policy of the company, felt that the placing of this large block of his stock in the hands of the administrative officers of the company would counteract the offers he foresaw would, in the great activities of the war, be made to them, not only to leave the company, but possibly to embark in the powder business themselves. It is quite evident from

the correspondence, also, that Coleman was deeply interested in his plan of stock distribution to the employés. Indeed, in the nature of things the stability and value of Coleman's remaining stock would be increased for his estate if his operation terminated fatally. From Pierre's standpoint and the proofs, it is equally clear that he, too, was anxious about the status of Coleman's stock, but for a totally different reason. His attention had been sharply challenged by the report—the proof as to which we quote later—that anti-Ally interests might buy from a stockholder said to be in financial difficulties large blocks of the stock. If the stock was bought by these anti-Ally interests, future contracts could not be gotten from the Allies. Pierre looked, therefore, with great favor on Coleman's wish to dispose of this large holding for distribution among the leading members of the company. It requires no reading between the lines to see that, whether justly or not, the fact was that Coleman felt that for some reason Alfred Du Pont had thwarted his plans and might thwart this one. And it is equally clear that a warm intimacy existed between Coleman and Pierre, that he confided his plan to Pierre, and before he made any offer to the Powder Company, Pierre, doubtless at Coleman's suggestion, had ascertained in advance of Coleman's offer that Alfred favored it. That Coleman felt, as noted, Alfred's opposition, he frankly states in a letter to Pierre of January 6, 1915:

"I am sorry that Alfred has taken the position you indicate. * * * I, of course, know Alfred had some ulterior motive in mind, as he has tried to do what he could against me at every opportunity; but this we both know and always take it into consideration."

And that Pierre had taken the precaution to ascertain Alfred's attitude toward the offer in advance is shown by Pierre's letter to Coleman of January 4, 1915:

"I have been intending to write you about the reception of your proposition by the finance committee. Unfortunately, Alfred, who had approved the plan before you went away, got somewhat crosswise in the meeting, and I think it wise to let the matter rest for the moment; preferably until I can see you, before taking any other step."

Assuming, however, that the wish expressed by Alfred at the finance committee meeting of December 23d, to wit, "I suggested, after the resolution had been passed, in conveying this information to suggest to Mr. T. C. Du Pont, that if he should keep the offer open a month or so longer, we might be able to increase the price for the stock," made Pierre an agent to get an extension of Coleman's offer, let us turn to the proofs and see whether Pierre made such effort.

Following the meeting of the finance committee, Pierre wrote Coleman on January 4, 1915, informing him of the outcome of his offer:

"Dear Coleman: I have been intending to write you about the reception of your proposition by the finance committee. Unfortunately, Alfred, who had approved the plan before you went away, got somewhat crosswise in the meeting, and I think it wise to let the matter rest for the moment, preferably until I can see you, before taking any other step. I am sorry and provoked that the proposition did not go through, for I feel that your offer was a generous one, and should have had more considerate treatment; but, like many other things, the final result cannot be obtained quickly. The Hercules plan was accepted in very good spirit. It is held up temporarily, because their attor-

neys have told them their company cannot loan the money to the directors. Technically, this may be correct; but I do not think they should hesitate to put the thing through, nor do I think they will. The Atlas people, acting under the same laws (of Delaware), have accepted the proposition and I understand from Lou Dunham today have taken over the stock. Undoubtedly the Hercules will come to the same conclusion."

We here note that this was the letter which Pierre did not turn over to Alfred in compliance with his request on February 10th, and which Pierre says he did not then give him, because he regarded it as a personal one. It is quite evident the letter, while it did report the reception of Coleman's offer and to that extent was a business letter, was one which Pierre rightly termed personal, and one which he naturally would not care to hand over to Alfred on account of the terms he used in reporting that Alfred had changed his attitude toward the offer. We are referred to nothing in the letter which would have in any way affected anything which Alfred wrote Coleman in his letter of February 16th quoted above, and a reading of this personal letter would certainly not have been conducive to the spirit of good will which the welfare of the company demanded should exist between its officials. The letter contains nothing pertinent to the case which in any aspect Pierre had any interest in concealing, and it is quite evident that in any aspect the withholding of it from Alfred was a matter of judgment, and not of violation of duty. On the other hand, and as evidencing the then state of mind of Pierre toward Coleman's offer, it is significant that, although Pierre regarded the offer as not accepted, it is quite evident that his effort was to keep Coleman from being rebuffed, and induce Coleman to carry the offer along. He tells him his Hercules plan was accepted in good spirit, that he thinks it will go through, and that his Atlas plan was accepted. And his suggestion "I think it wise to let the matter rest for the moment, preferably until I can see you, before taking any other step," was certainly along the line of encouraging Coleman to go ahead with this plan.

On receipt of Pierre's letter, Coleman did not withdraw his offer, but left it still open, writing Pierre on January 6, 1915:

"Perhaps it would be well for me to withdraw the proposition; if you think so, do it."

If Pierre had any ulterior purpose, here was his opportunity to withdraw the offer, for Coleman authorized him to do so. But the letter of Pierre to Coleman in reply, January 9, 1915, shows Pierre urging Coleman to follow up his offer. We quote what Pierre wrote:

"I feel you must be much disappointed in the question of the stock subscription. I used my best judgment in not trying to force the situation. Possibly I could have put it through by insisting, but at great risk of having the other side pitted against me; that might have complicated the whole plan for good and all. As it remains now, I feel that the proposition is open for reconsideration at your option, of course. Willie is away at present, but will be back in a couple of weeks, at which time I will take up the work again, unless I have word from you to the contrary. My judgment is that the deal will go through this time."

That Pierre's letter had the effect of encouraging Coleman to allow his offer to stand is shown by Coleman's reply, January 11th:

"As to stock subscription, I believed it was a good thing for the company when I made the offer and made a price that I thought low; but I concede that I have always placed a higher value on the stock than others. I did it for the good of the new committee, but am not anxious from a selfish standpoint to carry it out, except for the good of the company, and that is more important than personal reasons. If you feel it a good thing for the company, talk to Willie and do it; if not, don't. It may make some diff. in my Equitable finances, but I think not; that is, I think I can make some arrangement when I get back that I canceled before leaving, so use your own judgment."

From the above it is evident, first that Coleman, by his designation of William Du Pont as the one for Pierre to talk to, still felt Alfred would oppose his plan; second, that Coleman felt his plan was an unselfish one, and his offer below the real value of the stock; and lastly, that he had some financial calls on him which he had evidently expected to meet, from the company's acceptance of his offer. Indeed, that Coleman had counted on his offer being accepted by the company, and that he had made some changes in his financial arrangements which the non-acceptance of his offer by the Powder Company led him to change, is indicated in his letter to Pierre of January 6th, when he says:

"After talking to you, I told some New York bankers that I would not need the money that I had arranged to get from them, as I had made a more permanent arrangement, but can, I feel sure, fix this when I get back. Perhaps it would be well for me to withdraw the proposition; if you think so, do it."

The suggestion of Coleman, that his offer be taken up by Pierre, Pierre promised to carry out, and he also suggested to Coleman that if the effort to get William's consent failed, and consequently the company would not take the stock for the men, that an offer be made direct to the men. Of the effort to be made with William and the offer direct to the men, Pierre on January 14th wrote Coleman as follows:

"As to the stock offer: In Willie's absence I shall do nothing. He will be here in a week, and I will try to get some action. If this is not possible, it will mean that the question of value of the stock was not uppermost in their minds. If not *finally accepted*, would you approve making an offer direct to the men? I should think that a financing suitable to you might be arranged. I am quite sure that they would like to take the stock, but do not feel in position to say anything while you are negotiating with the company. No one but the executive committee and directors know of the offer as far as I know. The board, of course, knew it through the minutes of the finance committee."

From the above it will be seen that on January 15th Pierre regarded Coleman as being willing that negotiations go on, that William was away, that Pierre would take it up on his return, and that Pierre was not only anxious to have Coleman's plan carried out of selling the stock to the men through the agency of the Powder Company, but that he then suggested to Coleman that, if the company did not accept his offer, Coleman's plan might still be affected by dealing direct with the men. From this correspondence and from the testimony, we are of opinion that up to January 15, 1915, when this letter was written, Pierre Du Pont was most earnest in his efforts and sincere in his purpose to carry out Coleman's plan and have the Powder Company purchase Coleman's offered stock for distribution among the men; that in that regard he

had done his whole duty as an officer of the company, if any agency and duty to continue negotiations with Coleman were placed upon him at the finance committee meeting of December 23d.

But on the day previous, January 14, 1915, Coleman, of his motion, in his letter of that date, had taken matters in his own hands and withdrawn his offer. In doing so he recognized that Pierre might have carried out his suggestion of talking to William Du Pont and committed him (Coleman). He therefore announced himself ready to stand by what Pierre had done, but, subject to such commitment, Coleman withdrew his offer. His letter was:

"Dear Pierre: Thinking over the stock offer matter; I still think it an advantage to the company, but in view of Alfred's position I think it best to withdraw it, if the finance committee has not accepted my proposition. When I get home, we can talk it over, and, if best, I can renew it, but seems very unbusinesslike to leave it in its present condition. Of course, if you have talked to Willie, or are in any way committed, that settled it. I will carry out any statement you have made; on the other hand, if you have not made any, my judgment is to withdraw it. Again, if you have any good reason for not doing so, let me know your position."

Subsequent to writing this letter, Coleman received Pierre's letter of the 14th, which we have quoted above, and thereupon Coleman confirmed the withdrawal of his offer by a telegram of January 17th to Pierre:

"Letter of fourteen received if you are not committed withdraw my offer will write."

With this letter and telegram, it will thus be seen that on January 14, 1915, Coleman Du Pont, of his motion, withdrew his offer of 20,700 shares of common stock, and with such action on his part any and all foundation for any claim on the part of the Powder Company to an acquisition of this stock, and of course the obligation of every agent or officer of that company to take any steps looking toward the acquisition of said stock, ended. The facts now known and recited above make that very clear, and we have no doubt that, had the whole correspondence between Pierre and Coleman been made known by Pierre to William Du Pont and Alfred Du Pont when the finance committee met on February 10th, we venture the opinion that possibly the present controversy would not have arisen. We do not say there was any legal duty on Pierre Du Pont to state all these facts. We do not say that he violated any duty in not stating them, but we have no hesitation in saying that a spirit of entire frankness on all sides, and especially between Pierre and Alfred, might have saved a large part of these troubles.

Starting, then, with January 14, 1915, when Coleman withdrew his offer, and when no further duty in regard to Coleman's offer of December 7, 1914, rested on any member of the executive committee in regard to the 20,700 shares of Coleman's stock embraced in that offer, we note that, so far as the syndicate members are concerned, we have reached the conclusion that we find no responsibility on the part of Pierre Du Pont in connection with the offer by Coleman of 20,700 shares of stock for distribution among employes, which after the offer was withdrawn by Coleman incapacitated Pierre or the syndicate mem

bers from thereafter dealing with Coleman for the purchase by themselves of any or all of his stock in the company, if in such subsequent transactions they did not misuse their positions as officers, or misuse the resources or rights of the company in making such subsequent dealings.

Turning, then, to the sequence of events following the withdrawal by Coleman on January 14th of his offer of 20,700 shares, it appears that some correspondence followed which is of no legal bearing on the case, but which shows that Pierre still had in mind the possibility or desirability of Coleman carrying out his original plan. Thus on January 18th Pierre wrote Coleman that he had not seen William Du Pont and had not committed Coleman in any way and expressed his disappointment. The letter reads:

"My dear Coleman: Yours of the 15th has just come to hand. I have not talked with Willie alone, as he has been absent a couple of weeks and will not return for another week. However, as he supported Alfred in the stock proposal, I feel that I have obtained his opinion; but I had hoped that they would both swing around at our next meeting. There is, of course, no commitment: but I think there will be some disappointment, as I believe that the members of the executive committee were anxious to take the stock. Of course, no others than the executive committee and the board know of the offer; but I am sure that all the men would like to make the subscription, if the offer was made to them. I will, of course, do nothing further until I am authorized by you."

Coleman's letter of January 19th to Pierre:

"Inasmuch as Christmas and January 1st are past, I don't think two or three more months will make any difference, and in my mind it would be such a good thing for the young men to have a stock interest that I am sure we can arrange for them to take it without it being purchased by the company, through one of the New York banks, probably the Bankers' Trust Company; but I believe, if this is left until I get home, we can work it out better."

This shows that Coleman also still hoped that some arrangement to sell the stock to the men should be made, and on January 20th he follows it up by writing Pierre:

"Yours 18th received this a. m., and I am sure we can work out some plan on my return that will accomplish what we want. I cannot understand why the other two should not have taken advantage of the offer and let the company help the men on whom the success must depend."

On January 25th Pierre writes Coleman of a plan Alfred had suggested, but urged Coleman to go on with his own plan also. In that regard Pierre writes:

"I am sure that some plan of advantage can be worked out when we next meet. A couple of days ago Alfred suggested to me that the finance committee take up the question of selling treasury stock to our important men. What would you think of such a plan? I do not know what he had in mind, but suppose something similar to your offer, excepting at a lower price. I do not think it need interfere with your arrangement, if you desire to put it through also."

In the meanwhile, the common stock which Coleman had offered at \$160, as the proofs show, was on January 20th selling at \$186, and on January 26th it had reached \$190. This meant that Coleman's offer at

\$160 was then over \$600,000 under the market price. From that time no further correspondence was had in reference to carrying out Coleman's plan, which silence was doubtless due to the fact that no one would expect him to renew his offer to the company under such conditions.

But on February 17th Coleman, of his own initiative, took a radical step on a totally different line. Instead of buying to sell to the company for the benefit of its employes, Coleman determined to sell 40,000 shares of his common stock outright at \$200 per share, and following this offered to sell his entire holdings. How and to whom Coleman announced his purpose is testified to by Pierre Du Pont as follows:

"Q. Afterward you and your associates purchased the entire holdings of T. Coleman Du Pont? A. Yes.

"Q. Tell the court how that came about, what the first thing was that called it to your attention, whom you saw, and what took place. A. My attention was called to the stock by Mr. L. L. Dunham, T. C. Du Pont's secretary.

"Q. His representative? A. Yes. He called on me on February 16th or 17th—I think the 17th—and stated to me that he had authority to sell 20,000 to 40,000 shares of T. C. Du Pont's stock; that Mr. T. C. Du Pont had determined to sell that stock, and that it would be sold. I asked him whether he had authority to sell the stock then and there. He said he had authority to sell up to 40,000 shares at \$200 per share, but that he would not make a sale of such a large amount without conferring with Mr. T. C. Du Pont, although he did have the authority.

"Q. What else was said, if anything? A. I asked him whether, if T. C. Du Pont sold as much stock as that, he would be willing to pool the vote of the remaining stock that he had with those who had purchased the large part of it. He said he did not know, but that he would confer with Mr. T. C. Du Pont by telegram, which he did; at least, he so reported to me the following day.

"Q. He reported to you that he had received a telegram, or that he had reported to T. C. Du Pont by telegram? A. That he had received a reply.

"Q. What did Dunham say to you as a result of his communication with T. C. Du Pont? A. T. C. Du Pont said he would sell all of his holdings, but would not pool any part of them with those who purchased a part, unless he knew the conditions of the pooling agreement."

We have to break the regular sequence of events to note that this purpose of Coleman's to sell his entire holdings created a condition of grave concern to the Powder Company, as to what might be the result if Coleman's stock was bought by interests hostile to the Allies. So vital was this stockholding to the Allies that the mere rumor of its possibility had led the Allies to send a messenger from Europe to ascertain its truth. These facts were known both to Coleman and Pierre but Pierre was satisfied on January 25, 1915, no such danger existed, and so wrote Coleman of the rumor, the coming of the representative of the Allies from Europe, and his own belief that no such danger existed, as follows:

"My New York visit was to meet Mr. Kraftmeier, who, with his wife and daughter, arrived on the Lusitania Saturday. He had cabled he wished to meet Irénée and me immediately on his arrival. I supposed that his mission was to place additional orders, so we took Col. Buckner along, and were much surprised to find that Mr. Kraftmeier made no mention of orders. Finally, after he succeeded in drawing me aside, he told me that they had had a report that Kuhn, Loeb & Co., of New York (who are a pro-German firm), had gained control of our company through the embarrassment of one of our large

stockholders, and that they on that account had fears concerning the orders placed with us. I, of course, assured him that nothing of the kind had happened, or would happen; that all orders would be filled according to contract, without any shadow of a doubt. He seemed somewhat relieved to hear this, and said this was one of the important things that brought him over. From his conversation I judge that it was *the* important thing, for no other part of our discussion seemed to be of moment. I imagine that the orders placed with our company are of serious concern to the Allies, and a rumor such as Kraftmeier outlined might well be worth a visit of investigation to the United States."

When then, on February 16th, 17th, Coleman took the new step of selling 40,000 shares outright, and followed that by a willingness to sell his entire holdings, we can see that a grave situation confronted Pierre Du Pont and one that called for prompt action. William was in the South, and he and Alfred had both expressed themselves as opposed to the price of \$160, and would therefore be expected to oppose the acquisition by the company at \$200 of 63,000 shares of common, when they had opposed the acquisition of 20,700 shares at \$160. Indeed, as we shall hereafter see, the purchase of this stock by the company was one which experienced men testified would have weakened the company. And yet, unless the company or those in accord with its policy bought it, it might fall into hostile hands. In addition to this, as we shall hereafter see, there were at the time such grave problems of manufacturing capacity, extension, embargo, and other questions of product legislation confronting the company as made the purchase of this stock one of such large risk as might well deter men making the purchase. Moreover, it requires no reading between the lines to draw the conclusion that Coleman, who had been disappointed in his generous stock distribution plan at the price of \$160, felt some satisfaction in forcing the company, or those connected with its management, to take at \$200, either for themselves, for the company, or for its employés, stock which they had refused to take at \$160. When, therefore, he made the offer, there was urgent necessity, if the Powder Company was to be safeguarded, for either the company to buy for itself or for the officers to buy for themselves, or for, as eventually worked out, the officers to take a third course, namely, to buy Coleman's entire holding for themselves, but to get the principal officers of the company to buy such part of the stock as Coleman, by his original offer had intended they should have. What followed is thus stated by Pierre Du Pont:

"Then what was the next step? A. I conferred with Mr. Raskob, Mr. Irénée Du Pont, Mr. Lamot Du Pont, and Mr. Carpenter with reference to this possible purchase of T. C. Du Pont's stock. We agreed among ourselves that we would attempt to make the purchase.

"Q. Suppose you give the court the narrative of the events and dates, and we will furnish the letters and telegrams afterward. You saw Mr. Dunham on the 17th, you say? A. Either the 16th or 17th; I think the 17th, Wednesday.

"Q. When did you see him next? A. When he reported that T. C. Du Pont was willing to sell all of his stock, but that he would not pool the remainder of that, unless he knew the condition of the pool.

"Q. Then you saw Mr. Raskob and several others whom you have named, and asked them to join with you in the purchase of the stock? A. I do not know that I asked them, but between us we agreed to endeavor to buy the stock. We suggested that Mr. Raskob go to New York to see whether a loan could be placed on the common stock of the Du Pont Company.

"Q. Did Mr. Raskob go to New York? A. He did.

"Q. Did he go alone? A. He went alone, so far as I was concerned; that is, I didn't go with him. He reported to me that evening, and stated that he had called upon Mr. Porter, I think of Morgau & Co., who had taken an interest in trying to place the loan. He said he thought it could be done. Mr. Porter had gone out to make some inquiries, and on his return he told Mr. Raskob that he felt satisfied that at least \$10,000,000 of the necessary \$14,000,000 could be placed, and gave him hope that the whole of the \$14,000,000 could be placed. Mr. Raskob reported that on his return to Philadelphia that evening. I was in Philadelphia that evening."

Following this Pierre, on February 20th, made Coleman an offer for his entire holdings, and after some exchange of telegrams, Coleman on February 20th telegraphed his final acceptance. That this enormous transaction was arranged for and closed in six days shows it was recognized that prompt action was necessary to prevent Coleman's holding going into the open market.

How the purchase was financed we have heretofore noted. The purchase having been made and become public, the inquiry as to what stand William and Alfred Du Pont then took becomes all-important. Did they then contend that Pierre had been constituted an agent at the meeting of the finance committee on December 23d? Did they refer to the terms of such agency? Did they claim that Pierre, as such agent, had violated his agency? These questions become all-important, for it is quite clear that if then, or in the events that immediately followed the purchase, neither William nor Alfred averred that Pierre had been constituted the company's agent at the meeting of December 23d, we may with confidence rest on the conclusion we announced above, namely, that Pierre was not at such meeting of December 23d made an agent to negotiate further.

What, then, are the proofs in that regard? William Du Pont, as we have seen, had been away from Wilmington. He was in the South when he read in the papers of the purchase, and he at once telegraphed Pierre:

"Paper states you have purchased Coleman's stock, I presume for the company. Any other action I should consider a breach of faith."

This telegram does not, of course, specify any agency, and its terms are broad enough to include such a relation; but when William Du Pont came North and attended a meeting at Wilmington about March 4th or 5th, at which Pierre was present, he did not then allege any agency. What then took place appears in his testimony:

"Q. After sending that telegram, what did you do? A. I came North.

"Q. Did you come to Wilmington? A. I came to Wilmington direct.

"Q. Did you have any conference with anybody about this matter, or in connection with it, when you arrived in Wilmington? A. I was asked to come to a meeting at the office of Mr. Alfred I. Du Pont.

"Q. When was that? A. I think it was the evening of March 4th, but I am not sure. It might have been the 5th.

"Q. Who were present at that meeting? A. Mr. Alfred I. Du Pont, Francis I. Du Pont, Mr. Philip Du Pont, and several others.

"Q. Was Mr. P. S. Du Pont there? A. Mr. P. S. Du Pont came into the meeting; also Mr. Irénée Du Pont, without invitation, as I understood.

"Q. Had you been informed, or were you informed then, who were associated with Mr. P. S. Du Pont in the purchase of this stock? A. I think Mr. P.

S. Du Pont stated at that time who was associated with him; also I think the public print stated.

"Q. Do you recall who Mr. P. S. Du Pont stated were associated with him?

A. No, sir; I could not state.

"Q. Did you say anything in that meeting to Mr. P. S. Du Pont about this matter? A. Yes.

"Q. Please state to us as well as you can. A. I cannot recall what words I used, but I objected to the purchase of the stock.

"Q. State as nearly as you can your recollection of what you said at that meeting in the presence of Mr. P. S. Du Pont. I do not mean the exact words. I mean as near as your recollection is as to the substance of what you said. A. I cannot give you the words any more than what I have said. I cannot recall anything more than what I have already said.

"Q. What did you say? A. I told him I objected to the purchase of the stock for himself.

"Q. Did you tell him why you objected to the purchase for himself? A. I cannot say. I did tell him once, but I cannot say whether it was at that meeting or afterward.

"Q. What did you tell him at any time as your objection? About what time was it you told him why you objected? A. I could not say.

"Q. Did you then tell him of your objection. Did Mr. Alfred I. Du Pont say anything to Mr. P. S. Du Pont at that meeting? A. Yes.

"Q. Give us, as near as you can, as far as your recollection goes, what he stated. A. He objected to the purchase of the stock, but I cannot give you the words.

"Q. Can you give us the substance of his objection, why it was he objected? A. No, sir; I cannot."

The proofs show that Alfred Du Pont, having learned of the sale on February 28th, had an interview on March 1st with Pierre. What took place is thus stated by Alfred:

"Q. The letter of Mr. T. Coleman Du Pont is dated the 19th day of February. Will you tell me when you heard next thereafter—when you heard anything about any sale of the stock of T. Coleman Du Pont? A. When I read an account of the purchase of T. Coleman Du Pont's stock by P. S. Du Pont and his associates in the Sunday papers on February 28, 1915. * * *

"Q. What did you then do on receiving that information in the paper? A. I waited until March 1st, thinking perhaps Mr. P. S. Du Pont would come and tell me something in regard to his having acquired the stock.

"Q. You waited until 4 o'clock on the day of March 1st? A. I did.

"Q. What did you do then? A. I telephoned to Mr. P. S. Du Pont and asked him if he would kindly come down to my office for a few moments.

"Q. Did he come? A. He did.

"Q. Then what took place between you in your office? A. I asked Mr. P. S. Du Pont whether the information conveyed by the Sunday paper regarding his having purchased this stock was correct. He informed me that in the main it was true. I then said, 'Do I understand that you have acquired all of Coleman Du Pont's stock, both common and preferred, of the Du Pont Company?' He said that he believed that he had. I said, 'What do you propose to do with it?' He said that the stock would be held by a holding company that he had organized for that purpose. I asked him who the stockholders in that holding company were. He said they were himself, his two brothers, Lamnot Du Pont and Irénée Du Pont, his brother-in-law, Mr. R. R. M. Carpenter, and Mr. Raskob, treasurer of the company. I asked him in what proportions the stock of the holding company was divided among the gentlemen to whom he had referred. He told me that he would hold about 50 per cent., that his two brothers would hold about 16 per cent. each, and that the others would hold smaller amounts. I do not remember whether he stated exactly the amounts or not, but they were smaller amounts. I then asked him how he had financed the purchase for acquisition of this stock, and he told me he had borrowed through J. P. Morgan & Co., of New York, a large sum of money. I

asked him whether Morgan had loaned him the whole amount. He told me it had been redistributed among certain other banks, at least a large proportion. I asked him if he would kindly give me the names of the banks. He said he could not tell me the names of the banks. I then asked him whether he proposed to divide the stock acquired from T. Coleman Du Pont ultimately among the stockholders of the holding company in proportion to their respective holdings in the said holding company, and he told me that he did. I then said to him: 'Pierre Du Pont, don't do this. It is wrong.' He asked me why it was wrong. I said: '*Because you have accomplished something by virtue of the power and influence vested in you as an officer of the company, and by knowledge which you could only have acquired in your official capacity, which you could not have accomplished as a private individual. For that reason the stock which you have acquired in this matter does not belong to you, but belongs to the company which you represent.*' I therefore ask you to turn this stock over to the company.' He said he was very sorry that he could not agree with my point of view. In a further endeavor to get him to make some concession along my line of thought, I said: 'Pierre, your father and my father were brothers. Neither of those men would have approved, I am confident, of what you have done. For their sake, as well as for your own, put that stock in the company's treasury, because you can't afford to do anything that will *invite criticism or condemnation on the part of any of your fellow bankers which would in any way injure your business reputation.*' I said: 'Pierre, I ask you.' He said he would not do it; that the thing was an accomplished fact, and could not be undone. I said: 'Then you refuse to make this concession which I ask of you?' He said: 'I do.' That terminated the interview."

On March 3d, Alfred again met Pierre at a meeting where a number of the Du Pont family, including Philip F. Du Pont, the plaintiff, were present, and restated his position in regard to the purchase by Pierre as follows:

"Q. When was the next conversation that you had on this subject when Pierre S. Du Pont was present? A. On the evening of March 3d.

"Q. Where was that? A. In my office in the Du Pont building.

"Q. Who were present? A. Myself, Mr. William Du Pont, I think Mr. Alexis Du Pont, Mr. Philip Du Pont, Mr. Eugene E. Du Pont, Mr. Francis Du Pont, Mr. Pierre S. Du Pont, and Mr. Irénée Du Pont.

"Q. What was the subject of the discussion at that meeting? A. The subject of his having acquired Coleman Du Pont's stock and the propriety of the manner in which it had been acquired.

"Q. Please state what was said to P. S. Du Pont on that occasion, so far as you recall, by yourself or any one else. A. I could recall what I said myself. It was merely a reiteration in a general way of the position I took on March 1st, that he owed it to the company to turn that stock into the company's treasury, owing to the manner in which it was acquired.

"Q. Did you hear anybody else say anything to him on that occasion along the same line? A. Mr. William Du Pont expressed himself on the same line; also Mr. Francis I. Du Pont. * * *

"Q. Give us, as near as you can, the position taken by Mr. William Du Pont and expressed to Mr. P. S. Du Pont at that time. A. As near as I can remember, he stated that he believed that Mr. P. S. Du Pont should turn that stock in to the company; *that he had purchased it in his official capacity, and he would consider any other disposition of the stock an infringement of the properties of his office or a breach of faith as an officer.*"

As will appear from this, Pierre Du Pont refused on March 1st to turn the Coleman stock over to the Powder Company. On March 5th, however, he receded from this position, and addressed a letter to the company, in which he stated:

"As our transaction was made in the form of an offer to T. C. Du Pont, I give the company similar opportunity to make an offer to me and my associates."

In this letter, Pierre Du Pont states his understanding of the acts of bad faith which Alfred and William Du Pont charge against him in acquiring Coleman's stock. In that respect the letter says:

"On that date, March 2d, I received the following telegram from Mr. William Du Pont: 'Paper states you have purchased Coleman's stock. I presume for the company. Any other action I should consider a breach of faith.' Mr. Alfred I. Du Pont expressed to me verbally a similar opinion. In taking exception to the accusation of bad faith, I learn that the meaning attached to these words is as follows: That I could not have made the purchase of this block of stock unaided by the company; that, therefore, the company is entitled to the stock. There seems to be no contention that my position in the company enabled (disabled?) me to receive an offer from Mr. T. C. Du Pont—the point being that I could not have financed the purchase of the stock without using company credit."

It further appears, from the minutes of the directors' meeting of March 5th, that William Du Pont and Alfred Du Pont were present at this meeting, that the subject-matter of this letter was discussed, and that no objection or exception to the correctness of Pierre's statement of Alfred's and William's position was made by them, nor any assertion that Pierre had been constituted an agent by the finance committee at its meeting of December 23d.

The letter was referred to the finance committee, which considered it at a meeting held March 8th, and again at a meeting of the directors on March 10th. Both these meetings Alfred Du Pont and William Du Pont attended, but the minutes do not disclose that any assertion was made by either of them that Pierre had been constituted an agent to negotiate at the finance committee meeting of December 23d. Indeed, that such allegation was not then made by Alfred or William Du Pont is not a matter of mere inference drawn from its nonappearance in the minutes; but in the brief of the plaintiff's counsel it is affirmatively stated no such statement was made by any one. In that regard the brief says:

"No disclosure was made for the benefit of the directors not members of the syndicate that Pierre had been instructed by the finance committee to continue negotiations for purchase by the company, or that the correspondence had ensued which had been attended to."

As Pierre Du Pont has always contended he was not so instructed by the finance committee, it is manifest that, if his contention was true, he had no information to give on that point, and therefore did not conceal anything. On the other hand, if such instruction were given by the finance committee to Pierre to continue negotiations, there was every reason why Alfred Du Pont and William Du Pont should then have called the attention of the directors to the fact of agency. Their not doing so on this and on the other occasions noted above emphasizes the correctness of our conclusion, stated above, that at its December 23d meeting the finance committee did not constitute Pierre Du Pont its agent for further negotiations with T. Coleman Du Pont. In further confirmation of this view, it will also be noted that when this bill was

filed, some six months later, even the bill was not based on the alleged fact that Pierre Du Pont had been made an agent to negotiate, by the finance committee, at its December 23d meeting, but, on the contrary, the charge of the bill was that Pierre Du Pont and his associates had violated their duties. In that respect the gist and theory of the bill are properly summarized in the brief of plaintiff's counsel as follows:

"On December 8, 1915, the present bill was filed by Philip F. Du Pont, on behalf of himself and other stockholders, alleging * * * that *Pierre Du Pont and his associates had fraudulently and in violation of their duties to the Powder Company acquired the Coleman stock for themselves instead of for the company.*"

It will therefore appear, from the pleadings of the bill, and from the absence of proof that such agency was alleged or urged on the several occasions referred to above, that the real ground of recovery contended for is not the failure of Pierre Du Pont individually to perform duties imposed on him as an agent by the finance committee on December 23d, but that Pierre Du Pont and his associates (who so far as the proofs go had no part or even knowledge of such alleged agency of Pierre) had, after Coleman withdrew his offer, fraudulently violated their duty as officers of the Powder Company in buying such stock. It further appears, from the proof, that such fraudulent violation of their duty as officers was a conclusion based on the premise that the syndicate could not have bought the Coleman stock unless they had made use of the Powder Company's credit and resources and misused their position as officers to do so; and because they had made an otherwise impossible purchase, it is urged that the fact of the purchase in and of itself necessarily convicted these men of bad faith and fraud as officers of the company. This position was summarized by Alfred Du Pont in testimony already quoted:

"I then said to him: 'Pierre Du Pont, don't do this. It is wrong.' He asked me why it was wrong. I said: 'Because *you have accomplished something by virtue of the power and influence vested in you as an officer of the company, and by knowledge which you could only have acquired in your official capacity, which you could not have accomplished as a private individual. For that reason the stock which you have acquired in this matter does not belong to you, but belongs to the company which you represent.*'"

No clearer, more concise, statement of the theory of this bill, and of Alfred Du Pont's consistent reasoning and contention in support of it, could be made than these words, which, it will be observed, in no way embody any allegation, relation, or malfeasance of an agent, but, on the contrary, is based on Pierre's duty as an officer of the company. That this was Alfred's contention is shown by other witnesses. Francis T. Du Pont, who intervened as a plaintiff in the bill, was present at the meeting of the Du Pont family on March 4th, and gives an account of the meeting. His testimony makes no mention of any allegation of Pierre Du Pont's agency being made at this meeting, but says:

"Alfred Du Pont had taken the position that the deal *was financed on the credit of the company. I took that position, and went further; I took the position that a corporation had been formed, which controlled a large amount of stock, and therefore controlled the power to invest the company's money, and I took the position that that is what made the transaction possible; that*

*it was the power over the company's treasury which was really back of the notes of the Securities Company. He (William) also expressed himself, but just what he said I do not know. He expressed himself against the fairness of the transaction. * * * My impression is pretty strong that he said that the credit of the company had been used."*

And the proofs further show this was the view then held by Francis T. Du Pont. He was asked:

"Will you tell the court in what respect it [the purchase of the Coleman stock] was unfair to the company?"

And said:

"Because I did not believe he [Pierre] had the money to buy it. * * * He secretly made some arrangement with Mr. Coleman Du Pont to get his stock. That arrangement none of the directors were told about. He was an officer. The treasurer of the company was co-operating with him, and was instrumental in placing large deposits at different banks in New York. Even if those same banks were not the ones which helped finance the company, and I am not raising that question, the very expectation that there would be those deposits gave him a power which, in my opinion, *he should have used for the company and not for himself.*"

After due consideration of this phase of the case, we are of the opinion, and so find, first, that when Coleman Du Pont, on February 16, 1915, offered to sell to Pierre Du Pont his entire holdings in the company, of 13,899 preferred and 63,214 common stock, that neither Pierre nor the syndicate in their own then relations as officers of the company, or by reason of any prior relations of Pierre as alleged agent to negotiate for the 20,700 shares for the benefit of the company's employés, were disqualified to buy Coleman's stock; and, secondly, that in subsequently obtaining the credit and money to pay for said stock, Pierre Du Pont and his syndicate associates made no use of the credit or resources of the Powder Company, or took any illegal advantage of their several official relations to the company.

[4] Having made the purchase, Pierre Du Pont, their representative, at first stood on his and their right to purchase and hold said stock, and refused to convey it to the company, but having subsequently withdrawn such refusal, and having offered, in substance, to allow the company to make such purchase itself, the question arose whether the Powder Company should buy this syndicate stock. This question, in various ways, came before the directors, the stockholders' meetings, and finally was submitted to the stockholders in an election directed by the court below and held by its master. In this master's election, a very substantial majority of stockholders voted against the company buying the stock, and the court below dismissed the bill. Such dismissal decree is here assigned for error. The court below predicated its action on the vote taken by the master, and declined to be influenced by prior actions of directors and stockholders' meetings. Following, for present purposes, the same course, we shall not recite or discuss the proofs as to such prior meetings and votes; but, assuming for the present that the master's election was, as we shall later show, a full, free, and intelligent expression of the will of the majority stockholders, we address ourselves to the question of

whether the court below committed error in ratifying the decision of the stockholders by dismissing this bill.

Turning to that question, what have we? A purchase by executive officers of the company of the holdings of its largest stockholder, and a later offer by them to the company to itself buy the stock at what it had cost them. We have already found that no fraud on the part of these officers, or any of them, was established by the proofs, nor do we now find that in such election the majority stockholders made a wrongful use of their power against a helpless minority, thus creating one of the cases of corporate wrongs, where courts have unquestionably the power and undoubtedly the duty to interfere. It follows, therefore, that a reversal of the decree of dismissal in this case, and the entry of one responsive to the bill, would in substance and effect have this court hold, first, the purchase could be lawfully made by the Powder Company; and, second, that it must be made, even against the wishes of the majority of its stockholders. To us, however, it has seemed that, assuming for present purposes, but not deciding, that the company had legal power to buy, the proofs show the question of exercising its power to buy was, after all, one of those business questions of corporate policy which the stockholders, through their majority, and not a court, through its equitable power, should decide.

Turning, therefore, to the proofs, let us see what they disclose in that regard. That such question confronted the stockholders was evidenced by the fact that when the offer of Pierre Du Pont to sell the stock to the company, embodied in his letter of March 5th, came before the directors at their meeting on March 10th, a resolution was introduced which, in substance, involved this question and dealt with the matter as one of business policy. This resolution, which was offered by Alfred Du Pont, was as follows:

"A resolution was offered and seconded that the president of the company, in conjunction with the finance committee, be requested to select a committee of men, who, in their opinion, are capable of passing upon this matter from an economic standpoint, and who are not in any way interested in the company as holders of the company's securities, with a request to make recommendations as to the propriety of the acquisition of the stock in question by the Du Pont Powder Company."

We refer to this resolution, which was not adopted, as evidencing the view, not only that it was one of business policy, but that, at the time this purchase was made, the question of the business wisdom and propriety of the Powder Company itself making this purchase was one of such substantial uncertainty that the then largest stockholder of the company urged that the views of competent, disinterested business men should be had before the company decided the matter. Indeed, that the question was a debatable one, on which men had varying views, is seen from the proofs.

Beginning with the views held by Alfred I. Du Pont, the largest stockholder of the company, his fear, as we gather from the testimony, was that the purchase of this large block of stock by these officers would create a burden which they could not shoulder, and

which the Powder Company would eventually have to, in some way, assume. Or, to quote his views in his own words:

"A. As near as I can remember, my argument was somewhat to this effect: That Mr. P. S. Du Pont and his associates had acquired the holdings of Mr. T. C. Du Pont by borrowing a certain large sum of money and by creating further obligations in the form of notes to T. C. Du Pont in payment for T. C. Du Pont's stock; that those obligations would have to be met by some one in some way at some time; and that I could not see any way of payment of those obligations other than *getting the money from the company*, and I so stated at the meeting before the directors.

"Q. Other than getting it from the company? A. Yes; getting it in some way from the company's treasury. In other words, the company would be looked to for the funds in some way to meet these obligations; that in view of this fact it would be very much better and much more to the interest of the company and its stockholders for the company to make the necessary investment to acquire this stock, than to be placed in a position at some subsequent time where they might be forced to make *disbursements* in order to meet these obligations, when it would not be desirable or convenient to the company to do so. That in general was the argument which I gave."

The anxiety of Francis I. Du Pont, one of the interveners in this bill, went a step further, in that he feared the control of the company, in case the notes were defaulted, would pass to Morgan & Co., by reason of the money having been borrowed from them. In that regard he testified:

"XQ. Did you not further say, 'I believe Morgan & Co. loaned the money with the full expectation that, in case those notes were not paid, they could force the payment from the company's treasury by some financial scheme?' A. Morgan & Co. could have gotten control of the company if the notes were not paid."

From another angle we have the views of the defendants, who were opposed to the company buying the Coleman stock. In that regard, Raskob, one of the defendants, testified at length as to his reasons for voting against the resolution to have the company make an offer for the Coleman Du Pont stock:

"Q. Did you vote for or against this resolution? A. I voted against it.

"Q. Give your reasons for voting against it. A. I had a great many reasons for not voting in favor of the purchase of this stock: First, I considered it not any part of my duty as a director and trustee for the stockholders to take \$14,000,000 from the treasury of the company and speculate with it in the company's common stock; second, I knew that there had never been a precedent for any such procedure in the history of the E. I. Du Pont de Nemours Powder Company, nor did I know of any precedent in any other company where the board of directors voted to purchase as a speculative investment practically 20 per cent. of the total outstanding common stock of the corporation, or any other substantial amount. The book value of the common stock of the corporation at that time, which I knew to be about \$118 to \$120 a share, plus the uncertainties or plus some definite value which common stock might have through the orders, military powder orders, then in hand or likely to be secured, did not warrant any director voting in favor of the purchasing of that stock, stock of that character. The only arguments—the only reasons, for I did not think they were much in the way of arguments—that were offered in support of purchasing that stock, as I recall them, were offered by Mr. Alfred I. Du Pont, concurred in by Mr. William Du Pont, and some by Francis I. Du Pont. Those arguments seemed to be along the line that the company had made this purchase, or had in effect made it, if not actually in fact; the theory being that the syndicate would perhaps be unable to pay for this stock, in which event the Powder Company would have to pay

for it anyway, and they might as well have paid for it then, at the date of that meeting, rather than to find at some future date that they would have to take it up and pay for it. I, knowing full well the nature of the obligation which had been given to finance the transaction on the part of the Du Pont Securities Company could not follow that line of reasoning. I knew, for instance, that the note of \$8,500,000 which had been given to J. P. Morgan & Co. carried as collateral 14,599 shares of the preferred stock; certainly under most any conditions that would have been worth \$80 a share. That would have made a worth for this collateral of approximately \$1,200,000. There were 54,591 shares of common stock held as collateral on that note, and if the value of the common stock had dropped to a point of \$120 a share, which was about its selling price at a time previous to the war, the value of that 54,000 shares of stock, together with the value of the preferred stock of \$80 per share, would have netted an amount sufficient to pay within about \$800,000 of the \$8,500,000 loan; and for any one to assume that the guaranty of the six gentlemen back of that note was not good for \$800,000 was beyond my understanding. I knew, furthermore, that the note given to Coleman Du Pont for \$5,900,000 carried as collateral 36,900 shares of the common stock of the company; that that stock, if the worst should happen, and no profit whatever be realized from the business in hand, and the company be forced back to the position to which it was previous to the war—that is, in the position of having only their normal business—the common stock at \$120 a share would have cared for all of the payment of the Coleman Du Pont note except, I think, about \$1,500,000. That obligation of Coleman Du Pont ran for seven years. There was absolutely no power on his part to force the deposit of additional collateral, no matter to what point the common stock of the Powder Company which was held on that note as collateral would go, and therefore the underwriters of that note, these gentlemen who were—

“Q. Guarantors? A. No, they were not guarantors on that note; but the six gentlemen in question were principal stockholders in the Du Pont Securities Company, and to assume that those gentlemen, plus the other stockholders who were then in the Du Pont Securities Company, could not have taken care of an obligation or a guaranty or a shortage on collateral to the extent of \$1,500,000 in seven years was to my mind unbelievable. I think without exception every director at that meeting must have admitted that. So that, from that point of view, that argument appealed to me as being an argument with no force whatever in favor of making an offer to purchase; in other words, I could not see why that argument should be used as a reason for voting in favor of the purchase of stock.

“Q. Have you any other reasons that occurred to you at that time why the corporation should not buy this stock? A. May I finish my answer?

“Q. You had not finished? A. No.

“Q. Go ahead. A. Another argument used at that time in favor of purchasing the stock was, as I understood it, that the collateral on this loan, if the Du Pont Securities Company were unable to meet this loan, would be sold and likely be captured or gotten control of by J. P. Morgan & Co. I felt that any director that would vote, or would use his vote, to prevent a certain block of stock going to one set of stockholders, no matter who they might be, in preference to another set of stockholders, would be committing a fraudulent act. Another reason for my voting against that resolution—no, the other reason that I voted against that resolution was because I felt very strongly, although I knew nothing about the law, that any director that would act in his capacity as trustee for the stockholders for the corporation to do a thing which in his judgment, or in the judgment of an ordinarily prudent man, would be injurious to the credit of a corporation, might in some way be held personally responsible in connection with his colleagues voting in favor of such a resolution for any losses which the company might have incurred in connection with that purchase. Mr. Laffey, counsel for the company, was called into the meeting and stated that the company, in his opinion, could not legally purchase its own common stock for investment purposes in an amount greater than the surplus of the company. But I did not go into that reason, or question him about it, because there were reasons sufficiently

ample in my mind to justify voting against any such proposition without much consideration of that."

Irénée Du Pont, one of the defendants, gave his views on the company's buying the Coleman stock as follows:

"Q. How did you vote on the resolution reported from the finance committee with reference to the taking over of this stock or making an offer for it? A. I voted against making an offer for the stock.

"Q. Will you state the reasons that moved or actuated you in making that vote? A. I think the strongest reason is that the company should not speculate needlessly—should not go into speculation which it was not a part of its business to do, especially if that was to buy its common stock, and still more especially if it was at a high value for that common stock, \$200 a share. I think that that would be wrong. I think any preferred stockholder would oppose it successfully. I know that *I would have been prepared to go after the thing, if they had attempted to make such a purchase.*"

The testimony of Carpenter, one of the defendants, was as follows:

"Q. Did you vote on the question or resolution that was reported back to the finance committee? A. I did.

"Q. How did you vote, for or against it? A. I voted against the acquisition of the stock by the company.

"Q. Will you please state your reasons—what reasons actuated you as a director in voting negatively on that proposition? A. I had a very strong feeling that it was the most unbusinesslike thing to do for the company to acquire such a large block of its own common stock, and I felt that any stockholder would have a rather good case against the directors, if they should buy that stock, and if for any reason the value of the stock should go down. I did not want to be in the position of having a suit brought to help pay that money back to the company."

Carpenter also testified that he was influenced in his vote by business reasons, as he "felt that the company needed all of the money it could raise to carry on the proposition that we had never attempted before. In that connection, and showing the tremendous work that confronted this company in making these war calls and contracts, the testimony of H. F. Brown is enlightening. Mr. Brown says:

"Q. Will you state to the court some of the conditions and circumstances that confronted the Powder Company in 1914 and early 1915? A. I was in a very good position to realize the situation at that time, being in charge of the smokeless powder operating department, to which department was intrusted the duty of completing perhaps three-fourths of the war contracts which were received. The smokeless powder department prior to the war contained in its smokeless powder department proper (we make other things besides smokeless powder) perhaps about 1,000 men. That includes common labor. Probably not over half of that total number could be called powder makers. Early in March, 1915, the amount of business which had been handed over to me to fill was very large. It was an amount of business far beyond the capacity of the plants to produce. I therefore called upon the engineering department to enlarge those plants. The engineering department undertook to increase the capacity of our plants in record time, and to do in *5 or 6 months* what previously would have required *12 to 18 months*. We were called upon enormously to increase our operating force. It was impossible to obtain men skilled in the art of powder making. The manufacture of smokeless powder is perhaps one of the most difficult and exacting of all kinds of industry. Smokeless powder grains have to be made with wonderful accuracy, in order to obtain proper ballistic results. We were consequently confronted with a *very huge task*. We had to multiply our force. On the 1st of March orders in hand necessitated multiplying the force by at least

10 times, and where those men were to come from, and who was to train them, was an unsolved problem at that time. We took on those additional men. We had the task of training them in this very difficult business, and we undertook to fill these war orders at that time.

"Q. How many additional men were taken on? A. When we reached the maximum of our capacity, we had in my department about 40,000 men, as compared with 1,000 men at the beginning.

"Q. When was it you reached the maximum of capacity? A. We reached maximum capacity in May of this year.

"Q. About how much powder had actually been delivered on these war contracts in March, 1915? A. Prior to the 1st day of March we had delivered on export orders approximately 800,000 pounds of powder, and about 2,300,000 pounds of gun cotton. We were behind our orders on the 1st day of March, 1915, about 300,000 pounds. The situation was causing me the greatest anxiety. I felt that we would be able to make good, but we were not making good. The officers of the company were all anxious about the situation. I will say that on the 1st of April we were still further behind, and it was not until the latter part of May that we caught up with our orders. The situation, therefore, about the 1st of March, 1915, was one of keen anxiety, and I felt that anxiety perhaps as much as anybody in the company, because it was upon my department that the chief burden was placed.

"Q. You say you were behind in the deliveries. Was that behind in deliveries under the contracts? A. Under the contracts. *We were behind contract requirements.*

"Q. And did *not catch up until May of 1915?* A. Right.

"Q. Am I right or wrong in that? You overtook your contracts about what time? A. It was not until the latter part of May, 1915, that we caught up with our contracts.

"Q. Was there any question involved in the problem about making deliveries, even if you manufactured the goods? A. We were keenly anxious at that time about the uncertainty whether these new men could be taught, and whether or not the use of this tremendous number of new men would involve an accident risk far beyond what we had ever had before. In other words, there was grave uncertainty whether or not, even if we manufactured this powder, or started to manufacture it, that in the process we might be involved in a calamity, owing to the inexperience of these men. We had plenty of accidents under normal conditions, but under those abnormal conditions I feared that some calamity might easily be possible. In the next place, I recall very distinctly that we were very anxious in regard to whether or not we would be permitted to ship the powder after we had made it. I remember that prominent men in and out of Congress were clamoring for an embargo to be placed upon shipments of explosives, and I think many of us felt very uncertain whether or not we would be permitted to ship this powder out of the country after we had made it. That was another element of uncertainty in the situation."

In view of these conditions, Mr. Brown, a director, voted against the acquisition of the stock by the company, and as his reasons therefor he testified as follows:

"A. I voted against that because I considered that the purchase of that stock by the company would be a highly speculative proposition. I considered it would be highly speculative for the reasons I have already named in my previous answer. I was very well familiar with the circumstances attending the filling of these enormous war orders at that time, and I considered that the future was highly speculative, that the profits on these war orders had not been made, and that it was absurd for the company to pay at that time \$200 per share for its common stock in the purchase of this stock from P. S. Du Pont and his associates."

The reasons which William Coyne, another director, gave as influencing his vote against the purchase, were:

"A. I had quite a number of reasons. The most powerful one was the highly, as I considered it then, speculative value placed upon the stock of \$200—the uncertainty that was in my mind about our ability to fulfill those large contracts in the contract period. As I recall it, we never made more than 6,500,000 pounds of military powder in a year before, and we were then called upon to make seven or eight times that much. A number of green men had to be trained. A number of engineering men had to be trained to make our machinery and build our plants. The time, which was of the essence of practically all the contracts. *The return of the advance payments in the event of our being unable to fulfill the contracts.*

"Q. Did you know of any bonds for return of advance payments? A. Yes; I knew that in case of the *Russian powder orders* we had to put up a bond to *return* the advance payment in the event of our *not fulfilling the contract*. Then I felt that there might be some embargo placed upon the exportation of explosives, and a very important factor in forming my opinion was my experience with the Lake Superior Company. I was with that corporation prior to my coming with the Du Pont Company in 1904, and some time prior to my going with the Lake Superior Company its officers and directors had purchased large blocks of its common stock, which had depreciated very much in value after the purchase, causing the company great loss, and there was quite an international scandal about it, and threatened suits against all the officers to make them recoup the company."

Lammot Du Pont, a member of the purchasing syndicate, testified as to his reasons for opposing the Powder Company buying, as follows:

"Q. What were your reasons for voting against making the offer? A. As I remember at that time, I had several reasons. I think the principal one was that so far as I could see there was no reason why the company should buy the stock. The chairman of that meeting had asked for reasons why the company should offer to buy the stock, and no rational reason for doing so was presented. I knew of no reason, and I thought that it was pretty good policy not to pay out a large sum of money like that without having a reason for doing so.

"Q. Did the question of purchasing such a large block of the company's own stock by the company itself enter into your consideration? A. I thought it was an unwise thing to do, because the value of the stock at that time was very largely speculative. I thought that it was an unwise thing for the company to speculate in anything apart from its own business, that of manufacturing and selling explosives."

Eugene E. Du Pont, who occupied the same relation, testified to his reasons for opposing the purchase by the company of the Coleman stock, as follows:

"Q. Will you kindly state some of the reasons, or any of the reasons, that influenced you to vote against the acquisition of this stock? A. My main reason for voting against it was that I considered it entirely too speculative. I considered that the Du Pont Company had been earning for their stockholders, through the legitimate manufacture of powder, not through any speculation in their own stock. I considered that the *earnings* of the Du Pont Company should be made in the *legitimate* manufacture of powder and not *through speculation* in its own shares of stock in any way. I considered that that has been the policy of the company for nearly the last 100 years; and I saw no reason why we should deviate from that policy. Furthermore, I did not hear in that meeting *any* logical argument for the purchase of the stock. Those were my two main reasons for voting against it."

The testimony of E. G. Buckner bears largely on phases of the situation not touched on by other witnesses. Buckner negotiated large war contracts with foreign governments. He insisted on and obtained great payments in advance from these governments when the contracts were

made—a policy which aided in financing the vast outlays in buildings, raw material, and equipment necessitated by these contracts over normal conditions. Apart from the policy of a company buying its own stock, Buckner's view was that such a course would result in the Powder Company being unable to get any advance payments on contracts thereafter. His testimony in that regard was:

"Q. Please state to the court what your reasons were for voting against that resolution. A. To begin with, I was very much opposed to the proposition from every standpoint. I did not believe that it was a proper thing for the company to do under the conditions that existed at that time. I felt that it would be a great mistake for the company to invest any of its capital in its own stock. Really, I was opposed to the matter on principle. I did not believe that it was a proper thing for a director, or for a board of directors, to do, to unite in purchasing its stock for speculation under the conditions that existed at that time, or under any conditions almost that you might suggest to me, I think I should have been opposed to it. I have never been in favor in all my life, in any institution that I have been associated with, of its buying and speculating in its own stock. I believe that it was bad practice, and I believe have got the support in that belief of many of the Legislatures throughout the country who have legislated against it. I think it is a dangerous practice, and would have been opposed to doing it if there were no other grounds than that; but there were other reasons at this time that made me feel that it was unwise for us to buy our own stock. The suggestion had been made that we had plenty of money up to that time. Up to the time that this proposition came before the board, this company did not have any great surplus of money. We had liabilities, many of them. We had a large amount of indebtedness in the shape of bonds, and at no time had we ever felt that we had more money than we wanted, and that there was any occasion to reduce our capital stock. That being true, I did not feel that it would be right for us at this time to take the money that had been paid to us by these nations that had bought powder from us, and to invest it in this purchase. Being as I was associated with those people in selling them material, I had realized how difficult it was to obtain advances. They had opposed it for several months, paying us this great cash advance. They wanted us to take it in other ways of security. They wanted to deposit it in bank, and have it paid over to us after we had fulfilled the contract; but I had made them understand that this was their war, that we could make them powder, that we would make them powder if they would assume all the risk there was in the manufacture of it, and so I insisted that they must pay us this 50 per cent. They had finally agreed to it, and had been trading on that basis. I felt at this time that, if the board of directors exhibited any such spirit towards the investment of that money, that *had been paid to us to build plants and buy raw material*, that if we undertook to use that money in the purchase of this stock, that it would at once stop my ability to sell powder. We would have found an opposition towards paying us this money to be used in that way, and I thought that, if we went into such a transaction as the one that was proposed here, I might as well stop trying to sell powder, and I really believe that, had we done it, those people would have said to us, 'We are unwilling to pay you this cash advance,' and our business, instead of being the enormous business that it is to-day, in my judgment would have stopped at that time."

As we have seen, some of the testimony which has been quoted above referred to the speculative character of this stock as an element in inducing them to object to its purchase by the company, but none of the witnesses testified to certain extraordinary conditions affecting this company's future, which made the stock of the company of speculative value, utterly different from that of the ordinary manufacturing company in ordinary times. We have seen how in December its largest stockholder, T. Coleman Du Pont, regarded the stock as worth \$200,

while Alfred I. Du Pont regarded it as worth substantially \$125, and we shall see that by the end of the year the phenomenal fluctuation in value of the stock was far distant from the views of either of these men. It is to some of the uncertain elements on which the value of the Powder Company's stock depended, Mr. Buckner refers in his testimony :

"Q. What were the hazards and risks that you considered at that time in giving your vote as you did? A. We had sold all of the output of the plants that we had constructed. There was no doubt in my mind but that we could manufacture that powder from the plants that we then had in existence with the men that we then had employed, and had had for years, and with the organization that then existed; but the minute that we started beyond that, and commenced to sell the other 54,000,000 pounds, there was a hazard wrapped about that, that was very uncertain. In the first place, *we had no plants*. We had to go to untried manufacturers of machinery, of construction work, building, and depend upon them to supply us with this material for the construction. That was an immense undertaking. We had only allowed ourselves in the contracts 5 to 6 months to begin deliveries, and these goods we had to give to untried people, and had to rely upon untried people to supply us with this construction material, and we then had to rely upon the manufacturers of raw material. There was a question of railroad facilities. We had to depend upon the railroad people much to get this material to our plants, and you must bear in mind that the time was very limited that we had to do this in. Then the question of labor, to obtain men to make this powder. We had sold all the capacity we had, and for all this future work it required new men, untried men, and we had to rely upon them. That was one hazard. Another was that at that time there was great uncertainty as to whether we would be able to complete our manufacture, due to the efforts on the part of people who wanted to destroy all of this work, and you must remember that there was a great effort made from every direction. People were attempting in every way to stop us in Congress, and the people who were attempting to make this material for us found great difficulty, due to the efforts on the part of overzealous friends who were striving to interfere, and there was much effort made on the part of our own employes to interfere.

"Q. Illustrate that. Tell us what way they interfered. A. They interfered in the way of the manufacture of material. We had made many hundred thousand pounds of powder, and believed that it was perfect in every particular, and packed it into boxes that were, according to contract, air-tight. The powder was clean and in fine shape. Samples would be withdrawn from the boxes, and we would offer them to the inspectors of the foreign countries, and when they arrived and made their own inspection, through their samples, they found all kinds of trouble had been created. *Nails had been driven into the boxes to cause leaks of the powder. All kinds of foreign matter, it did not matter what it was, that a fellow could get hold of, he dropped into the boxes.* Nails, dirt, old lunches, rags, anything that he could get hold of, he would put in those boxes, in order to make it undesirable and cause a rejection of it. We had many an explosion. Of course, we have never been able to trace the explosions to causes that were antagonistic to us; but there were explosions all the time all the same, and it caused us great difficulties. We did not know to what great extent those things might grow.

"Q. Did you take into consideration the possibility of the stopping of the war? A. Yes. That was another consideration we had had. * * *

"Q. How about inspection of the powder? A. I have just told you about the inspection, how they would reject the powder, the danger of our ability to deliver powder due to inspection.

"Q. Did the rejection of powder amount to any considerable quantity? A. It did. At times it was quite large, but the great hazard in reference to inspection was due to the fact that as long as they wanted the powder, as long as they were anxious to get it, they weighed the difficulties that we were encountering and took the powder as it was; but when they reached the point where they did not care to have the powder, when there was any occasion

that came up that they might not want to accept it, they were very rigid in their inspection, and were inclined to throw the powder back on our hands for the smallest reasons, and at times that grew quite difficult and made it very uncomfortable for the company."

In quoting the testimony of all these witnesses bearing on their reasons for respectively urging or opposing a purchase of the Coleman stock by the Powder Company, we have not overlooked the fact of the personal, financial interest those witnesses had, which would necessarily affect their views, for it will be apparent that Lammot Du Pont and other witnesses held portions of Coleman's stock, which had tremendously increased in value, when this bill was filed, and which the bill, *inter alia*, sought to take from them for the company. On the other hand, we can also see that Alfred I. Du Pont, who was the largest stockholder of the company, and other witnesses for the plaintiff, had large financial interests if the company acquired at \$200 its own stock, which, when the bill was filed, was selling at several times that price. In the light of the interest of all these witnesses in the premises, and recognizing how their interest might color their views as to the proper business policy to be pursued by the company, we turn to the testimony of two witnesses, one of whom was, as far as we can see, free from personal financial interest when he voted on the subject of purchase by the company, although he afterwards became a purchaser of syndicate stock. We refer to Henry F. Du Pont. The other, who at no time has had any personal financial interest or bias, was C. L. Patterson.

In April, 1915, Henry F. Du Pont became interested in the T. Coleman Du Pont stock by exchanging his Powder Company stock for stock in the Du Pont Securities Company, which had purchased the T. Coleman Du Pont stock; but on March 10th, when as director of the Powder Company he voted against that company buying the Coleman stock, he was not interested in said stock. Such being the case, the business views of Mr. Du Pont, which were:

"A. I voted against it because I *did not approve* the company buying *its own stock*, particularly as the stock was *speculative* at that time, and all the funds the company had on hand I thought should be kept for the enlargement of its plants, buying raw materials, and in case of many contingencies that might arise. Contracts might be canceled. The war might be over"

—carry conviction. Like views were held by Mr. C. L. Patterson, also a director and one of the vice presidents of the Powder Company. He voted at the directors' meeting of March 10th against the Powder Company buying it. His reasons were as follows:

"Q. I understand you to say that you had no interest in the subject, except to do your duty as a director? A. None whatever.

"Q. Will you give the court your reasons for voting against that purchase? A. There were several reasons. The principal reason was that it seemed to me the commercial risk was too great and there were several other reasons. * * *

"Q. Will you please name them as far as you can? A. It seemed to me that there were a great many factors, the uncertainty connected with the business at that time, which made it very doubtful as to the ultimate outcome of the earnings of the company; the duration of the war was one, and bills

in Congress which might prohibit shipment of munitions of war abroad was another. I think these are the principal reasons."

[5] We shall not consider in detail the events which followed in the way of votes by the stockholders at corporate meetings supporting the action of the directors in declining to take this stock for the company. For present purposes it suffices to say the court below, after careful consideration, determined to submit to a vote of the stockholders the question whether or not the Coleman Du Pont stock should be acquired by the Powder Company. This was done by an order which, *inter alia*, provided:

"(6) That the question whether said E. I. Du Pont de Nemours & Co. shall acquire said stock, and the dividends or proceeds of dividends thereon, shall be submitted to the stockholders of said corporation at a meeting to be called for that purpose by, and conducted under the supervision of, a special master appointed by this court.

"(7) In determining the decision arrived at by the stockholders, any votes cast upon the 126,628 shares of the common stock of the E. I. Du Pont de Nemours & Co. received as a dividend upon the 63,314 shares of the E. I. Du Pont de Nemours Powder Company shall not be counted."

Such order was in accord with the prayer of the bill.

"(8) That a decree be entered that the matter of acquisition of the stock of T. Coleman Du Pont or the proceeds thereof in the stock of E. I. Du Pont de Nemours & Co. be *submitted to a duly called meeting* of the stockholders of the E. I. Du Pont de Nemours & Co., and that it be decreed that at said meeting of the stockholders aforesaid of E. I. Du Pont de Nemours & Co. that the holders of the stock acquired from T. Coleman Du Pont or the proceeds thereof in the stock of E. I. Du Pont de Nemours & Co., be enjoined from voting such stock."

Indeed, this submission to the stockholders of the company of the advisability of the company making this purchase, thus made by the court in response to the prayer of the bill, was in accord with settled legal principles. Of the general right of courts of equity to protect minority stockholders against the fraudulent and oppressive control of a majority there is no question; but where the question between stockholders is one of the business policy of a corporation, courts do not interfere with corporate control. In that regard the general attitude of courts toward corporate management, is fairly stated in Thompson on Corporations, § 4483:

"All questions within the scope of the corporate powers, which relate to the policy of administration or of expediency of proposed measures are for the good faith decision of the majority. As said by one of the courts: 'When the management is not shown to be fraudulent or dishonest, and when it is a matter of opinion *whether it is wise or unwise, advantageous or disadvantageous, if the acts complained of be intra vires, there is no authority for equity to interfere.* To do so would be to place the control *indirectly in the hands of the minority*, whenever interference removes from control the officers selected by the majority. There is certainly no presumption that a minority stockholder is right, and a majority stockholder is wrong, in opinion as to values and the managing of the corporate property.'"

And in Clark on Corporations, 498, 499, as follows:

"Nor can the holder of a majority of the stock of a corporation so conduct and manage its affairs *in their own interest*, or in the interest of others as

to oppress the minority, or commit a fraud upon their rights. If they attempt to do so, a court of equity will, in a proper case, grant relief, at the suit of the minority. However, the judgment of the majority is not lightly to be set aside, and fraud or oppression must clearly appear. "The holders of a majority of the stock of a corporation may legally control the company's business, prescribe its general policy, make themselves agents, and take reasonable compensation for their services. But, in thus assuming the control, they also take upon themselves the correlative duty of diligence and good faith. They cannot lawfully manipulate the company's business in their own interests, to the injury of other stockholders." It is not every question of mere administration or of policy in which there is a difference of opinion among the shareholders that gives the minority a right to claim that the action of the majority is oppressive, and to come into a court of equity for relief. Generally, the will of the majority must govern, if its action is within its corporate powers. "The court," it was said in a New York case, "would not be justified in interfering, even in doubtful cases, where the action of the majority might be susceptible of different constructions. To warrant the interposition of the court in favor of the minority shareholders in a corporation or joint stock association, as against the contemplated action of the majority, where such action is within the corporate powers, a case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been influenced by an honest desire to secure such interests, but that he must have acted with an intent to subserve some outside purpose, regardless of the consequences to the company, and in a manner inconsistent with its interest."

At such election held by the master, the stockholders had the full benefit of after events, of the full disclosure of all the facts which had been proved in this case, and of a full discussion of such proof by the learned judge of the court below. It is apparent, also, they had further light on the question of the legal power of the Powder Company to make this purchase. It will thus appear that the whole question was before them, and, excluding from such vote the stock purchased from Coleman Du Pont, the large majority of the stockholders of the Powder Company voted against the company buying the stock.

[6] Complaint is made that the stock owned by the defendants and other persons who had bought Coleman Du Pont stock, and also family relatives were allowed to vote. We see no reason why the stock held by such persons should be excluded from the count, because the owners of that stock also owned some of the Coleman Du Pont stock which was not voted. For it is manifest that, if the ownership of the Coleman Du Pont stock created such an interest as disqualified such persons from voting, it is equally clear that a like adverse interest existed in Philip F. Du Pont and the other plaintiffs, who were and would be directly interested in the Powder Company, obtaining at \$200 Coleman Du Pont's stock, which was of much greater value. So, also, if the relatives of the defendants were incapacitated by such relationship, and were thereby prevented from voting with the defendants, the same relationship would have incapacitated such of the plaintiffs' relatives as voted with them. To forbid a stockholder from voting on a question of policy simply because he is related to a person who favors or opposes such policy is a contention that will not stand the test of reason.

From these considerations it is quite evident the master did no injustice in his conduct of the court's election.

And there was another large element in this action of the stockholders, which must have entered into the minds of disinterested stockholders, and which, if this bill were to be otherwise sustained, might well cause a court of equity to now decline to decree that the Powder Company should be awarded this Coleman Du Pont stock at \$200, and might well justify stockholders at the master's election in refusing to vote that the company buy this stock. That is the element of delay. This stock was acquired by the syndicate in February, the directors declined to take the stock for the company in March, and this bill was not filed until December. In the meantime the stock had increased to an extraordinary value. It was known in March that the company by its directors had declined to take it. If the directors took this step in violation of their duty, the wrong was done then, and the basis for legal redress then existed. Nothing happened since to change the rights, obligations, or liabilities of all concerned. But no steps were taken until nearly nine months afterwards. Indeed, the proofs show that the plaintiff, Philip F. Du Pont, did not consult counsel until September, and did not file the bill until December. The proofs further show that up to that date Alfred I. Du Pont and William Du Pont had no part in the filing of the bill, and that neither they nor any other of the plaintiffs intervened until January, 1916. In the meantime the whole situation had changed. The expansion of the company's business had gone on, uncertainties had become certainties, and the business had proved so successful, such large profits were so certain, that the stock increased rapidly in value. This substantial change in the affairs of the company made the question of the purchase of this stock at \$200 when the bill was filed a wholly different question from the uncertain speculative question it was in March preceding, and this bill, filed in December, stands in a very different light before a court of equity from what would have been the case, had it been promptly filed. If the company had been unsuccessful, if the fears of Alfred I. Du Pont, and those who thought with him, had proved well founded, and the syndicate had not been able to take the stock, and there had been an effort to compel the company to take it, there can be little doubt—indeed, the proof by one of the stockholders is—that legal steps would have been taken to prevent the company taking it, if such attempt had been made. Had the vast expansion of business resulted in loss, had the company been unable to fulfill its contracts, it is quite evident the resources of the company might have been swept away.

Viewing the case from every aspect, we see no reason to differ from the conclusion reached by the stockholders, evidenced by their vote at the master's election, against the company taking the stock, and we find no error in the court enforcing that conclusion by dismissing the bill. In view, however, of this bill having been filed by Philip F. Du Pont, who was an unofficial stockholder, of its being filed, as he conceived it, for the benefit and protection of like stockholders; and for the benefit of the company, we are inclined to the

belief that the decree of the court below might be modified, by directing that the costs of the case be paid by the Powder Company. While this is our present view, yet, as that question was not raised or discussed, we shall leave it open for any person or party so desiring to be heard on that question. But, if no one so moves, we will, as we have said, so modify the decree of dismissal by directing the Powder Company pay the costs of the case.

SCHULTZ v. BROWN.

(Circuit Court of Appeals, Ninth Circuit. March 3, 1919.)

No. 3143.

1. MASTER AND SERVANT ⇨302(1)—TORTS OF SERVANT—MASTER'S LIABILITY.
Whether a servant's act or omission, injuring a third person, is within the scope of his authority, so as to render the master liable, is to be determined from the surrounding facts and circumstances.
2. MASTER AND SERVANT ⇨302(3)—TORTS OF SERVANT—MASTER'S LIABILITY.
An aggrieved party cannot recover from a master for an assault by his servant, unless it constituted a violation of an absolute duty owed him by the master, or was within the scope of the tort-feasor's employment.
3. MASTER AND SERVANT ⇨332(2)—TORTS OF SERVANT—MASTER'S LIABILITY.
In an action for an assault on plaintiff by defendant's sheep herder, whether the herder was acting within the scope of his authority *held*, under the evidence, for the jury.
4. TRIAL ⇨296(2)—INSTRUCTION—CONSTRUCTION AS A WHOLE.
In an action for an assault on plaintiff by defendant's sheep herder, an instruction as to the herder's duties *held*, in view of others, to be correct.

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

Action by John Brown against Otto Schultz. There was a judgment for plaintiff, and defendant brings error. Affirmed.

W. B. Rodgers, of Anaconda, Mont., and Henry G. Rodgers, of Dillon, Mont., for plaintiff in error.

Maury, Wheeler & Melzner and A. G. Shone, all of Butte, Mont., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This is an action for damages for personal injuries inflicted upon John Brown, the defendant in error, by one Dimitre Heinz, a servant of Otto Schultz, the plaintiff in error.

At the time of the injury, Schultz was the owner of a large band of sheep and employed Heinz as his herder. Schultz was also the owner of an uninclosed tract of land about three miles from Silver Star, in Madison county, Mont. To this tract of land a band of sheep owned by Schultz was driven by Heinz, the herder, about the 14th of October, 1916. A few days before this time, Brown, who was herding a band of sheep owned by one Frank Reed, drove his sheep upon the same land. Upon the arrival of Heinz upon the land with the

sheep owned by Schultz, he told Brown not to allow his sheep to cross to the north side of a certain creek; that the land on that side of the creek belonged to Schultz. Brown continued to herd his sheep on the north side of the creek until the two bands became mixed, whereupon Elmer Reed, the son of Frank Reed, and one Cowins, the camp-tender for Schultz, were notified. They came to the place to separate the sheep, and this was accomplished on the morning of October 19, 1916; by the use of a corral; both bands being driven into the corral, and the bands separated by driving out the sheep owned by Schultz and keeping in the corral the sheep owned by Reed. The separation was conducted by Elmer Reed and Cowins. Heinz and Brown drove the sheep through the chute. After the separation had been accomplished, Brown started to the corral to let his sheep out, whereupon Heinz made the assault upon Brown which is the subject of this action.

Elmer Reed testified that he saw the happening of the tort; that he was somewhere around 12 or 15 feet from Brown at the time, and about the same distance from Heinz; that he could overhear the conversation that took place between them; that he could hear Heinz and was talking to him; that he told Heinz Brown must keep his sheep on the other side of the creek; all that Heinz said was that Brown wanted this side of the creek. He did not hear any other statement, and then Heinz struck Brown over the head with a shovel handle, inflicting the injury charged in the complaint. On cross-examination, Reed testified:

"At the time the plaintiff received the injuries, our sheep were in the corral, and Mr. Schultz's sheep were just on the outside. That is Mr. Schultz's land that lies around that corral on that side of the creek. The sheep had been entirely separated at the time Brown received his injuries, and Cowins was up at the barn, I think. There had been no trouble there that morning between any of us; there had been no dispute between Mr. Cowins, Mr. Schultz, and myself; everything had been friendly. Just before the trouble happened, I was talking to Brown about the sheep, showing him where to go, telling him what to do with our sheep when they were taken out of the corral. I told him to go on the south side of the creek, and stay off of Mr. Schultz's land. The corral was on the north side; this land was on both sides of the creek; when I said this to Brown, Dimitra Heinz was opposite me, standing on the opposite side; Heinz had not said or done anything. After I told Brown to take the sheep back on the south side of the creek, and stay away from that place, Heinz said, 'Brown wants this side of the creek.' There was no dispute at that time. Neither Brown nor I were at that time in any way interfering with Mr. Schultz's sheep, or in Heinz's care of Mr. Schultz's sheep. The sheep had been taken to the corral by mutual consent of myself and Mr. Schultz's man, for the purpose of separating them."

Brown testified that Heinz said, "Don't let them cross the creek"—referring to Reed's sheep. Brown says he told Heinz to ask Mr. Reed, to which Heinz appears to have made no reply, but struck Brown over the head with a shovel handle. Cowins was not present when Heinz assaulted Brown. He had gone to the barn to get his horses, and saw none of the fight. After the assault, Heinz crossed the creek, went up the hill towards his camp, and disappeared, and has not been seen since.

This suit, brought by Brown against Schultz for damages for the injury described, is based upon the charge that Heinz, when he committed the assault, was in the employ of Schultz, and was engaged in furthering the business of his master. In a legal sense the charge takes the form that the plaintiff, Brown, was injured by Heinz, a servant of the defendant Schultz, while the servant was acting within the course and scope of his employment.

[1-3] In 26 Cyc. 1533, under the title of "Master and Servant," and the subtitle of "Liability of the Master for Injuries to Third Persons," there is a statement concerning the acts within the scope of employment, with authorities cited in support of the text. The statement is applicable to the question in controversy in this case. It is there said:

"In determining whether a master is liable for the torts of his servants, the most difficult question is whether the particular act or omission of the servant, causing the injury for which the master is sought to be held liable, was committed within the scope of the servant's employment; and this question is in most cases one of fact, to be determined by the jury from the surrounding facts and circumstances. The terms 'course of employment' and 'scope of the authority' are not susceptible of accurate definition. What acts are within the scope of the employment can be determined by no fixed rule; the authority from the master generally being gatherable from the surrounding circumstances. An act is within the scope of a servant's employment, where necessary to accomplish the purpose of his employment, and intended for that purpose, although in excess of the powers actually conferred on the servant by the master."

With respect to the course and scope of Heinz's employment, it is not claimed that he was employed to assault Brown. The claim is that the course and scope of his employment furnished the motive and purpose of the assault, as distinguished from any personal or private animosity of his own. The defendant, Schultz, was called as a witness for the plaintiff. He testified that Heinz—

"was there as a herder, sheep herder; he had no other duties than those of sheep herder. The duties of a sheep herder are to herd the sheep, while they are out on a range, and do his own cooking; he does not select the place where he herds them; the camp tender or foreman does that for him."

Being called later as a witness in his own behalf, he testified:

"I had not given Heinz, who was herding for me, any instructions relative to keeping other people's sheep, or Reed's sheep, or anybody's else sheep, off that land. I always gave my instructions through the camp tender or foreman. The camp tender was Mr. Cowins."

Mr. Cowins, called as a witness for the defendant, testified:

"The sheep herder has no duty relative to where he herds his sheep. It is the camp tender's or boss' duty to instruct him where to herd the sheep. When any dispute arises over range questions, grass, or over the mixing of sheep, the sheep herder has no duty, only to put the sheep through the corral and do as the camp tender tells him to."

But this witness, on cross-examination, testified:

"When I was away telephoning, and on other matters, Heinz had the herding of the sheep; the sheep moved around while they were herding and grazing, and were under his control. He directs their place of herding when I am away, and was on the 18th of October of last year."

On further cross-examination, this witness was permitted to testify without objection that:

"Dan [Heinz] said, 'This man wants trouble all the time;' and after he went out we had a conversation, and I told him not to have any trouble, that the sheep would be separated in a day or two, and Dan [Heinz] said he would not. Dan wanted to herd off of these sections, and John Brown wanted to herd on the sections, and John would get on one side of the sheep, and drive them towards the sections, and Dan would get on the other side to try and keep them off; and after I told him not to have any trouble, Dan turned away and let them go on the sections, rather than have any trouble with Brown. I did not fear any trouble between them after I told him. I feared there would be trouble between them after he got on one side and drove them, and Dan the other way; but I was positive there would be no trouble after I told him not to have any trouble. Dan did not tell me that he was going to stop him. I thought from his conversation he was going to have trouble; from Dan's conversation. Dan just said, 'This kind of a man wants trouble all the time;' that is all he said in regard to that, and told me about the way that Brown would drive the sheep onto the sections, and he would drive them off, and from what he said I thought probably he would cause trouble if I did not stop him—about the sheep, if I did not stop him; there was no other cause of anger between the men that I know of; I never saw any other trouble. I was working for Schultz."

This testimony tends to prove that prior to the assault there were signs of trouble between Heinz and Brown concerning the herding of the sheep; that there was no other cause of trouble between them; that at the time of the assault neither Schultz, the owner of the sheep, nor Cowins, his sheep tender, was present; that after the separation of the two bands of sheep Heinz was the only representative of Schultz authorized to act for him in keeping the two bands apart, and, acting within the scope of that authority, he assaulted Brown, because the latter would not say that thereafter he would keep the Reed sheep off the Schultz land.

The liability of the master for an assault of the servant is thus stated by Labatt on Master and Servant, par. 2347, p. 7085:

"A master who actually authorizes an assault by a servant upon a third person is, of course, liable for the resulting injury. For an assault not so authorized, the aggrieved party cannot recover damages unless he shows either (1) that it constituted a violation of an absolute duty owed to him by the master; or (2) that it was within the scope of the tort-feasor's employment. Whether it was an act of the latter description is ordinarily a question for the jury. If the question is answered in the affirmative, the assault is imputable to the master, although the servant may, in respect of its commission, have transcended the actual limits of his authority, or may have been specially instructed not to commit it. Nor is the action any the less maintainable, because an assault is a criminal offense as well as a civil wrong."

There is also some evidence tending to prove that Schultz ratified the act of Heinz in assaulting Brown. Brown testified:

"Before I left the Madison Valley, I talked with Mr. Schultz, about six weeks after I got hurt; I talked with him in Twin Bridges, and he said, 'How did I feel?' and I said, 'Pretty fair;' and he say, 'Don't bother my land any more, or you will get hurt again.'"

We think this evidence was sufficient to take the case to the jury, and that it was for the jury to determine whether, upon such evidence, Heinz, at the time he made the assault upon Brown, was acting within

the scope of his employment, and not from any personal or private animosity of his own.

[4] It is assigned as error that the court instructed the jury as follows:

"If this herder of the defendant, because of the difficulty that the two herders had before, one trying to herd a certain place and the other trying to keep them off, if the defendant's herder, because of that, and in punishment of that, and in punishment and retaliation for that, struck this plaintiff the blows that have been testified to, and which apparently he did, then that would be so closely connected with the difficulties over the place of herding a day or two before that you have a right to say that it was an incident of his duties of a few days before, always within the scope of his employment, and for which the defendant is liable."

It is contended that this in effect was an instruction to the jury that, after the completion of the wrong to his master in the herding of the sheep, it was within the scope of the servant's authority to inflict punishment upon the wrongdoer or assault him by way of retaliation.

We do not so read the instruction. Immediately preceding the instruction to which exception was taken, the court instructed the jury as follows:

"Now, gentlemen of the jury, in so far as there had been any difficulties between the two herders a day or two days or three days before, possibly up to the time of the separation that was going on, and the morning when they came to separate the sheep, there was nothing for each herder to do, except take his sheep and drive them away. At the same time, although this herder of the defendant may have been ordered not to attempt to drive away trespassers, and not to get involved in any trouble," etc.

Immediately following the instruction to which exception was taken, the court advised the jury that the incident referred to was for them to consider as furnishing an inference in one way that Heinz was acting for his master, in another that he was acting in satisfaction of a private grudge against the plaintiff. The court said:

"It is an inference for you to draw. If, on the other hand, it was not done for that purpose, if that man Heinz had some private grudge against this plaintiff, or if he merely wanted to satisfy his own resentment, with no idea that he was going to help out his master, even in a case where his master had forbidden him, then you may say it was not incident to his employment, and at that time and place the defendant would not be liable."

The court, at the very outset of its instructions, had said:

"You take the law from the court; that is your duty. You take the facts upon your own judgment from the evidence; that, also, is your duty. If the court should comment on the facts, it is not to control your judgment, but solely in the way that it might aid you to arrive at a fair and proper conclusion; you are not bound by any expression of the court in reference to the facts, but arrive at such conclusion as your judgment dictates; who you will believe, how much weight you will give to evidence, what inference you will draw from circumstances and proof, is wholly for your judgment."

We think these instructions are correct, and that they are to be commended for their clearness, and the judicious reference that was made to the testimony, and the inferences to be drawn therefrom.

The case was one particularly for the jury upon the facts proven, and in view of all the surrounding circumstances.

Finding no error in the record, the judgment of the District Court is affirmed.

THE INTERNATIONAL

(Circuit Court of Appeals, Second Circuit. January 15, 1919.)

No. 92.

1. NAVIGABLE WATERS ⇨20(1)—INTERNATIONAL BRIDGE AT BUFFALO—DUTY TO MAINTAIN HELPING TUG.

International Bridge Company, incorporated by New York and Canada in 1857 to build and operate a bridge over Niagara river at Buffalo, and whose charter was confirmed by Congress by Act June 30, 1870, remains subject to the provisions of the state charter, which require it to keep always at hand a tug to help without charge both sail and steam vessels desiring to pass through the draw.

2. ADMIRALTY ⇨28—BRIDGE—NEGLIGENCE IN OPERATION OF DRAW.

The failure of a tug, maintained by a bridge company to help vessels passing through the draw, to come promptly to the assistance of a vessel signaling, by reason of which she was injured, gives no right of action in rem, but does give a right of action in personam against the owner.

3. NAVIGABLE WATERS ⇨20(8)—INJURY TO VESSEL FROM NEGLIGENT OPERATION OF BRIDGE—DAMAGES.

The proof must be very clear to warrant allowance of damages for depreciation of a vessel because of an injury, beyond the allowance for cost of repairs.

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

Suit by William L. McFadden and others, owners of the steamer Albert T. Gowen, against the tug International and the International Bridge Company. Decree for libelants, and respondent Bridge Company appeals. Modified and affirmed.

Rebadow, Ladd & Brown, of Buffalo, N. Y., for appellant.

Moot, Sprague, Brownell & Marcy, of Buffalo, N. Y., for appellees.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. July 12, 1915, at about 7:30 a. m., the steamer Albert T. Gowen was lying at anchor on the west side of Squaw Island in the Niagara river, with her bow heading toward the island, sucking sand and gravel from the river bed. The river runs north and south, and is crossed by the International Bridge between Buffalo, in the state of New York, and the Dominion of Canada at a point some 600 feet above where the steamer was lying. Her bow began to swing upstream and she herself to drag her anchor. She blew a signal for the opening of the draw and went slowly down the river with the current, using her engines to help keep her in the channel, so that she might pass through the draw at the east end of the bridge. The draw was opened timely, but she finally brought up on the west side of the riprap, which acts as an ice breaker for Pier 8.

[1] The respondent, International Bridge Company, was incorporated by chapter 753 of the Laws of 1857 of the state of New York, and another corporation of the same name was incorporated by the Dominion of Canada. St. 20 Vict. c. 227. Section 2 of the New York act provides:

"Section 2. The draws of said bridge shall be of ample width to give free and unobstructed passage to all steamboats and other vessels navigating said river or Lake Erie; they shall be at all times tended and moved at the expense of said company, so as not to hinder or delay, unnecessarily, the passage of any steamboat or vessel. From sundown until sunrise, during the season of lake navigation, suitable lights shall be maintained upon said bridge to guide vessels or steamboats approaching said draws, and shall at all times keep in readiness one or more steamboats or steamtugs, suitable for towing such vessels through such draws, and shall tow all sail vessels through said draws, whenever requested so to do by the officers of such sail vessels on their regular passage up or down the river or harbor, without charge; and said company, shall be liable to pay owners of any steamboat or vessel, or the cargoes thereof, all damages which they may sustain, by reason of any neglect of the provisions of this section."

Section 12 of the Canadian act provides:

"XII. The said bridge shall be constructed so as not materially to obstruct the navigation of the Niagara river. The said bridge shall have two draws— which said draws shall be of ample width to give free and unobstructed passage to all steamboats and other vessels navigating the said river; the said draws shall be at all times tended and moved at the expense of the said company so as not to hinder unnecessarily the passage of any steamboats or vessels; from sundown until sunrise during the season of navigation suitable lights shall be maintained upon the said bridge to guide vessels and steamboats approaching the draws; and for assisting the passage of any vessel through the said draws, the said company shall at all times keep in readiness one or more steamboats or steam tugs suitable for towing the said vessels through the said draws and shall tow all the said vessels through the same, whenever requested so to do by the officers of such vessels on their regular trips up and down the river or harbor without charge; and the said company shall be liable to pay the owners of any steamboat or vessel, or the cargoes thereof, all damages which they may sustain by reason of any neglect of the provisions of this section."

The two corporations were consolidated by chapter 550, Laws 1869, of the state of New York, which imposes on the new corporation all the duties prescribed by the original acts. *People v. International Bridge Co.*, 223 N. Y. 144, 119 N. E. 351.

Congress by Act June 30, 1870, c. 176, 16 Stat. 173, confirmed the charter, so making the bridge to be thereafter built in accordance with the requirements of the act of 1869 a lawful structure over navigable waters of the United States. It provided:

"Any bridge and its appurtenances which shall be constructed across the Niagara river, from the city of Buffalo, New York, to Canada, in pursuance of the provisions of an act of the Legislature of the state of New York, entitled 'An act to incorporate the International Bridge Company,' passed April 17, 1857, or of any act or acts of said Legislature now in force, amending the same, shall be lawful structures, and shall be so held and taken, and are hereby authorized to be constructed and maintained as provided by said act and such amendments thereto; * * * but this act shall not be construed to authorize the construction of any bridge which shall not permit the free navigation of said river to substantially the same extent as would be enjoyed under the provisions of said act and the amendments thereto."

The bridge was actually constructed between 1870 and 1874.

We have no difficulty in construing the acts to mean that the Bridge Company shall keep always at hand a tug to help both sail and steam vessels wanting to pass through the draw, which it has done continuously for the last 40 years.

The libel is in tort, in rem against the tug and in personam against the Bridge Company, for failure to perform a maritime duty imposed by statute, and the negligence charged is, first, that the tug, though signaled for, did not come promptly to the steamer's assistance as she might have done, and so have prevented the damage; second, that the master of the tug, when helping the steamer off the riprap, instead of taking a line from her bow, as he was requested to do, took it from her stern, with the result that the port bow and side of the steamer struck the riprap with great violence, sustaining severe damage.

In respect to the second charge, Judge Hazel found that the major injuries to the steamer occurred when the tug was helping her off the riprap; that the extent of the tug's duty was to exercise ordinary care and skill according to the circumstances; that the situation presented many difficulties, and, if the master of the tug did not take the wisest course, still he failed only in the matter of judgment, for which neither the tug nor its owner is liable.

In respect to the first charge, the District Judge held that the tug had failed to come to the assistance of the steamer with reasonable promptness, and that if she had done so the accident would not have happened.

Both these conclusions are or depend upon findings of fact, which in accordance with our practice we would not disturb, unless we thought them clearly erroneous, which we do not.

[2] The failure of the tug to come promptly to the assistance of the steamer gives no right in rem, though it does a right in personam against the owner.

It is contended as matter of law that the act of Congress alone applies to the bridge, and that, as it says nothing about the employment of a tug by the Bridge Company, no such obligation exists. Under its power to regulate commerce the United States has always had a right to prevent obstruction of its navigable waters by bridges, even when constructed under state statutes, and has often exercised this right by approving such structures, as in this case, by special acts, *Pennsylvania v. Wheeling Bridge*, 13 How. 630, 14 L. Ed. 249; *Union Bridge Co. v. United States*, 204 U. S. 364, 400, 27 Sup. Ct. 367, 51 L. Ed. 523. Since the passage of chapter 907, § 7, Act Sept. 19, 1890, 26 Stat. 426, 454, no bridge can be erected over such waters without first obtaining the approval of the Secretary of War. See, also, chapter 425, Act March 3, 1899, 30 Stat. 1151. These acts establish a uniform method of procedure, which saves Congress the trouble of special acts legalizing such structures.

We think the act of Congress was intended simply to make the bridge a legal structure and not to regulate the management of it. It cannot be supposed that there was any intention to relieve the Bridge Company of such very obvious and necessary duties as were imposed

upon it by the said statute; e. g., opening the draw, in setting lights, or in supplying a tug to help vessels to pass under it in safety. Upon these subjects Congress did not speak, and therefore left them within the power of the state. Indeed, the language of the act seems to confirm the state regulations:

"Chapter 176, Act June 30, 1870. An act to authorize the construction and maintenance of a bridge across the Niagara river.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that any bridge and its appurtenances which shall be constructed across the Niagara river, from the city of Buffalo, New York, to Canada, in pursuance of the provisions of an act of the Legislature of the state of New York, entitled 'An act to incorporate the International Bridge Company,' passed April 17, 1857, or of any act or acts of said Legislature now in force, amending the same, shall be lawful structures, and shall be so held and taken, and are hereby authorized to be constructed and maintained as provided by said act and such amendments thereto, anything in any law or laws of the United States to the contrary notwithstanding, and such bridge shall be, and is hereby, declared to be an established postroad for the mails of the United States; but this act shall not be construed to authorize the construction of any bridge which shall not permit the free navigation of said river to substantially the same extent as would be enjoyed under the provisions of said act and the amendments thereto, heretofore enacted and now in force: Provided, nevertheless, that the location of any bridge, the construction of which is hereby authorized, shall be subject to the approval of the Secretary of War, but not to be located south of Squaw Island: And provided further, that such bridge shall have at least two draws of not less than one hundred and sixty feet in width, in the clear between the piers, which shall be located at the points best calculated to accommodate the commerce of said river; and the piers of said bridge shall be parallel to the current of said river.

"Sec. 2. And be it further enacted, that the bridge herein named shall be subject, in its construction, to the supervision of the Secretary of War of the United States, to whom the plans and specifications, relative to its construction, shall be submitted for approval. And all railway companies desiring to use the said bridge shall have and be entitled to equal rights and privileges in the passage of the same and in the use of the machinery and fixtures thereof and of all the approaches thereto, under and upon such terms and conditions as shall be prescribed by the District Court of the United States for the Northern District of New York, upon hearing the allegations and proofs of the parties, in case they shall not agree. * * *"

[3] The accounting before the commissioner seems to us to do justice, except that there should be no allowance for depreciation in value. The proofs ought to be very clear to sustain such finding. The court below is directed to strike out this allowance, and, so modified, the decree is affirmed. There will be no costs of this appeal.

NAPIER v. GREENZWEIG.

(Circuit Court of Appeals, Second Circuit. January 15, 1919.)

No. 90.

1. PHYSICIANS AND SURGEONS \S 14(1)—DEGREE OF SKILL AND CARE REQUIRED.

A surgeon or physician attending a patient is bound to possess and to give the case such reasonable and ordinary skill and diligence as surgeons or physicians in similar localities and in the same general line of practice ordinarily exercise in like cases.

2. PHYSICIANS AND SURGEONS \S 18(6)—ACTIONS FOR MALPRACTICE—BURDEN OF PROOF.

In an action against a surgeon for malpractice the burden rests on plaintiff to establish by a preponderance of evidence that defendant failed to exercise the skill which the law demanded, or that in his treatment of the case he was guilty of negligence.

3. APPEAL AND ERROR \S 1002—REVIEW—VERDICTS.

In actions at law in the federal courts the jury are the judges of the credibility of witnesses and of the weight of evidence, and if the evidence is conflicting, or there is any evidence which, if believed by the jury, is legally sufficient to support it, the verdict will not be disturbed by an appellate court.

4. EVIDENCE \S 553(2)—EXAMINATION OF EXPERTS—HYPOTHETICAL QUESTION.

What facts a hypothetical question must cover are to be determined by the sound discretion of the trial judge.

5. EVIDENCE \S 553(2)—EXAMINATION OF EXPERTS—HYPOTHETICAL QUESTIONS.

While a hypothetical question should be based upon facts as to which there is such evidence that a jury may reasonably find that they are established, it is not in general essential that each hypothetical question should embrace every fact which it might be contended should affect the expert's judgment.

Hough, Circuit Judge, dissenting.

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

Action by George Greenzweig, an infant, by Bernard Greenzweig, his guardian ad litem, against Charles D. Napier. Judgment for plaintiff, and defendant brings error. Affirmed.

The defendant in error, who was plaintiff below, will hereinafter be referred to as plaintiff. The plaintiff and his guardian ad litem are citizens of Russia and residents of the Eastern district of New York. The plaintiff in error, who was defendant below, will be hereinafter referred to as defendant, and is a citizen of the United States and a resident of the Eastern district.

The defendant is a physician and surgeon, and was at the times hereinafter referred to and still is attached to the staff of physicians and surgeons at the Kings County Hospital, in the borough of Brooklyn, city of New York. The plaintiff was admitted to the Kings County Hospital on July 7, 1915, to be treated for a derangement of the bones of his legs, commonly known as bow legs.

The third and fourth paragraphs of the complaint alleged as follows:

"Third. That the ailment for which the plaintiff was treated was not a serious ailment, and a proper course of treatment therefor is not dangerous to the patient, and consists, in part, of the application of a plaster cast to the leg.

"Fourth. That that part of the plaintiff's treatment at the said hospital consisting of the application of such cast to the plaintiff's leg, and the care and treatment of the plaintiff thereafter was intrusted by the said hospital authori-

ties to, and was undertaken by, the defendants. But the defendants, and each of them, in violation of their duty to the plaintiff, undertook to and did apply a plaster cast to the foot and leg of the plaintiff too tightly, and so unskillfully, negligently, and unprofessionally, and thereafter applied medicines to the foot and leg of the plaintiff so unskillfully, negligently, and unprofessionally, and were thereafter so careless, negligent, and unprofessional in their treatment of the plaintiff, that the said cast restricted the flow of blood to the foot, and the defendants finally found it necessary to amputate and sever the foot and part of the leg of the plaintiff from his body."

Damages in the amount of \$50,000 were asked.

The original action was brought against defendant and one Dr. Benjamin E. Wolfort. The jury found in favor of the defendant Wolfort. But they found against the defendant Napier in the sum of \$7,500, and judgment has been entered against him, and in favor of the plaintiff, in the amount of \$7,709.57.

Nadal, Jones & Mowton, of New York City (Edward P. Mowton, of New York City, of counsel), for plaintiff in error.

Ellenbogen & Selig, of New York City (Samson Selig and John Vernon Bowvier, Jr., both of New York City, of counsel), for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). This is an action for malpractice. It belongs to a class of cases comparatively rare, at least in appellate courts. But occasionally it happens that an attorney, or a physician, or a surgeon, is called upon in a judicial tribunal to defend himself against a charge of a want of skill or a want of care.

In this case the defendant is a surgeon. A surgeon is one who practices surgery, and in the Century Dictionary surgery is defined as:

"Therapy of a distinctly operative kind, such as cutting operations, the reduction and putting up of fractures and dislocations, and similar manual forms of treatment."

In Webster's New International Dictionary the term "malpractice" is defined as:

"The treatment by a surgeon or physician in a manner contrary to accepted rules and with injurious results to the patient; hence, any professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties; wrongdoing. A question of professional malpractice or negligence is determined by what might be reasonably required under the circumstances of the case."

[1] The law is well established that a surgeon or physician attending a patient is bound by his contract to possess and to give the case such reasonable and ordinary skill and diligence as surgeons or physicians in similar localities and in the same general line of practice ordinarily exercise in like cases. Wharton's & Stille's Medical Jurisprudence (5th Ed.) vol. 3, § 473. See also *Pike v. Honsinger*, 155 N. Y. 201, 49 N. E. 760, 63 Am. St. Rep. 655; *Carpenter v. Blake*, 75 N. Y. 12; *Hitchcock v. Burgett*, 38 Mich. 501; *English v. Free*, 205 Pa. 624, 55 Atl. 777.

We have said that a surgeon or physician is bound by his contract to possess and exercise reasonable skill and diligence. His contract un-

doubtedly imposes such an obligation. But the law imposes such obligation even if there is no contract. Thus in *Styles v. Tyler*, 64 Conn. 432, 463, 30 Atl. 165, 176, the court said:

"The obligation of a physician to exercise ordinary care and skill arises not so directly from the contract of employment as from the duty imposed upon him by law, which requires him in the exercise of a skilled and privileged profession to use at his peril that degree of skill and care which the law says shall be requisite for the practice of such profession. The violation of that duty is a wrong which entitles the person who suffers from that wrong to legal redress. This duty, and the right of action consequent on its violation, existed before the law recognized any contract of employment, and when the only compensation a physician could receive for his services was the honorarium paid at the option of the patient."

In *Savings Bank v. Ward*, 100 U. S. 195 (25 L. Ed. 621), the Supreme Court of the United States, discussing to some extent the doctrine of malpractice, points out at page 200 that beyond all doubt the general rule is that the obligation of an attorney grows out of contract, and is to his client, who employs him, and is not, in the absence of fraud or collusion, to a third party, who does not employ him, and at page 203 the court points out that there are exceptional cases in which privity of contract is not essential to the maintenance of an action, as where "a patient" is "injured by improper medicines prepared by an apothecary, or one is unskillfully treated by a surgeon."

The liability of the physician and of the surgeon is in this respect not unlike that of an apothecary or pharmacist. If one who compounds or sells medicines carelessly labels a poison as a harmless medicine, and sends it so labeled into the market, he becomes liable to any one who without fault on his part uses it and is thereby injured. In such a case the liability does not arise from contract, but from the duty, imposed by law upon him who falsely labeled it and sent it forth, to avoid acts which in their nature are dangerous to the lives of others. See *Thomas v. Winchester*, 6 N. Y. 397, 410, 57 Am. Dec. 455, which is the leading case in this country. We recognized the doctrine in a recent case involving the liability of a vendor of unwholesome food products. *Ketterer v. Armour & Co.*, 247 Fed. 921, 160 C. C. A. 111, L. R. A. 1918D, 798.

Inasmuch as the surgeon's obligation is imposed by the law, the law requires the same degree of care and diligence of the surgeon, or of the physician, when his services are rendered gratuitously as when he receives compensation. *Wharton & Stillé's Medical Jurisprudence* (5th Ed.) vol. 3, § 478; *Edwards v. Lamb*, 69 N. H. 599, 45 Atl. 480, 50 L. R. A. 160; *Peck v. Hutchinson*, 88 Iowa, 320, 55 N. W. 511; *Becker v. Janinski* (N. Y.) 27 Abb. N. C. 45. So that no question is raised in this case as to whether the child or the child's father (the guardian ad litem) was under agreement to compensate or had compensated this defendant for his services. No such question was presented to us.

[2] In cases of alleged malpractice the burden is upon the plaintiff to establish that the defendant failed to exercise the skill which the law demanded, or that in his treatment of the case he was guilty of negligence. *Brown v. Goffe*, 140 App. Div. 353, 125 N. Y. Supp. 458. The plaintiff must establish this by a preponderance of the evidence.

Wood v. Wyeth, 106 App. Div. 21, 94 N. Y. Supp. 360. And in the case at bar the jury were properly instructed in these respects. The court was asked to charge, and did charge, as follows:

"The burden is upon the plaintiff to establish negligence on the part of Dr. Napier by a fair preponderance of the credible evidence, and in the event that he fails to sustain the burden, or in the event that the evidence on the question of negligence on Dr. Napier's part is evenly balanced, the verdict must be for Dr. Napier."

The law relating to malpractice is well settled. Whatever difficulty there is arises from the fact that its simple and well-settled principles are sometimes difficult in their application. The complaint is that, when it was apparent on July 12th that the cast or the bandages were too tight and interfered with the proper circulation of the blood, as disclosed by the swelling of the toes and their cyanosed condition, the defendant prevented the opening of the cast and the bandages and their removal until July 16th, when gangrenous conditions had set in which made amputation necessary. It is not claimed that on August 21st, when the amputation occurred, it was not necessary, or that it was not skillfully done. The defendant did not perform the operation. All the testimony agrees that from July 16th to August 21st everybody did all they could to make amputation unnecessary. And no fault is found, so far as this defendant is concerned, with what happened prior to July 12th, when the defendant first took charge of the case.

The testimony introduced by the plaintiff is in conflict with the testimony given by the defendant, which is in part confirmed by others. But it is for the jury, and not for this court, to say what the testimony established.

The ailment for which the plaintiff in this case was treated was not of a serious nature, and a proper course of treatment therefor is not dangerous to the patient. The plaintiff, a boy of five years of age, was bow-legged, and it was necessary to operate on both legs below the knee. But the treatment in this case made it necessary to amputate the left leg from a little below the knee down, and this notwithstanding the fact that the experts had never known of an amputation which resulted from an operation for bow legs. So that a jury might well conclude that, if in this case there was such an operation, some one was guilty either of negligence or want of skill; and the question the jury had to decide was to determine whether this defendant in what he did or did not do was at fault. The operation to straighten the legs seems to have been performed in the usual manner, by making an incision through the skin at the lower end of the tibia, separating the muscles, and inserting a chisel and making a cut in the bone of each leg two-thirds of the way through. In preparation for the operation, the patient's legs were scrubbed with soap and water, then washed with a bichloride solution, covered with sterile dressings saturated in bichloride of mercury, and he was then removed to the operating room. The operation on the left leg was performed by Dr. Wolfort, assisted by Dr. Tarbox and an interne, Dr. Mayes by name. The operation on the right leg was performed by Dr. Tarbox. The bones were fractured, set in position, the wounds closed, the skin sutured, the bleeding

stopped, the legs bandaged, and plaster applied. Over the sterile dressing on the leg a gauze pad was applied, and over the pad sheet wadding was placed. Over the gauze and pad another gauze was wrapped, after which a plaster of paris bandage was wrapped around the leg, outside of the dressings and padding. The pad was put between the dressing over the wound and the plaster of paris to permit and allow for, and not interfere with, the swelling that always follows such an operation.

The defendant, however, insists that the plaintiff failed to establish any negligence whatever on his part that can be said to be the proximate cause of the loss of the leg. If there is no such evidence, of course, this judgment must be reversed; for it is within the province of this court to examine the record and say whether or not there is any evidence from which the jury might conclude that the defendant had not exercised such care as the law demanded of him under the circumstances.

The defendant as we have said was a visiting surgeon on the hospital staff. The hospital contained both adult and infant wards. The visiting surgeons took turns in visiting these wards and at stated periods exchanged services; that is, the visiting surgeon to the adult ward would exchange with the visiting surgeon to the infant ward. At the time the operation to cure the bow-legged condition occurred, and when the casts were put on, which as we have seen was on July 7th, the defendant was in charge of the adult ward, and so was not in any way responsible for what took place in the infant's ward, then in charge of another member of the hospital staff. The defendant did not see the plaintiff until July 12th, which was the first day after the operation, when the defendant in the ordinary course of his work made a visit to the hospital. No complaint is made against this defendant concerning anything that happened prior to defendant's visit on that day.

The first witness called for the defendant, one of his friends and a member of the hospital staff, testified that two conferences by the defendants were held to prepare this case for trial; that at these conferences the two defendant doctors, including the witness, were present; that the whole case was gone over; that the records were examined; that there was a general discussion, and that the specific time covered in the consideration of the question of who, if any one, made a mistake in treating the child, was the time from the original application of the cast up to the 12th of July, when defendant claims he first took professional notice of the case; and that they all came to the unanimous conclusion that up to the 12th of July, nothing happened to impose blame on anybody.

It is true that the evidence discloses that the cast on the left leg had been put on too tight. But the defendant had nothing to do with the putting on of the cast which was done on July 7th. And this was made plain to the jury, the court charging as follows:

"Dr. Napier is not responsible for any condition of the plaintiff's leg that arose either by reason of the operation for the cure of bow legs, or by reason of any subsequent treatment or lack of treatment after that operation and before Dr. Napier saw the plaintiff on July 12, 1915."

It is extremely difficult to determine, when a cast is put on, whether it is too tight. In order to make sure that it is not too tight, and that the pressure may be discovered in time, it is customary to leave the toes exposed and outside the cast. If the cast or the bandages are too tight, the fact is indicated by the toes beginning to swell and turn blue, which shows that the circulation is being interfered with. The proper procedure then is not to remove the cast at once, but to cut the cast or bandages a certain extent, and if the patient's condition improves to proceed no further, but if it does not improve to cut more and more, and if necessary to remove the entire cast, and even the bandages under the cast, in order to relieve the pressure and allow the blood to circulate properly through to the foot.

The testimony in this case is that there was a swelling of the toes of the left foot, followed by cyanosis. There is evidence that when this condition was discovered the interne cut down the plaster around the toes and up the leg a distance of five or six inches, and that relief followed. This relief was not sufficient, and the same conditions again asserted themselves. Thereupon the interne says that he cut the cast from the bottom to the top, and intended spreading the cast and cutting the bandages beneath, so as to eliminate the pressure from the leg. But his testimony is that, just as he cut the cast, the defendant appeared in the ward and told him to stop, and not to proceed further with it; and because of this order, which the interne was bound to obey as coming from his superior, nothing further for the relief or spreading of the cast was done until July 16, when the cast was removed by one of defendant's assistants and a looser cast was applied. The defendant, however, denies that he directed the interne to stop the cutting on July 12th, and he testified that the defendant himself proceeded to cut the cast at that time, on July 12th, from end to end, and the bandages beneath, which he removed, having spread the cast apart like a trough. There was thus a direct conflict in the evidence, and it was for the jury, who saw and heard the witnesses, to determine what the truth was. The entries in the hospital or bedside history of the case, made from day to day, confirmed the interne's account of what happened. It contained no statement of any cutting of the cast or spreading of it by the defendant, or any dressing of the leg on July 12th. The entry made by the interne at the time and under date of July 12th reads:

"The child, when asked where hurt, pointed to right leg. Cast on this leg cut down; window inserted over wound; seemed healthy; cast not removed. Cast on other leg cut down, and at about the time was cut down was advised by Dr. Napier [defendant] not to remove cast. Heavy dressing applied; child's leg rested on pillow."

The nurse was corroborative of the interne. She was asked by counsel whether she was in the hospital on July 12th, when the interne was at the bedside of the plaintiff, and she answered, "Yes." And the court then asked, "At the time he [the interne] was cutting the cast?" to which she replied, "Yes." Then followed question and answer as follows:

"Q. Were you there when Dr. Napier and Dr. Tenopyr came along, while he was so engaged? A. Yes.

"Q. Did you hear or see Dr. Napier and Dr. Mayes engaged in any conversation? I don't ask whether you heard what they said, but did you see them converse? A. Yes, sir.

"Q. After the conversation took place, was there anything more done to the cast than had already been done by Dr. Mayes prior to the conversation? A. Not that I remember.

"No cross-examination."

And the entry made by the nurse on July 12th states:

"Cast cut by Dr. Mayes (the interne). Child crying and restless."

This testimony supports the interne that he did the cutting of the cast, and it contradicts the defendant's testimony in the particulars already stated. Moreover, if the defendant did what he testified he did, it is strange that the fact is not recorded in the bedside history of the case. There is other testimony given by the defendant, which we do not consider it necessary to set forth in this opinion, which might easily have produced an unfavorable impression upon the jury. But this court does not sit to weigh evidence. It is not for us to say whether the defendant's testimony was true or untrue, and we do not pass judgment upon it. It is indisputable, however, that there is testimony in this record which would justify a jury, if they believed it, in finding that this defendant did not do what he said he did, and that he did do what the interne said he did, viz. prevented the removal of the cast at a time when, according to the expert testimony, it should have been removed, and when it would have been removed by the interne, if he had not been stopped by the defendant when he (the interne) was in the act of removing it.

[3] It is said that the testimony upon which the verdict is based is incredible. The answer is that, while it is the duty of a court to determine the competency of a witness, the credibility of the witness is for the jury. It is true that testimony may be so manifestly untrue that it may be the duty of a court to reject it as wholly barren of evidentiary value. If the testimony of a witness is opposed to the laws of nature that lie within the court's judicial knowledge, it has been held that it should be disregarded as false. *Weltmer v. Bishop*, 171 Mo. 110, 71 S. W. 167, 65 L. R. A. 584. And where one says he looked and did not see an object which, if he had looked, he in the nature of things must have seen, he cannot be credited, if he says he did not see the object. See *R. C. L.* vol. 10, p. 1009. It is an extraordinary case, however, when a court can disregard testimony as incredible, and the doctrine of incredibility in the sense above referred to is clearly not applicable to the testimony in this case.

It is also said that the verdict is not only against the weight of the evidence, but that it is contrary to the evidence. The answer is that appellate courts of the United States do not sit to weigh conflicting testimony. *St. Louis Paper Box Co. v. J. C. Hubinger Bros. Co.*, 100 Fed. 595, 40 C. C. A. 577; *Western, etc., Co. v. Berberich*, 94 Fed. 329, 36 C. C. A. 364; *Meyers v. Brown*, 102 Fed. 250, 42 C. C. A. 320. The jury are the judges of the weight of the evidence; and if there is any evidence which, if believed by the jury, is legally sufficient to

support the verdict, it will not be disturbed. *Lincoln v. Power*, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224. And where the evidence is conflicting an appellate court does not interfere. *Troxell v. Delaware*, 227 U. S. 434, 33 Sup. Ct. 274, 57 L. Ed. 586.

[4, 5] The defendant objects to the form of the hypothetical question which was asked of the plaintiff's expert. What facts a hypothetical question must cover are to be determined by the sound discretion of the trial judge. It is true that a hypothetical question should ordinarily be based at least upon the direct examination, upon facts as to which there is such evidence that a jury may reasonably find that they are established. *Denver, etc., R. Co. v. Roller*, 100 Fed. 739, 41 C. C. A. 22, 49 L. R. A. 77; *Young v. Johnson*, 123 N. Y. 226, 25 N. E. 363. And it is not in general essential that each hypothetical question should embrace every fact which it might be contended should affect the expert's judgment. *Swensen v. Bender*, 114 Fed. 1, 51 C. C. A. 627; *People v. Krist*, 168 N. Y. 19, 60 N. E. 1057; *State v. Doherty*, 72 Vt. 381, 48 Atl. 658, 82 Am. St. Rep. 951; *Howard v. People*, 185 Ill. 552, 57 N. E. 441. In the instant case the hypothetical question assumed that there was no cutting of the cast by the defendant; but that was part of the plaintiff's testimony and was properly included in his hypothetical question. It also assumes that the cast was allowed to remain on the left leg from the 12th to the 16th of July; but there was testimony to that effect in the case, and the plaintiff had the right to include it in the hypothetical question. We are satisfied that the objections raised to the hypothetical question are without merit.

Judgment affirmed.

HOUGH, Circuit Judge (dissenting). I agree with the statements of law made in the opinion of the court and relating to the general liability of physicians and surgeons in respect of claims for malpractice, but as to the trial of this particular case I am of opinion that it was so managed, especially in respect of the allowance of unfair and misleading hypothetical questions as to produce a result at once unjust and unlawful.

For this reason I dissent.

THE CUBADIST.*

(Circuit Court of Appeals, Fifth Circuit. February 22, 1919.)

No. 3330.

1. SEAMEN ↔24—WAGES—TIME FOR PAYMENT.

In Rev. St. § 4529, as amended by Act March 4, 1915, § 3 (Comp. St. § 8320), providing that a seaman shall be entitled to his wages "in case of vessels making foreign voyages * * * within 24 hours after the cargo has been discharged," construing said section with section 4530, the words "within 24 hours after the cargo has been discharged" refer to discharge on completion of the voyage for which the seaman shipped.

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

*Certiorari denied 249 U. S. —, 39 Sup. Ct. 392, 63 L. Ed. —.

2. SEAMEN ⇨24—WAGES—TIME FOR PAYMENT—TERMINATION OF "VOYAGE."

Under shipping articles for a voyage from Boston to a Cuban port, and such other West Indian or Gulf of Mexico ports as the master might direct, and back to a final port of discharge, north of Hatteras, for a term not exceeding six calendar months, the voyage includes such trips, within the articles, as may be made within the six months, and the seamen are not entitled to payment of full wages within that time, unless the vessel makes a United States port north of Hatteras.

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

Appeal from the District Court of the United States for the Southern District of Alabama; Robert T. Ervin, Judge.

Suit in admiralty by Henry W. Gordon and others against the steamship Cubadist; Harry L. Michelson, claimant. Decree for respondent, and libelants appeal. Affirmed.

For opinion below, see 252 Fed. 658.

Alex T. Howard, of Mobile, Ala., for appellants.

Palmer Pillans, of Mobile, Ala., for appellee.

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

GRUBB, District Judge. [1] This is an appeal from a decree in admiralty from the Southern District of Alabama, 252 Fed. 658. The libelants were seamen who shipped on the steamship Cubadist, and the dispute arose as to their right to demand full wages after the lapse of 24 hours after the ship had discharged its cargo at the port of Mobile, Ala. The case calls for the construction of section 4529, Revised Statutes of the United States, as amended by the Act of March 4, 1915 (38 Stat. 1164, U. S. Compiled Statutes, § 8320), and which is section 3 of the act commonly known as the "La Follette Seamen's Act." The facts were agreed upon. The libel was dismissed as to appellants, upon the ground that they were not entitled to demand full wages, and from that decree the appeal is taken.

The appellants shipped on the Cubadist, under shipping articles describing a voyage from Boston to Port Padre, Cuba, and to such ports and places in any part of the West Indies and/or the Gulf of Mexico, as the master might direct, and back to a final port of discharge in the United States, north of Hatteras, for a term of time not exceeding six calendar months. The Cubadist steamed from Boston to Port Padre; thence to New Orleans with a cargo of molasses, which was there discharged; thence to Matanzas, Cuba, where it took on another cargo of molasses, which it carried to Mobile, and there discharged. It was 24 hours after the discharge of this last cargo that the demand for full wages by the appellants was made by them and refused by the master. The pertinent sections of the Seamen's Act (Revised Statutes, amended, §§ 4529 and 4530) are here set out in full:

Section 4529: "The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is

discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. * * *

Section 4530: "Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary shall be void: Provided, such a demand shall not be made before the expiration of, nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall then be due him, as provided in section forty-five hundred and twenty-nine of the Revised Statutes. * * *"

Comp. St. §§ 8320, 8322.

Section 4529, so far as it affects this case, provides that the master or owner of any vessel shall pay to every seaman his full wages "in case of vessels making foreign voyages, within 24 hours after the cargo has been discharged." The Cubadist had made a foreign voyage and had discharged her cargo at Mobile, and the situation created by the Seamen's Act, if literally construed, had arisen. The appellants contend for a literal construction. The appellees contend that, construing the act in its entirety, it is evident that the words of section 4529, "within 24 hours after the cargo has been discharged," refer to a discharge of cargo upon the completion of the voyage for which the seamen shipped. This was the holding of the District Judge, and we concur in it.

Section 4529 and section 4530 should be construed together. The former provides for the payment of full wages to seamen; the latter, for half then earned wages at any port, touched by the ship, where cargo is received or discharged. The former applies to full payment on completion of the voyage, or the termination of the shipping articles, or the discharge of the seaman; the latter to partial payments to be made during the progress of the voyage. Section 4530 provides for the payment of half then earned wages "at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo *before the voyage is ended.*" During the progress of the voyage, full wages can only be demanded if half then earned wages are wrongfully denied. The section then reads as follows:

"And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall then be due him, *as provided in section 4529 of the Revised Statutes.*"

It is clear from this reference to section 4529 that Congress intended that section to cover only the payment of full wages due, on the completion of the voyage or discharge of the seaman, and section 4930 to cover all payments to be made during the progress of the voyage. The use of the words, in case of foreign voyages, "after the cargo has been discharged," instead of "when the voyage is ended," may be at-

tributed to their former use in the Revised Statutes, when a necessity for retaining seamen, not only until completion of the voyage, but until after discharge of cargo, existed. However this may be, reading sections 4529 and 4530 together, they form a complete system only if we attribute to section 4529 the function of regulation of final payments in full upon completion of the voyage or discharge of the seaman, and to section 4530 the regulation of payments arising out of situations that occur during the progress of and before the time for final settlement between the seaman and the shipowner, either because of the ending of the voyage for which he shipped or the discharge of the seaman, if that first occurred.

To bring the two sections into harmonious relation with each other, it is necessary to give to the words "after the cargo has been discharged" the meaning of a discharge upon the completion of the voyage for which the seaman shipped. There might be many complete discharges of cargo during the progress of a single voyage. In such cases, section 4530 and section 4529 would both apply, if section 4529 be given the construction contended for by appellants, and it would then come into direct conflict with section 4530. Section 4530 would entitle the seaman to only half of his wages then earned, while section 4529, if applicable to such a situation, would entitle him to full wages, even though he had not then been discharged. It will not be presumed that Congress intended to confer on seamen the right to demand, at their option, half-earned wages, or full wages, in identical situations. If section 4529 is limited to payments to be made upon completion of the voyage shipped for, and discharge of cargo thereupon, or to the discharge of the seaman, if that first occurs, there will be no such conflict between the two sections, and each will have its proper scope.

[2] The question remains as to what constituted the voyage, under the shipping articles in this case. They provided for a trip from Boston to Port Padre, Cuba, and to such other West Indian or Gulf of Mexico ports as the master might direct, and as the ship could make, within the allotted six months, and also for a return trip to any port in the United States north of Cape Hatteras. Section 4511, Revised Statutes (Comp. St. § 8300), recognizes the validity in shipping articles, of voyages of this kind, and provides a form in the schedule attached to it to describe them. We think it clear that a voyage, within the meaning of shipping articles so worded, is the journey or journeys permissible to the ship by the language of the articles, and for which the seaman engages. Under the language of the articles in the record, the ship was permitted to go to Port Padre, and also to such other ports or places, one or many, in any part of the West Indies or Gulf of Mexico, as the master might direct, provided the time limit of six months was not exceeded, and provided the ship had not theretofore made a port in the United States north of Hatteras. The *Martha*, Fed. Cas. No. 9144; *In re George Moncan*, alias *Ah Wah* (C. C.) 14 Fed. 44.

The facts show that the Cubadist, before landing at Mobile, had not made any ports other than ports in the West Indies and Gulf of

Mexico, had not been away from Boston the stipulated six months, and had not touched at any port in the United States north of Hatteras, since its arrival at Port Padre, Cuba, and so had not completed the voyage that appellants shipped for in Boston. They were, therefore, not entitled to full pay, upon demand 24 hours after discharge of cargo at Mobile, since the voyage they shipped for was then incomplete.

The libel was properly dismissed, and the decree of the District Court is affirmed.

FOSTER v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. February 27, 1919.)

No. 3251.

1. INDICTMENT AND INFORMATION ⇨132(8)—ELECTION BETWEEN COUNTS—DISCRETION.

In view of Rev. St. § 1024 (Comp. St. § 1690), authorizing joinder in one indictment of several charges for the same act or transaction, election by the government between counts, all based on the same transactions, and all alleged to have been violations of Penal Code, § 225 (Comp. St. § 10395), as to embezzlement by postmaster, need not be required before the evidence is presented, but is in the discretion of the trial judge.

2. POST OFFICE ⇨38, 48(7½)—EMBEZZLEMENT BY POSTMASTER—INDICTMENT—INTENT—"WILLFUL."

Under Pen. Code, § 225 (Comp. St. § 10395) making it embezzlement for a postmaster to fail to remit or to fail or refuse to surrender money order funds on demand of authorized agent of Postmaster General, no specific intent is involved, so it is enough for indictment to aver that defendant acted willfully; "willful" implying knowledge and purpose to do wrong.

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

3. INDICTMENT AND INFORMATION ⇨65—EMBEZZLEMENT BY POSTMASTER—MATTERS OF EVIDENCE.

Averments of indictment against postmaster under Penal Code, § 225 (Comp. St. § 10395), for embezzlement, held good against objection that they did not say by what means the alleged depository of the post office was designated and the post office inspector made the authorized agent of the department; these being matters of evidence rather than of averment.

4. CRIMINAL LAW ⇨1186(4)—REVERSAL—INDICTMENT—DEFECT OF FORM.

Any imperfect averment of an indictment, being a matter of form, which could not have prejudiced defendant, was cured by Rev. St. § 1025 (Comp. St. § 1691), especially when first objected to on the trial.

5. POST OFFICE ⇨50—EMBEZZLEMENT BY POSTMASTER—QUESTION FOR JURY.

Oral testimony of post office inspector that the H. post office was the designated depository for money order funds for the S. post office, with the fact that defendant, while postmaster at S., had habitually made remittances of such funds to H., was sufficient for submission of the issue to the jury.

6. CRIMINAL LAW ⇨304(10)—EVIDENCE—JUDICIAL NOTICE—POST OFFICE INSPECTOR'S AUTHORITY.

Post office inspector's authority to demand and receive money order funds is a matter of post office departmental rules and regulations, of which the courts take judicial notice.

7. CRIMINAL LAW ⚡400(3)—EVIDENCE—OFFICIAL CAPACITY OF WITNESS.

Witness could, without producing his commission, testify that, when he made a demand on defendant postmaster for money order funds, he was a post office inspector; his testimony establishing, at least, his character as a de facto officer.

8. CRIMINAL LAW ⚡371(2)—EVIDENCE—OTHER OFFENSES—INTENT.

Proof of previous failures of defendant postmaster to remit, as required by law, and likewise that he had issued money orders to himself to pay for whisky, without paying for them, was competent on the question of intent, involved at least in the count charging embezzlement by conversion to his own use of the money order funds of which he was shown to be short.

9. POST OFFICE ⚡38—EMBEZZLEMENT BY POSTMASTER—SHORTAGE.

It would be a shortage, on which the statutory embezzlement by a postmaster (Penal Code, § 225 [Comp. St. § 10395]) could be predicated, for him to issue money orders to himself to pay for whisky, without paying for them; it not being necessary that he actually received the money for which he failed to account.

10. POST OFFICE ⚡38—EMBEZZLEMENT BY POSTMASTER—CHARACTER OF FUNDS—REGULATIONS OF DEPARTMENT.

Relative to embezzlement by postmaster of money order funds, the character of moneys received by him on C. O. D. parcel post packages, to be remitted to sender, is fixed by the Post Office Department, by its regulations, treating them as money order funds.

11. CRIMINAL LAW ⚡1169(6)—HARMLESS ERROR—EMBEZZLEMENT—WRONGFUL INCLUSION OF FUNDS.

No fine being imposed, postmaster, convicted of statutory embezzlement of money order funds, could not be injured by ruling treating as such funds money received by him on C. O. D. parcel post packages, to be remitted to sender; such money constituting but a small part of the conceded balance due from him to the government, and not explained by him.

12. WITNESSES ⚡360—DISCREDITING—GOOD CHARACTER IN REBUTTAL.

Testimony of defendant that, though he had signed a confession, he did so at instance of C., government witness, who knew it contained untrue statements, and promised him immunity if he signed it, tended to so discredit C. as to justify the government, on rebuttal, in proving his good character.

13. POST OFFICE ⚡49—EMBEZZLEMENT BY POSTMASTER—EVIDENCE—ACCOUNT WITH AUDITOR.

The effect given by Penal Code, § 225 (Comp. St. § 10395), to the transcript of the account of a postmaster with the Auditor for the Post Office Department, showing a balance due the government from him, is to require him, on prosecution for embezzlement, to explain the shortage.

14. CRIMINAL LAW ⚡786(1)—INSTRUCTIONS—INTEREST OF DEFENDANT.

A charge held properly given on the effect of the interest of defendant on the weight of his testimony.

15. CRIMINAL LAW ⚡29—CONVICTION ON DIFFERENT COUNTS.

That all of the counts of an indictment under Penal Code, § 225 (Comp. St. § 10395), for statutory embezzlement by postmaster, are based on the same shortage, will not prevent conviction on more than one count, as the same shortage, may constitute all the offenses charged.

In Error to the District Court of the United States for the Western District of Louisiana; Geo. W. Jack, Judge.

John W. Foster was convicted under Penal Code, § 225, and he brings error. Affirmed.

J. M. Foster, F. J. Looney, and W. A. Wilkinson, all of Shreveport, La., for plaintiff in error.

Joseph Moore, U. S. Atty., of Shreveport, La.

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

GRUBB, District Judge. Plaintiff in error, who was the defendant in the District Court, was convicted in the Shreveport division of the Western district of Louisiana for a violation of section 225 of the Penal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1133 [Comp. St. § 10395]). The defendant was postmaster at Shongaloo, La., at the time of the alleged commission of the offenses charged in the indictment. That instrument contained four counts, all based on the same transactions, and all alleged to have been violations of the different penal provisions contained in that section. The first count was abandoned by the government on the trial. The defendant was acquitted under the second, which charged embezzlement of money order funds by the defendant while postmaster at Shongaloo. The third count charged the defendant with failing or refusing to remit to or deposit in the Treasury of the United States, or in a designated depository, money order funds of the Shongaloo post office, and thereby embezzling them. The fourth count charged the defendant with having failed to account for or turn over to the proper officer or agent money order funds, when required so to do by the law or the regulations of the Post Office Department, or upon demand or order of the Postmaster General, either directly or through a duly authorized officer or agent, and having thereby embezzled them. The defendant was convicted under the third and fourth counts of the indictment, and sentenced to four years' imprisonment in the penitentiary.

[1] The defendant first complains of the overruling of his motion to require the government to elect on which of the four counts of the indictment it would proceed to trial. Section 1024 of the Revised Statutes (Comp. St. § 1690) authorizes the joinder in one indictment of several charges for the same act or transaction. The usefulness of the statute would fail, in cases where the different counts present one transaction in different forms to meet possible differing aspects of the evidence, if an election was required to be made before the evidence was presented. The matter was within the discretion of the District Judge, and his exercise of it against the motion was not only not an abuse, but was justified. *Terry v. United States*, 120 Fed. 483, 56 C. C. A. 633; *McGregor v. United States*, 134 Fed. 187, 69 C. C. A. 477; *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208.

[2] The plaintiff in error also complains of the overruling of his motion to quash each of the two counts of the indictment under which he was convicted. Two grounds of objection are made to the third count: That it was not charged in it that the defendant willfully and intentionally failed and refused to remit to and deposit in the post office at Shreveport, La., and that the charge was not specific enough as to what the requirements were as to making deposits, which had not been com-

plied with. The ground of objecting to the fourth count was, in substance, the first ground interposed to the third, applied to the averments of the fourth. No specific intent is involved in either of the offenses charged in the third and fourth counts. The statute makes the failure to remit, or the failure or refusal to surrender, on demand of an authorized agent of the Postmaster General, post office funds the offense of embezzlement. The failure must be willful, and it is averred in each count to have been done "willfully, unlawfully, and feloniously." The word "willful" implies on the part of a defendant knowledge and a purpose to do wrong. Its use was sufficient where the act constituting the offense was not required to be done with a specific intent. *Felton v. United States*, 96 U. S. 699, 24 L. Ed. 875; *Potter v. United States*, 155 U. S. 438, 15 Sup. Ct. 144, 39 L. Ed. 214.

[3, 4] The averments of the third count that Shreveport "was then and there the designated depository of the said post office at Shongaloo, La.," and of the fourth count, that the defendant failed to turn over to the post office inspector "upon demand and order of the Postmaster General, made through the said A. C. Caldwell, post office inspector, the said A. C. Caldwell, post office inspector, being then and there a duly authorized officer and agent of the Postmaster General," are good against the objection made to them that they do not say by what means the depository was designated and the post office inspector made the authorized agent of the department. The manner in which or the means by which these things were done are matters of evidence rather than of averment. The defendant could have obtained a more particular description by demanding a bill of particulars. No prejudice could have resulted to the defendant from the alleged imperfect averment, and, if imperfect, it was cured by section 1025 of Revised Statutes (Comp. St. § 1691), especially when, as in this case, objection was first interposed upon the trial of the cause. *Benson v. United States*, 240 Fed. 413, 153 C. C. A. 339; *Evans v. United States*, 153 U. S. 590, 14 Sup. Ct. 934, 38 L. Ed. 830.

[5] The plaintiff in error further insists that the government's proof failed to show that the post office at Shreveport was designated as a depository for the post office at Shongaloo for money order funds, and that Post Office Inspector Caldwell was authorized by law, or by regulation or order of the Postmaster General to demand of the defendant that he turn over to him the money order funds in his possession as postmaster.

The oral testimony of the inspector that the Shreveport post office was the designated depository for money order funds for the Shongaloo post office, together with the fact that the defendant himself had habitually made remittances of money order funds to Shreveport during his incumbency, was evidence sufficient for the submission of that issue to the jury.

[6] The post office inspector's authority to demand and receive money order funds is a matter of post office departmental rules and regulations, of which the courts take judicial notice. *Caha v. United States*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415. In addition, the defendant recognized the right of Caldwell to make the demand, by pay-

ing to him, in response to the demand that portion of money order funds he then had on hand.

[7-9] The plaintiff in error also relies upon numerous exceptions to the admission and rejection of evidence. He complains that the court permitted Inspector Caldwell to testify orally to the fact that he was a post office inspector at the time he made the demand. We think it was competent for him to testify to this fact, and that the production of his commission was not necessary. His testimony established at least his character as a de facto officer. Proof of previous failures on the part of defendant to remit, as required by law, was competent on the question of intent, which was involved at least in the second count, which charged embezzlement by conversion to his own use of the money order funds of which he was shown to be short. For the same reason, proof that he had issued money orders to himself to pay for whisky, without paying for them, was competent. Under the counts under which he was convicted, proof of an amount due the government in that way, and not accounted for by him, would be a shortage, on which the statutory embezzlement could be predicated. It was not essential for the government to show under those counts that he had actually received the money he failed to account for.

[10, 11] The defendant also contends that the money received by him on C. O. D. parcel post packages, to be remitted to the sender, did not constitute money order funds, and could not be considered by the jury in determining the shortage. The evidence showed that the post office regulations provided that the C. O. D. tags should be treated as applications for money orders, and that the delivering postmaster should fill out a money order on the sending post office to remit the amount collected from the addressee. The department treated such moneys as money order funds, and they clearly might be properly so treated, and this fixed their character as such. Again, the funds of this character were but a small part of the conceded balance due from defendant to the government, and not explained by him, and the ruling could have made no difference to the defendant on whom no fine was imposed.

[12] It is also objected that the government was permitted to fortify the credibility of its witness Caldwell, the post office inspector, by evidence of his good character. The evidence was first offered in rebuttal. The defendant, testifying in his own behalf, had admitted signing a written confession, but had stated that he did so at the instance of Caldwell, who knew it to contain untrue statements, and who promised defendant immunity if he signed it. This testimony of defendant tended to discredit Caldwell in a way that justified the government in proving his good character, in rebuttal of it.

[13, 14] The plaintiff in error excepted to portions of the court's general charge to the jury. The court charged the jury that the introduction of the transcript of the account of the defendant with the Auditor for the Post Office Department, showing a balance due the government from the defendant, made it incumbent on the defendant to explain the shortage. This is the effect given the transcript by section 225, as we construe it, especially when applied to the offenses charged under the

third and fourth counts of the indictment, under which alone the defendant was convicted. It was competent for Congress to so enact. The defendant was left the opportunity of denying or explaining away the prima facie effect of the transcript. The defendant also excepted to the court's charge upon the effect of the interest of the defendant upon the weight of his testimony. The charge was in the language of the Supreme Court in the case of *Reagan v. United States*, 157 U. S. 301, 15 Sup. Ct. 610, 39 L. Ed. 709, and was justified by the attitude of the defendant in offering himself as a witness in his own behalf. The other exceptions to the general charge present questions already passed upon under previous exceptions.

[15] The plaintiff in error requested a number of special charges. We have examined them in detail. Many of them present questions already decided adversely to plaintiff in error. None of them is sufficient to work a reversal of the judgment. The only one that requires specific mention was a direction to the jury that they could only convict the defendant upon one of the three counts of the indictment submitted to them. All the counts were based on the same shortage. This, however, would not prevent the jury from convicting on all three, since the same shortage might constitute all three offenses. It might be that the defendant should receive punishment under but one of the two counts on which he was convicted, both being based on the same criminal act. The record does not show that he was sentenced to a term in excess of what would be permissible, had the conviction been upon one count alone.

We find no reversible error in the record, and the judgment is affirmed.

Affirmed.

MICHIGAN MUT. LIFE INS. CO. v. OLIVER.*

(Circuit Court of Appeals, Fifth Circuit. March 6, 1919.)

No. 3152.

1. INSURANCE ⇨186(5)—LIFE INSURANCE—PAYMENT OF PREMIUMS—MONEY
ADVANCED BY AGENT.

Receipt by the insurer in a life policy from its agent of the full first premium, less the agent's commission, and its retention, operated as full payment of the premium, although the payment was made by the agent, who took the note of insured for the amount.

2. EVIDENCE ⇨123(1)—STATEMENT TO PHYSICIAN AS PART OF RES GESTÆ.

Testimony of a physician that he was called by telephone to the house of insured by some one, who stated that insured had "just killed himself," held properly excluded, as not part of the *res gestæ*; it not appearing that the sender of the message was a witness to the killing.

3. EVIDENCE ⇨471(29)—CONCLUSION—UNDERSTANDING AS TO AGREEMENT.

Testimony of the agent who took an application for life insurance, and who delivered the policy, taking the note of insured for the first premium, that it was "understood" that he should remit the money for the premium, held admissible as equivalent to a statement that such was the agreement, and not of a conclusion.

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

*Certiorari denied 249 U. S. —, 39 Sup. Ct. 494, 63 L. Ed. —.

4. APPEAL AND ERROR ⇨1060(1)—HARMLESS ERROR—ARGUMENT BY COUNSEL. Statements outside the record by counsel for defendant in an action on a life policy, intended to convey to the jury the idea that it was the local belief that insured committed suicide, and counter statements by counsel for plaintiff, *held* improper argument, but not prejudicial.

5. TRIAL ⇨117—ARGUMENT OF COUNSEL—READING OF OPINION IN ANOTHER CASE.

Permitting the reading by counsel to the court in the presence of the jury of the opinion in another case bearing upon the law of the case on trial *held* not error.

In Error to the District Court of the United States for the Southern District of Alabama; Robert T. Ervin, Judge.

Action at law by Ann Hope Oliver, administratrix of the estate of William S. Oliver, against the Michigan Mutual Life Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Forney Johnston and W. R. C. Cocke, both of Birmingham, Ala., for plaintiff in error.

T. M. Stevens, of Mobile, Ala., Page & McMillan, of Brewton, Ala., and Stevens, McCorvey & McLeod, of Mobile, Ala., for defendant in error.

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

BEVERLY D. EVANS, District Judge. The action was by the beneficiary of an insurance policy to recover for the death of the insured. Several pleas were stricken by the court on demurrer, and the case was tried on the issue raised by the plea averring that the insured came to his death by suicide while sane. The verdict was for the plaintiff.

[1] 1. The assignments of error on the order sustaining the demurrer to the pleas, which were stricken, are without merit. The demurrer to the replication raised the point as to the sufficiency of its allegations after amendment. The replication alleged that the policy was solicited and delivered by one Mason, acting as agent of the insurer; the insured gave his note to Mason for the first premium on the policy; this note was given to Mason individually, and it was understood between the insured and Mason that the latter would pay to the insurer the amount to which the insurer was entitled for the first premium, and that Mason, after delivery of the policy, and receiving the note, and long prior to the death of the insured, paid to the insurer, or to its agents duly authorized to receive same, the first premium upon the policy, less Mason's commission for writing the policy, and that the money so paid was received and retained by the insurer, or its duly authorized agent. It is insisted that the allegations are insufficient to show the payment of the full premium to the insurer. When the insurer received from its agent the full premium, less the amount claimed by its agent as commissions, and retained the money under those circumstances, the transaction operated as a payment of the whole premium.

[2] 2. The insured, William S. Oliver, was found dead early in the morning of Monday, July 17, 1916, in the garden in the rear of his residence. At the time of his death he was tax collector of Conecuh county, and was short in his accounts in excess of \$3,000. He was given by the authorities until Tuesday, July 18th, to settle this shortage. He retired as usual on Sunday night. His wife did not discover his absence from the house until about half past 5 o'clock the next morning. She found his dead body in the garden, lying near a small tree; his feet being about six feet from it. His gun was lying alongside of his body, with the muzzle near his head. The top of his head was blown off. From the spot where the body lay were found tracks, as of a man running from the garden. A short distance off was a sack containing a watermelon and 13 cents. There was testimony that the insured had said to neighbors that thieves were stealing his watermelons, growing in the garden where his body was found. Two reports of a gun were heard that night very close together, the first being louder than the second.

The defendant called Dr. Betts as a witness, and asked him:

"How were you summoned, and state what was said to you and how?"

His answer was:

"The phone rang, and the message, as near as I can remember, was, 'I want you to come down and see Mrs. Oliver; Mr. Oliver has just killed himself.'"

The answer to the question was excluded. The witness in his testimony further said that on receipt of the telephone message he went to see Mrs. Oliver and found her in bed, and shortly afterwards he saw Mr. Oliver's body. He arrived at the place about 6 o'clock, and the body had not been removed from the garden.

It is argued that the physician's answer was admissible as part of the *res gestæ*. We do not think so. Its purpose was to establish the defense of suicide by a declaration of a person at the residence of the deceased. The sender of the message, whether Mrs. Oliver or another, was not shown to be a witness to the circumstances eventuating in Mr. Oliver's death. The declaration sought to be proven was not of a percipient witness to the act, coincident in point of time with the principal fact, tending to explain it. It is a declaration of a person necessarily acting on information obtained after the happening of the principal fact. If the information was the result of an investigation of physical facts, it would be only an inference drawn from those facts. If the information imparted was derived from others, it would be hearsay. So in any event the testimony was properly excluded.

[3] 3. The agent of the defendant, Mr. Mason, testified that the insured made the application to him, and on this application the policy was issued. The witness took the note of the insured for the amount of the premium when the policy was delivered. Witness paid to the defendant the amount of the premium, less his commissions; "the company took that on this particular policy." The witness was asked if he had agreed with Mr. Oliver that he would remit the money necessary to pay the premium, and answered that it

was so understood between him and Oliver. The court refused to exclude this answer on the ground that it stated a conclusion. We think the witness used the word "understood" as synonymous with "agreed," intending to state the fact that such an agreement had been made. Vide *Holman v. Clark*, 148 Ala. 289, 41 South. 765.

[4] 4. The case was brought in the state court and removed to the District Court of the United States by the defendant. In the course of his argument counsel for plaintiff said:

"Mr. Johnston [counsel for defendant] in his argument to you said, 'Mr. Oliver's faction and close friends were in control of the judicial machinery of Conecuh county, and if they thought he had been foully murdered, as suggested by plaintiff, it is probable that they would have inaugurated prosecutions or proceedings of that character, and the fact that they have not done so carries the inference that they did not believe he had been murdered, but had committed suicide.'"

And, continuing, counsel for plaintiff said:

"If these gentlemen wanted the case left for trial in Conecuh county, where the public knew about the facts of this case, they could have left it there; but they exercised the right to have it removed here, where the juries knew nothing about it. We were willing to try it there, but they removed it."

Counsel for defendant objected to this language, and moved an instruction that it was an improper argument. The court denied the motion, saying: "I think it a proper argument." The only purpose of the statement by defendant's counsel was to convey to the jury the idea that the people of Conecuh county thought that Oliver had committed suicide, and the reply of counsel for the plaintiff was to counter this suggestion by explaining that the suit was originally brought there. We cannot agree with the trial judge that the argument was proper, for neither statement was legitimate argument. Counsel for both plaintiff and defendant traveled out of the record in their statement of facts. But the remarks objected to were not of an inflammatory character, or calculated to prejudice the defendant in having a fair and impartial trial.

[5] 5. In his concluding argument counsel for the plaintiff began to read to the jury a reported case of an action on an insurance policy and a defense of death by suicide. After reading the facts he began to read the opinion of the court, when objection was made to the reading of the case to the jury. The court sustained the objection, whereupon counsel for plaintiff stated that he would read the opinion to the court, and proceeded to read to the court the opinion in that case, over objection made and overruled. It is to be noted that the exception is to the reading of the opinion to the court, and not to the reading of the facts of the case. We have examined the case referred to in this exception, and the discussion of the legal questions in that case are illustrative of the law governing the case at bar. The court indicated by his ruling that he desired to have the law as expounded in that case read to him. What was done in this case does not fall under the rule condemning the reading of facts in a reported decision as evidence of their existence in another case.

6. Other assignments of error examined, and found to afford no

sufficient reason for reversing the judgment of the court. They present no new or novel question, and we forbear a discussion of them. On the whole record we find no reversible error.

Judgment affirmed.

BAYARD COAL & COKE CO. v. MITCHELL et al.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1919.)

No. 1669.

MINES AND MINERALS Ⓒ—55(7)—**SALE OF RESIDUE OF ADDITION—MINERAL RIGHTS RESERVED IN PRIOR DEED.**

Considering together contract to convey to lumber operator all the residue of the tract of land, called P. addition, it to contain 850 to 950 acres and to be defined by plat prepared by M. from a survey to be made by him, and deed pursuant thereto of all those pieces of land constituting the residue of the tract called P. addition, which said residue is intended to include all of the said tract not heretofore conveyed, and which by survey made by M. contains 878 acres of land, more or less, there was no intention to convey the minerals reserved by a prior deed to another of 100 acres in the addition, not included in the survey and plat made by M.

In Error to the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Action by the Bayard Coal & Coke Company against John T. Mitchell and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Charles C. Wallace, of Baltimore, Md. (Robert R. Carman, of Baltimore, Md., and Edward F. Colladay, of Washington, D. C., on the brief), for plaintiff in error.

Albert A. Doub, of Cumberland, Md., for defendants in error.

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

PRITCHARD, Circuit Judge. This was an action of ejectment instituted by the plaintiff in error against the defendants in error, in the District Court of the United States for the Maryland district, to recover the minerals and mineral rights in what are known as "military lots Nos. 1308 and 1370," such lots constituting a part of the tract of land in Garrett county, Md., known as "Addition to Paradise." A jury trial was waived, and the case was heard before the District Judge, who made certain findings of fact and conclusions of law upon which he entered a judgment in favor of the defendants. The case comes here on writ of error.

In this opinion, reference will be made to plaintiff in error as plaintiff, and the defendants in error as defendants, such being the relative positions of the parties in the court below. The facts are substantially as follows:

Military lots Nos. 1308 and 1370 are two of the numerous lots, containing 50 acres each, situated in Garrett county, Md., which were al-

lotted to soldiers of the Revolution for military services. They became a part of a resurvey, known as "the Addition to Paradise," by patent of the state of Maryland, dated June 11, 1831, containing 1,472 acres, and which on June 4, 1869, was conveyed to Josias Pennington, along with other tracts of land. In 1876 William C. Pennington, trustee under the will of Josias Pennington, deceased, conveyed to Lewis Nydegger the surface of military lot 1370 and reserved the coal and mineral rights, and on the 4th day of January, 1877, he conveyed the surface of military lot 1308 to William J. Wilson, also reserving the coal and mineral rights.

Besides, some other parts of the "Addition to Paradise" were either conveyed away or abandoned by the estate of Josias Pennington, because they were claimed adversely. On the 21st day of September, 1888, the estate of Josias Pennington, of which William C. Pennington was trustee under his will, entered into an agreement for the sale to William Whitmer of "all the residue of the tract of land called 'Addition to Paradise,' the said tract to contain 850 to 950 acres of land and to be defined by a plat prepared by John T. Mitchell, lately County Surveyor of Garrett county." The agreement further provided:

"The cost of the survey heretofore made in connection with this negotiation and of all further surveys that may be made by said Mitchell are to be paid by the two parties hereto equally."

Mr. Mitchell made a survey and a plat of the tract of land to be conveyed under this agreement for both parties, and on the 23d day of February, 1892, William C. Pennington, trustee, conveyed to William Whitmer—

"all those pieces and parcels of land, military lots and tracts, constituting the residue of the 'Addition to Paradise,' * * * which said residue is intended to include all of the said tract so acquired and not heretofore conveyed by said Josias Pennington, nor by said trustee, and which by a survey thereof specially made in accordance with the terms of said agreement by John T. Mitchell, late county surveyor of Garrett county, contains 898 acres of land more or less."

William Whitmer, the grantee in this deed, who was a lumber operator, and not a coal operator, and wanted to buy lumber, and not coal, was present at the survey with Mr. Mitchell, and saw the boundaries as run and fixed, before the preparation and delivery of this deed.

On January 24, 1893, William Whitmer and wife conveyed to the Bayard Coal & Coke Company all the coal and other minerals underlying all those tracts of land and military lots and tracts constituting the residue of the tract called "Addition to Paradise," being the same land which was conveyed by William C. Pennington, trustee, in the deed aforementioned, and containing 898 acres, and in the same deed conveyed other tracts of coal, minerals and mining property.

Subsequently Adrian Hughes, the substituted trustee of Josias Pennington, reported to the court the sale of the coal under the military lots Nos. 1308 and 1370 to John T. Mitchell, and on the 30th day of March, 1917, by his deed conveyed the coal to Mitchell, after the sale had been duly ratified by the court. The defendants, before pleading to the declaration, filed a disclaimer of all right, title and interest in

the surface of military lots Nos. 1308 and 1370, except such easements or rights as are reasonably necessary to the mining of the coal, but the disclaimer was not to affect their rights to the coal underlying the lots, and then pleaded the general issue plea.

In determining the real issue involved in this controversy, we must consider the contract and the deed together, in order to reach a correct conclusion as to the amount of land Pennington intended to convey. Plaintiff insists that the deed is broad enough to include the minerals underlying tracts Nos. 1308 and 1370, in which, as we have stated, the title of the surface was conveyed to Nydegger and Wilson under the will of Josias Pennington, deceased.

The learned judge, who tried the case in the court below, stated in clear and concise terms the issue involved, as follows:

"The controversy is one that we can settle without looking at a plat, the facts being admitted that 1308 and 1370 were part of Additions to Paradise and owned by the Pennington estate at one time, and the real question here is a very definite one. They had 898 acres, or some such matter, that they owned without any qualifications or any limitation, and they owned the mineral rights under another 100 acres. They made an agreement with the predecessors in title of the plaintiff by which they agreed to sell all the balance of the land that they had, and they said it was somewhere from 850 to 950 acres, and they were going to have a survey made. They had the survey made, and it turned out that it was 898½ acres, or some such matter, and they got a conveyance of that 898 acres. Something like 10 years later it turned out, or it was for the first time realized, that there were these coal rights under another 100 acres which belonged to Pennington estate at the time it made this conveyance. I have not seen the correspondence as yet, but apparently the plaintiffs or their predecessors in title wrote Mr. Pennington, 'Didn't you intend to convey to us everything that you had left in Paradise, including the mineral rights?'

"And he writes back, 'Yes, I did so intend,' and subsequently he gets other information, and thinks it over, or does something, and he writes subsequent letters which modify that statement. How much it modifies the statement I am not yet advised. Then nothing more seems to have been done for a period of some 12 to 15 years, and after his death the trustee proceeds to sell the mineral rights to the defendant. Now, this is all the case I know of."

The plaintiff offered in evidence a letter from William C. Pennington to W. McCullough Brown, which plaintiff insists tends to establish the fact that Pennington, at the time he sold defendant the property, intended not only to convey the land embraced in the survey, but also the minerals underlying the tracts or lots in question. The letter is in the following language:

"In the sale of 'all the residue of the tract of Addition to Paradise' to William Whitmer & Sons, I probably did not recall the reserved mineral rights in 1308, 1370, and 1385; but my intention certainly must have been to convey any and all interest in the tract, vested in me, and the language used conveys that intention in full. I therefore make no claim to them."

The plaintiff insists that this indicates that Pennington intended to include the minerals underlying these two tracts. It appears that early in 1903, some time after the foregoing letter was written, the treasurer of the appellant company requested Mr. Pennington to sign a paper which purported to be a confirmatory deed. Thereupon Mr. Pennington consulted with Mr. Mitchell upon the theory that he was acting as trustee for others, as well as in his own behalf, and he felt bound to pro-

tect their interest. Mr. Mitchell, in reply to this letter, explained that Mr. Whitmer had not bought the minerals under the military lots, and that the survey and plats were not intended to include, nor did they include, the military lots; that in making such survey he included only the portion of tract covered with timber upon the area owned in fee. In other words, that the survey was not intended to include any land other than the lands embraced therein. The following extracts from the letter of Mr. Mitchell are pertinent to the contention of the defendants.

"When Mr. Whitmer purchased this property, he did so more especially for its timber value than anything else. Coal at that time was not considered by him in the deal, and was an after consideration when he had taken off all the timber.

"The sale to him was not intended to cover anything but the timber, and when I made the survey under the terms of the agreement I included only that part of the tract covered by the timber, and the acreage reported was based upon the timber area only. In making the survey, I found the lines of the original tract interfered some with Mr. John G. Steyer and Mr. Isaac I. Thompson, both of whom had portions of the tract under fence and cultivation; and all this was excluded by Mr. Whitmer's request.

"The minerals underlying lot No. 1370 were not included in the sale to Mr. Whitmer. The deed from you to Mr. Whitmer contains in substance these words, 'all the residue of Addition to Paradise,' which said residue is intended to include all of said tract acquired and not heretofore conveyed by said Josias Pennington, nor by said trustee, and which by a survey specially made in accordance with the terms of said agreement by John T. Mitchell, etc., contains 898 acres more or less."

"The language of the deed is broad enough to cover all, if it were not limited by a reference to the survey of the property actually intended to be covered. Mr. Whitmer never claimed any more than what was included within the lines of survey, and on March 7, 1892, he executed three deeds, conveying the surface of all this land to John G. Steyer, John T. Steyer, and William J. Wilson, in accordance with the lines of the survey, and the acreage. On January 25, 1893, he conveyed the minerals under the same land to the Bayard Coal & Coke Company, containing 898 acres, more or less.

"When the surface was sold, I prepared all the papers for the parties, and made the divisions of the property between them, as had been agreed with Mr. Whitmer and the purchasers, and since then I have had occasion to retrace some of the lines.

"The Bayard Coal & Coke Company undoubtedly get all the title in the mineral rights acquired by Mr. Whitmer from you, and I can see no necessity for the confirmatory deed from you. It seems to me that the only question to be determined is what the deed from you to Whitmer conveyed; if a proper construction of it conveys the minerals under lot No. 1370 then the coal company already has the title. As the deed to Mr. Whitmer refers to the conveyance of land only, it occurs to me that mineral rights should be specially mentioned in order to convey them.

"I just found to-day all the correspondence with you and Mr. Whitmer in reference to the making of the deed and payment of the balance of the purchase money, and no reference is made anywhere to the minerals under lot No. 1370. From the facts as I know them, it is my opinion that the Bayard Coal & Coke Company have no claim on the minerals under lot 1370."

The contract upon which this deed is based provides that—

"The said tract to contain from 850 to 950 acres to be defined by a plot prepared by John T. Mitchell. * * *"

The grantor prepared the deed himself, and we think his language made his intention perfectly clear. He conveyed:

"All those pieces and parcels of land, military lots and tracts, *constituting the residue of the tract* * * * called 'Addition to Paradise.'"

Not being content with the foregoing description, he continued to make clear that which otherwise might have been in doubt by employing the following language:

"Which said residue is intended to include all of the said tract so acquired and not heretofore conveyed by said Josias Pennington, nor by said trustee, and which by a survey thereof specially made in accordance with the terms of said agreement, by John T. Mitchell, late county surveyor of said Garrett county, contains 898 acres of land, more or less." (Italics ours.)

If Mr. Pennington had intended to convey to the plaintiff that part of the residue of the estate consisting of the mineral interest theretofore reserved, it would have been an easy matter to have provided in the contract that, in addition to surveying the lands specifically mentioned in the contract to be surveyed, the underlying minerals of the two tracts in question should also be included as part of the survey. The fact that he failed to do so shows conclusively that Mr. Pennington never contemplated conveying the minerals underlying these tracts as part of the residue of the estate.

When we consider the contract and deed together, as we have stated, we find the same to be in perfect harmony with what was obviously the intention of the grantor at the time the deed was executed, to wit: To convey only such land as was described and definitely located by the survey. This is true, independent of any parol evidence; nevertheless it should be borne in mind that it was shown by oral testimony that, at the time these lands were purchased, it was the purpose of the plaintiff to purchase timber lands, and that the grantor only intended to convey such lands is clearly shown by the survey in question.

We do not deem it necessary to enter into an extended discussion of the question, which is within narrow limits, further than to say that we are of the opinion that the findings of fact of the court below and conclusions of law were correct; therefore it follows that the judgment of the court below should be

Affirmed.

THE NEW YORK CENTRAL NO. 17.

(Circuit Court of Appeals, Second Circuit. January 15, 1919.)

No. 77.

COLLISION ⇨105—BOAT AT FAULT—EVIDENCE.

Evidence *held* to show that collision of tug, bound up East River, with ferryboat, bound for slip in borough of Manhattan, and lying less than 200 feet off shore, waiting for slip to clear, was caused by sole fault of tug, beginning with violation of statutory duty (Ash's Greater New York Charter [4th Ed.] 1253, § 757) to keep in middle of river, and completed with violation of the ordinary rules of navigation.

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

Libel by the Union Ferry Company of New York & Brooklyn against the steam tug New York Central No. 17, her engines, etc.; the New York Central Railroad Company, claimant. Decree for libellant, and claimant appeals. Affirmed.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones, of New York City, of counsel), for the New York Central No. 17. Macklin, Brown & Purdy, of New York City (Pierre M. Brown, of New York City, of counsel), for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. This is a suit in admiralty to recover for a collision which occurred on February 13, 1917, between the steam ferryboat Montauk and steam tug New York Central No. 17. The Montauk left the foot of Hamilton avenue, borough of Brooklyn, at about 3:30 p. m., and was bound for the foot of Whitehall street, borough of Manhattan. The weather was clear and the tide ebb. As the Montauk neared her New York slip, she was obliged to stop for a sister boat of the same line to which she belonged, which was bound out of the slip she was bound into, as well as for a South Ferry boat going into the slip immediately above the slip of the Montauk. The Montauk complains that while she was so lying, with her machinery stopped, the steam tug No. 17 came around the Battery, bound up the East River, close in to the Manhattan shore, and that she was proceeding at a high and dangerous rate of speed; that the Montauk sounded a signal of two whistles to her, expecting that the tug would pass ahead of her, to which no reply was made, whereupon the Montauk repeated the signal of two whistles, to which no reply was given; that thereupon the Montauk reversed her engines, in order to give the tug, with her tow, an opportunity to pass safely ahead of her, and between her and the Manhattan shore; that, while the Montauk was backing, the tug, when close to her, suddenly ported her wheel and swung to starboard; that thereupon the Montauk sounded alarm whistles and put her engines in forward motion, there being no other way to avoid collision; that the tug gave no signals, but continued on with her float, colliding with the Montauk, striking her port side abaft of the wheel.

The steam tug claims that, when she saw the Montauk waiting for the boat in her slip to come out so that the Montauk could go in, she blew two whistles to the Montauk, which the latter did not immediately answer, but after some little time blew a signal of one blast; that the tug at once stopped and reversed, and blew the danger signal and backing signal, and that there was then plenty of room for the Montauk to go across the bow of the tug, if she had held her course and speed; that the Montauk failed to do this, but stopped and reversed her engines and blew the danger signal; that after blowing the danger signal the Montauk blew two blasts; that after these two blasts were blown the tug stopped and reversed and remained at rest, to see what the Montauk intended to do, and that shortly thereafter the Montauk started ahead, without blowing any whistles at all, and evidently

intending to cross the bow of the tug; that thereupon the tug again reversed, but that the boats were then too close to avoid collision.

There is no doubt that the Montauk blew two whistles, but the master of the tug did not hear them, but says that he blew two, and got no reply. The ordinary rule is to believe each party; and the fact is that each vessel by its own testimony shaped its navigation in obedience to an exchange of two whistles. We assume that in the confusion neither vessel heard the other's two whistles.

The court below has held the tug solely at fault; in this view of the matter this court concurs. The tug No. 17 was navigating in violation of what is known as the East River statute enacted by the state of New York in 1848 and which is found in the margin.¹ In the consolidation of the New York laws the original act of 1848 is put down as abolished. See Birdseye Cumming & Gilbert's Consolidated Laws of New York (2d Ed.) vol. 5, p. 5424. The rule, however, is not abrogated, but is found in the Greater New York Charter. See Ash's Greater New York Charter with Appendixes (4th Ed.), 1253, § 757. The rule as there laid down has modified the rule as prescribed in 1848 as to the rate of speed by providing that steamboats "shall not be propelled at a greater rate of speed than eight miles an hour below Corclear's Hook, nor ten miles an hour above Corclear's Hook. The testimony is that the tug was from 100 to 150 feet off from the shore, or as one witness testified "at the most not over 200 feet off." The mate of the tug testified that after the accident when marine superintendent of the New York Central "found that they (the tug) were only 100 feet off the docks" he informed them that "it was the wrong way," and that Capt. Fay of the New York Central said, "I want you to keep out further than 100 feet," and he said "we would be in the wrong if we went over 500 feet inshore." The master of the tug testified that at the time of the accident he had never heard of the statute. After the accident the men were furnished with a typewritten copy of the act.

This violation of the statute puts on No. 17 the burden of showing that the violation did not contribute to the collision. If she had been in the middle of the river, as the statute required, the collision could not have occurred. The statute is being constantly violated because vessels desire to escape from the strength of the tide and wish to save coal. But if in defiance of the act they navigate near the shore, and a collision results, as in this case, with a vessel which had a right to be where it was while waiting to enter her slip, they must abide the consequences.

It was plainly the duty of the tug to keep out of the way of the Montauk, which was lying at rest in the river, awaiting an opportunity to enter her slip. When the tug blew a two-whistle signal she knew that she could not go across the bow of the Montauk unless the latter gave

¹ "All the steamboats passing up and down the East River, between the Battery at the southern extremity of the city of New York, and Blackwell's Island, shall be navigated as near as possible in the center of the river except in going into or out of the usual berth or landing place of such steamboat, and shall not be propelled at a greater rate of speed than ten miles an hour." Laws of New York 1848, c. 321, p. 450, § 1.

the signal, but that her duty was to go under the Montauk's stern. The latter did not indicate that she was willing to allow the tug to go across her bow; and although the Montauk did not assent to the maneuver proposed, the tug continued straight ahead with the evident purpose of crossing the Montauk's bow. While thus coming ahead suddenly the tug ported her wheel and steered to starboard. Thereupon the captain of the Montauk, seeing that a collision was going to occur, tried to avoid it by starting ahead. He sounded an alarm and put his wheel to starboard to swing the Montauk around, but did not succeed in preventing the collision. The Montauk went ahead half a minute or less when the collision occurred. The captain on his cross-examination testified as follows:

"Q. As I understand your testimony, Captain, you say that the No. 17 blew no whistles whatever at any time? A. That is right.

"Q. And you also say that the Montauk was lying at rest out in the river? A. Yes.

"Q. And that No. 17 deliberately ported her wheel and ran into you? A. Yes.

"Q. And it was broad daylight, when everything could be seen? A. Yes.

"Q. And your account of this collision is that No. 17, notwithstanding the fact that you were in plain view, deliberately ported her wheel and ran into you, although she could have gone straight ahead and gone across your bow? A. Yes, sir."

The quartermaster of the ferryboat Richmond, belonging to the Municipal Ferry, testified as follows:

"Q. What did you observe about the course of the 17 from the time you saw her? A. When I first saw her she was off the government property; when I first saw her; then I watched her until the collision.

"Q. Did you see any change in her course? A. Yes; I saw her take a sheer out to starboard.

"Q. So far as you could observe, was there any vessel which would have prevented the No. 17 from going ahead and crossing the bows of the ferryboat? A. No, sir."

Seven witnesses, including three disinterested witnesses, testified to this sheer. No other finding than that it occurred can be made on this record. It is equally clear that it was this sheer which was the proximate cause of this collision.

No. 17 must be held solely at fault. As counsel very well said, she began with a violation of a statutory duty, in that she kept too close to the shore, and she completed her wrongdoing with a violation of the ordinary rules of navigation, thereby bringing about the collision.

Decree affirmed.

THE JOHN TWOHY.

(Circuit Court of Appeals, Third Circuit. February 10, 1919.)

No. 2401.

1. ADMIRALTY Ⓒ117—EFFECT OF APPEAL—TRIAL DE NOVO.

An appeal in admiralty vests the appellate court with jurisdiction to consider the case de novo.

2. ADMIRALTY Ⓒ104—APPEAL—DISCRETION TO PERMIT WITHDRAWAL OF APPEAL.

An appeal in admiralty by one party only vests the appellee with no right of review, which precludes the appellate court in the exercise of its discretion from permitting the withdrawal of the appeal.

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

Suit in admiralty by T. M. Duche & Sons against the American Schooner John Twohy; Albert D. Cummins and Howard Compton, claimants. From the decree, claimants appeal. On motion by appellants for leave to withdraw appeal. Granted, on conditions.

For opinion below, see 243 Fed. 720.

Certiorari granted, 249 U. S. —, 39 Sup. Ct. 386, 63 L. Ed. —.

Howard M. Long, of Philadelphia, Pa., for appellant.

Harrington, Bigham & Englar, of New York City, and Conlen, Brinton & Acker, of Philadelphia, Pa. (William J. Conlen and J. Thurston Manning, Jr., both of Philadelphia, Pa., on the brief), for appellee.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Duche & Sons filed their libel and obtained a decree against the schooner John Twohy for some \$900 for injury to part of a cargo delivered and some \$1,600 for short delivery. On hearing, that court awarded the first item, but denied the second. From this decree the schooner appealed to this court. This appeal, under our case, *The Canadia*, 241 Fed. 234, 154 C. C. A. 153, opened the whole subject-matter for reconsideration in this court, and although the libelants had not appealed, they might, if the proofs so justified, have secured a more favorable decree. But in point of fact they did not appeal, and the schooner, before the cause has been heard in this court, has moved this court for leave to withdraw its appeal; it paying the costs of such appeal. To the grant of this motion libelants object.

[1, 2] We find no reported case involving the precise question here raised. That the schooner's appeal gave jurisdiction to this court to consider the case de novo has, as we have seen by our own decision, been held by this court. Having acquired such jurisdiction, it is equally clear that jurisdiction can only be taken away by the court's own action, and, if the appellant desires to withdraw its appeal, it can

only do so by the court's order. The making of such order by the court would therefore seem to be a matter of discretion on its part, unless such appeal has vested some right in the libelants, which right now precludes the exercise by this court of the power to allow a dismissal of the appeal and forces it to decide it. After due consideration, we have reached the conclusion, first, that in a case involving the facts and procedure of the present one this court should not surrender that wholesome, discretionary control a court should have over its own processes and procedure; and, second, that in the exercise of that discretionary power this motion should, under proper restriction, be allowed.

The reasons for such conclusion are, first, when the decree was entered in the court below, the libelants had a right to appeal, and thereby to have acquired the right to require the appellate court to proceed and decide the same; second, this course the libelants did not follow, and, having omitted to avail themselves of a course which would have given them a legal right to insist on having their appeal heard, they cannot now complain if this court, in the exercise of its discretionary power, declines to decree them as a legal right that which by appropriate procedure they might have made such if they had so desired; third, we feel the due administration of the admiralty will be furthered by the conclusion we have reached, for the allowance of the withdrawal of this appeal is in accord with that early principle, "Agree with thine adversary quickly, whilst thou art in the way with him," which the law later embodied in its maxim, "Interest reipublicæ ut sit finis litium."

We are all aware that under the smart of defeat quick appeals are sometimes taken, which on cooler judgment would not have been taken. Why should not there be a leeway for the exercise of that cooler judgment by a suitor? On the other hand, if it be understood that such appeal may be withdrawn, it will forewarn all parties who feel themselves aggrieved by a decree to themselves appeal if they desire to prosecute their rights. Moreover, if it were held that an appeal once taken was irrevocable, and that, even if it subsequently appeared it was mistakenly taken, it could not be withdrawn, we can conceive of cases where appeals from real injustice would not dare to be taken, because by such appeal the appellant was thereby committed to litigation beyond his power to stop.

But, while the present is a case where we have discretionary power, we feel it should be exercised only under proper conditions. This case has been pending since 1916; the final decree was entered April 16, 1918; this appeal was taken April 27, 1918, and has resulted in nearly a year's delay, but for which the libelants would have been long since paid the amount which the appellant now impliedly concedes should have been so paid.

If, therefore, the appellant presents to the clerk of this court, within 30 days after notice to his counsel of the filing of this opinion, a certificate that the sum decreed the libelants, with interest, has been paid, together with such costs as were adjudged against the schooner in the

court below, and such printing cost as the respondent has incurred in preparation of this appeal, and shall also pay the costs of his appeal in this court, then the motion for the withdrawal of this appeal will be allowed; otherwise, it will be refused.

In re SIEGEL.

Petition of QUINTO.

(Circuit Court of Appeals, Second Circuit. January 15, 1919.)

No. 138.

BANKRUPTCY Ⓒ386—COMPOSITION—MODIFICATION AFTER CONFIRMATION.

As, after confirmation of a composition, the estate vests in the bankrupt, and jurisdiction of the bankruptcy court ends, except that, under Bankruptcy Act, § 13 (Comp. St. § 9597), a party in interest may within six months move to set aside the composition for fraud, provision therein for payment of certain attorney's fees cannot be stricken on any other ground.

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of David Siegel, bankrupt. Petition of Oscar Quinto to revise an order of the District Court. Order (252 Fed. 197) reversed.

Maurice L. Shaine, of New York City, for bankrupt.

James N. Rosenberg, of New York City, for petitioner.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. February 14, 1918, at the first meeting of creditors, David Siegel, the bankrupt, offered a settlement of 37 per cent. in cash and payment of all priority claims, the expenses of the proceeding, and \$1,000 to reimburse a committee of creditors for the amount expended by them in employing counsel to make an investigation into the failure and the assets and liabilities of the bankrupt at that time. The offer was accepted by a majority in number and amount of the creditors and the amount necessary to carry it out duly deposited.

April 9, 1918, an order of confirmation was entered by the District Judge. April 10, on motion of the attorney for the bankrupt, he struck out the provision for the payment of the \$1,000 aforesaid. June 28, a motion to vacate this latter order and to reinstate the original order was made, which came on to be heard and was denied by the District Judge July 10.

There is a dispute as to whether the committee of creditors had any notice of the order of April 10, and the District Judge disposed of the motion to vacate it and to reinstate the original order on the merits, and not because of laches in making the motion.

On confirmation of a composition the estate vests in the bankrupt

and the jurisdiction of the bankruptcy court comes to an end (In re Hollins, 229 Fed. 349, 143 C. C. A. 469; *Id.*, 238 Fed. 787, 151 C. C. A. 637), except that under section 13 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. [Comp. St. § 9597]) a party in interest may move to set aside the composition within six months "if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition." No fraud was practiced in this case. The agreement to pay \$1,000 was a part of the offer, and it was set out in the affidavit required under District Court rule 23 upon presenting the motion to confirm. No motion was ever made to set aside the composition on the ground of fraud.

The order is reversed.

EDDY et al. v. KRAMER et al.

SAME v. MATHER et al.

(Circuit Court of Appeals, Third Circuit. December 9, 1918. Rehearing Denied April 30, 1919.)

Nos. 2402, 2403.

PATENTS ⇨328—INVENTION—CALENDAR FIXTURES.

The Eddy patents, No. 1,153,543 and No. 1,153,545, relating to tin caps for the top of yearly calendar pads, *held* void for lack of invention, in view of the prior art.

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

Suits by James Francis Eddy and another against Henry F. C. Kramer and others, and against Charles E. Mather, Victor Mather, and Gilbert Mather, copartners trading as Mather & Co. Decrees for complainants, and defendants appeal. Reversed.

For opinion below, see 247 Fed. 962.

D. H. Solis-Cohen and Arno P. Mowitz, both of Philadelphia, Pa., for appellants Kramer and others.

Hector T. Fenton, of Philadelphia, Pa., for appellants Mather.

Ward W. Pierson, of Philadelphia, Pa., and Russell M. Everett, of Newark, N. J., for appellees.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. The two patents here involved concern the construction of a tin cap, at the top of a yearly calendar pad, which by engagement with a slot in a permanent backboard holds such pad in engagement with the backboard. The court below, in an opinion reported in 247 Fed. 962, found the patents valid and infringed. The facts are fully stated in that opinion, and we avoid restatement by reference thereto.

The case turns on validity, and we add nothing to the reported case by a further discussion of details. The question of inventive character of plaintiff's tin cap was one of fact. A permanent, slotted back, on which a new calendar could be placed each year, was in itself old. Such a removable calendar pad for the current year, with a tongue at its back adapted to engage on its back to a movable backboard, was also old. A metallic cap at the top of a calendar pad was also in prior use. The improvements made by the defendant in his first patent consisted in widening the slot, in widening the tongue to completely fill the widened slot, and thus engaging the locking calendar and board in a firmer manner than theretofore. In his second patent the plaintiff placed lugs or ears at either end of the widened tongue, the functional purpose of which was to afford greater space, and consequently more permanency to the calendar sheets, where the nails went through the tin cap and bound the sheets together.

After careful consideration, we are of the opinion these improvements were the natural advance incident to the art. It is true this plaintiff's cap made a more attractive looking calendar, one which had a firmer connection with the backboard than heretofore, and one which possibly gave a firmer and more effective hold to the sheets, by affording a larger margin on the upper side of the holes by which the sheets were held in place. But all of these improvements were in our judgment but the natural manufacturing advances in an existing art, where improvement was to be expected, in the comfort and attractiveness of office appliances which have in the last few years characterized the surroundings of business and professional work. Regarding the patentee's improvements as the natural growth to such art, we feel they do not involve invention.

The decrees below are therefore reversed, and the cases remanded, with instructions to dismiss the bills.

Ex parte MITCHELL.

(District Court, N. D. New York. March 3, 1919.)

1. ALIENS ⇨49—GROUNDS FOR DEPORTATION—"PERSON LIKELY TO BECOME A PUBLIC CHARGE."

To warrant the exclusion or deportation of an alien, under Immigration Act Feb. 5, 1917, § 3 (Comp. St. 1918, § 4289¼b), as a "person likely to become a public charge," some facts or conditions must be shown which make it "likely" that such person will become an occupant of an almshouse, or otherwise require support at public expense, for want of means to support himself in the future.

2. ALIENS ⇨49—GROUNDS FOR DEPORTATION—PERSON LIKELY TO BECOME A PUBLIC CHARGE.

An alien woman 42 years old, in good health, who is and has been able to support herself, and has both real and personal property in this country, is not subject to deportation as a "person likely to become a public charge," because of the possibility that she may be deprived of her property by being made defendant in a suit not brought or even threatened.

3. ALIENS ⇨54—PROCEEDING FOR DEPORTATION—REVIEW ON HABEAS CORPUS.

A finding by immigration officers or the Secretary of Labor that an alien is subject to deportation is not conclusive, and may be reviewed on habeas corpus, and if there is no evidence to sustain the findings of fact, or if such findings are insufficient in law to warrant deportation, it is the duty of the court to so decide.

4. ALIENS ⇨46—RIGHT OF DEPORTATION—LIMITATION BY STATUTE.

The statute, by enumerating the conditions upon the allowance of an alien to land or remain in the country may be denied, prohibits the denial in other cases.

Petition of Eunice Mitchell for writ of habeas corpus. Writ granted.

The petitioner, Eunice Mitchell, is now held by Don W. McIntosh, Inspector of Immigration, under an order of deportation made by John W. Abercrombie, Acting Secretary of Labor, on the ground she is a person likely to become a public charge, and is threatened with deportation by virtue thereof.

She has obtained this writ of habeas corpus on the claim that she is illegally held and detained and restrained of her liberty, for the reasons the warrant or order of deportation was made in excess of the power of the officers and department making it, and is void because on the undisputed facts she is not and was not a person likely to become a public charge, and never was and there is no evidence whatever that she is or ever has been such a person, and that she is not within the description of any class of alien persons who may be denied admission into the United States, or who may be deported therefrom. The alien was given a hearing, and all the evidence and testimony is before the court. The contention of the petitioner is that the order of deportation was made and the warrant issued on an entire misconception of the law as to what constitutes a person "likely to become a public charge."

George H. Cobb, of Watertown, N. Y., for petitioner.

D. B. Lucey, U. S. Atty., of Ogdensburg, N. Y., opposed.

RAY, District Judge (after stating the facts as above). [1] Prior to the Act of February 5, 1917, c. 29, § 3, 39 Stat. 875 (Comp. St. 1918, § 4289¼b), in giving a description of the classes of persons who shall be excluded from admission into the United States, the words "persons likely to become a public charge" were inserted between the words "paupers" and "professional beggars," and the courts held (see cases

hereafter cited) that, reading the Immigration Act together and considering the connection in which the words "persons likely to become a public charge" were used, the meaning to be given such words was "those persons who are likely to become occupants of almshouses for want of means with which to support themselves in the future." This is the natural meaning we would give the words. In the Act of February 5, 1917, the same words are used, viz. "persons likely to become a public charge," but the location of such words is changed, and now we have:

"Persons who have come in consequence of advertisements for laborers printed, published or distributed in a foreign country; persons likely to become a public charge; persons who have been deported under any of the provisions of this act, and who may again seek admission within one year from the date of such deportation, unless prior to their re-embarkation at a foreign port, or their attempt to be admitted from foreign contiguous territory, the Secretary of Labor shall have consented to their reapplying for admission," etc.

I am unable to see that this change of location of these words in the act changes the meaning that is to be given them. A "person *likely* to become a public charge" is one who for some cause or reason appears to be about to become a charge on the public, one who is to be supported at public expense, by reason of poverty, insanity and poverty, disease and poverty, idiocy and poverty, or, it might be, by reason of having committed a crime which, on conviction, would be followed by imprisonment. It would seem there should be something indicating the person is liable to become, or shows probability of her becoming, a public charge.

In this case it is sought to deport the above-named alien, a subject of Great Britain, and a citizen of Canada, whence she came into the United States, some three or four years ago, on the sole ground that she is a "person likely to become a public charge." There is not and has not been produced or presented to any immigration officer or before this court a scintilla of evidence that she is or has been a public charge in any degree, at any time or place, or that she is liable or likely to become a public charge within the meaning of the Immigration Act and deportation laws. There is no evidence whatever that the alien at any time has relied in any degree on the charity of others. The entire evidence produced, and on which the order was based, is before the court. On the other hand, the evidence is and shows, and is undisputed, that the alien is a woman 42 years of age, in good health, a nurse on occasion, a preacher of the gospel, and that she is able to earn her own living and always has done so, and that she is the owner in her own name and right of real estate at Watertown, Jefferson county, N. Y., where she resides and has resided for at least three years last past, worth some hundreds of dollars, and also is the owner of quite an amount of personal property. Her relatives and brothers are well to do.

[2] The theory advanced, and on which the order or warrant of deportation was granted and is sought to be sustained, and deportation had, is that the alien has excited the jealousy and possibly the resent-

ment of a Mrs. S——, a married lady, by too great familiarity in conversation and association with her husband, and by living in the same house with him, not alone, however, other ladies and people living there with her, and by receiving from him lessons in bicycle riding, evenings, and that Mrs. S—— has left her husband and sued him for a separation, the action being now pending in the Supreme Court of the state of New York, untried, and that Mrs. S—— *may* sue this alien for alienating the affections of her husband, and in such suit *may* recover damages and take all of the alien's property, and leave her without means of support, except her personal earnings. It is also suggested that the alien *may possibly* be arrested on a criminal charge, tried, convicted, and imprisoned, and that *in such event* she *would* become a public charge, as the state would be compelled to board her during such imprisonment. There is no evidence whatever that such a suit, or any suit, or such a prosecution, or any prosecution, has been commenced, or is even threatened, or is contemplated. The separation suit is based on a charge of cruel and inhuman treatment on the part of the husband, but the alien is not named in the papers in the suit.

Such speculative and possible, but remote and conjectural, occurrences do not indicate or tend in any degree to show that the alien is or has been a person "likely to become a public charge." The alien *may* become sick; she *may* lose her house by fire; she *may* lose her personal property by bad investments. All this is possible, but not probable. There is no claim that this alien is suffering, or that she has suffered at any time, from any mental or physical defect. It is not claimed this alien has been convicted, or even charged with the commission, of any crime, or that she came to the United States, or is in the United States, for any immoral or improper purpose. On the other hand, her occupation has been the preaching of the gospel and nursing of the sick when her services were needed.

Putting the "worst side out," the facts are that this alien is or was a member of the Holiness Church, so called, and a preacher therein; that she came from near Montreal, Canada, to the city of Watertown, Jefferson county, N. Y., where she established or was put in charge of a mission and preached; that she met with success, and that Mr. and Mrs. S—— were members of her congregation, and that she was invited to and visited at their house; that Mr. S—— was prominent in the church, and that this brought him and the alien much together in discussing church affairs; that the alien for a time lived in the same house where Mr. S—— lived, but with others occupying the same house; that Mr. S—— did give the alien some lessons in bicycle riding; that the alien loaned Mr. S—— some money, about \$800, at one time, to aid him in building operations in which he was engaged; that Mrs. S—— did become jealous and dissatisfied regarding this intimacy, and did have some words with the alien on the subject of the attentions paid her by her husband, and that she thereafter left her husband. There is no evidence or charge of any improper sexual relations between the alien and Mr. S——. Several witnesses give to the alien a good character and reputation from the speech of people, and there is no evidence of a bad character or reputation. There was a division in the

church, and a new minister was installed, but the alien installed a new mission, and this, of course, excited the opposition of the new minister. It is evident that wisdom and discretion under such circumstances would have dictated that this alien and Mr. S—— keep widely apart, but failure to do so cannot be regarded as evidence that the alien is "likely to become a public charge." It shows want of good judgment under the circumstances, but not the commission of a crime or misdemeanor, or immoral practices or conduct.

It seems to me that the Supreme Court of the United States, in *Gegiow v. Uhl*, Acting Commissioner of Immigration, 239 U. S. 3, 8-10, 36 Sup. Ct. 2, 60 L. Ed. 114, and cases cited, reversing *United States v. Uhl*, 215 Fed. 573, 131 C. C. A. 641, and the Circuit Court of Appeals in this (the Second) circuit, in *Howe*, Immigration Commissioner, v. *United States ex rel. Savitsky*, 247 Fed. 292, 294, 159 C. C. A. 386, have settled this question against the validity of this order of deportation and the right of the government officials to deport this alien. In *Howe v. United States*, supra, the Circuit Court of Appeals said:

"It seems to us evidently intended, by defining the proof required, to prevent just such conjectures as were indulged in by the immigration inspector in this case. Indeed, with such latitudinarian construction of the provision 'likely to become a public charge,' most of the other specific grounds of exclusion could have been dispensed with. Idiots, imbeciles, feeble-minded persons, insane persons, persons affected with tuberculosis, and prostitutes might all be regarded as likely to become a public charge. The excluded classes with which this provision is associated are significant. It appears between 'paupers' and 'professional beggars.' We are convinced that Congress meant the act to exclude persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future. If the words covered jails, hospitals, and insane asylums, several of the other categories of exclusion would seem to be unnecessary. We are referred to a decision of the District Court for the Southern District of New York in *United States ex rel. Freeman v. Williams* (D. C.) 175 Fed. 274, in which the deportation of an alien whose career before entering the United States had been one of habitual delinquency was sustained on the ground that he was likely to become a public charge. We are not persuaded by this decision, and think *Savitsky* did not fall within the class under which the order of deportation was made. *Gegiow v. Uhl*, 239 U. S. 9, 36 Sup. Ct. 2, 60 L. Ed. 114."

The court holds expressly that the words "likely to become a public charge" are meant to exclude only those "persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future." Such in effect is the decision in *Gegiow v. Uhl*, supra, where the court said:

"Persons likely to become a public charge' are mentioned between paupers and professional beggars, and along with idiots, persons dangerously diseased, persons certified by the examining surgeon to have a mental or physical defect of a nature to affect their ability to earn a living, convicted felons, prostitutes, etc. The persons enumerated, in short, are to be excluded on the ground of permanent personal objections accompanying them, irrespective of local conditions, unless the one phrase before us is directed to different considerations than any other of those with which it is associated. Presumably it is to be read as generically similar to the others mentioned before and after."

[3] But it is said the Secretary of Labor at Washington has passed on the *question of fact*, and has decided as matter of fact that this alien is a person likely to become a public charge, and that this finding

is conclusive on the court. But *there are no facts, and not a single fact*, and the record is before the court, indicating that she is such a person. The facts being before the court, it becomes a question of law whether or not this alien is within the description of persons subject to deportation. *Gegiow v. Uhl*, 239 U. S. 31, 36 Sup. Ct. 2, 60 L. Ed. 114; *Gonzales v. Williams*, 192 U. S. 1, 15, 24 Sup. Ct. 177, 48 L. Ed. 317; *Howe v. United States*, 247 Fed. 292, 159 C. C. A. 386 refusing to follow U. S. ex rel. *Freeman v. Williams* (D. C.) 175 Fed. 274.

In *Gegiow v. Uhl*, supra, reversing 215 Fed. 573, 131 C. C. A. 641, the Supreme Court says the words "likely to become a public charge" are "to be read as generically similar to the others mentioned before and after"; that is, generically similar to "paupers" and to "professional beggars." And so, in substance, says the Circuit Court of Appeals in this circuit. To repeat, says the court:

"We are convinced that Congress meant the act to exclude persons who were likely to become occupants of almshouses for want of means with which to support themselves in the future."

Within both these decisions, this alien, as matter of law, taking every fact stated in the evidence as true (excluding or including the statement of the alien), is *not* a person "likely to become a public charge," and is not within the description of any person liable to deportation. In the three cases cited the Commissioner of Labor or immigration officers decided that the person sought to be deported was within the description, and deportation was ordered; but the writ of habeas corpus was sustained on appeal, and the alien released. This alien does not come under the provisions of the act, and this is a question of law, which the courts may and must decide. *Gegiow v. Uhl*, supra. In that case the court held:

"The courts have jurisdiction to determine whether the reasons given by the Commissioner of Immigration for excluding aliens under the Alien Immigration Act agree with the requirements of the act; and, if the record shows that the Commissioner exceeded his powers, the alien may obtain his release upon habeas corpus.

"The Alien Immigration Act, by enumerating conditions upon which aliens may be denied admission, prohibits the denial of admission in other cases.

"The conclusiveness of the decisions of immigration officers under section 25 of the Immigration Act is conclusiveness of questions of fact; but the court may review the findings of a Commissioner on the question of whether the alien comes under the act. *Gonzales v. Williams*, 192 U. S. 1 [24 Sup. Ct. 177, 48 L. Ed. 317].

"An alien cannot be excluded under the Alien Immigration Act simply because the immigration officers declare that he may become a public charge on account of overstocked conditions of the labor market at the point of immediate destination.

"Under section 1 of the Alien Immigration Act, the ground of exclusion of persons enumerated are permanent personal objections, irrespective of local conditions."

In *Frick, Immigration Inspector, v. Lewis*, 195 Fed. 693, 115 C. C. A. 493, the lower court was reversed on the ground there was *some evidence* of prostitution, and that therefore on habeas corpus the decision of the Department of Commerce and Labor on this question of fact could not be overruled, but the court expressly said:

"Where there is nothing to support a charge, we agree that the department cannot rightfully issue a warrant to deport; for that would be a clear abuse of power."

It is *not* true that on habeas corpus the court is not at liberty to review the evidence. It is its *duty* to review the evidence for the purpose, not of ascertaining or deciding on the weight or preponderance or credibility of the evidence when there is a question as to what the facts are, but for the purpose of ascertaining and determining whether or not there is *any evidence* tending to support the charge made, and whether or not the charge made, if established, is one that justifies or warrants deportation under the statute. Is the person one subject to deportation, and is there any evidence legitimately tending to show that such person is within the description of persons who may be deported? In this case the first inquiry is: "Is this petitioner an alien, and therefore, *in a proper case*, subject to deportation?" So much is admitted. The next question is: "Is there any evidence that the alien is within the statutory description of persons who may be deported?" The charge is, and there is no pretense of any other ground for the warrant of deportation, that the petitioner is a "person likely to become a public charge." The question is not, "Is there a *remote possibility* that she *may* become a public charge, or *may exigencies arise* which *might* make her a public charge, but is there any evidence that she *is* or is "*likely to become a public charge*"—that is, a pauper, or poor person who will be, or might properly be, sent to an almshouse and supported at the public expense? See cases cited.

[4] As already stated and shown, there is not a scintilla of evidence that this alien is or ever has been such a person. Said the court in *Gegiov v. Uhl*, *supra*:

"The courts are *not* forbidden by the statute to consider whether the reasons, when they are given, agree with the requirements of the act. The statute, by enumerating the conditions upon which the allowance to land may be denied, *prohibits the denial in other cases*. And when the record shows that a Commissioner of Immigration is exceeding his power, the alien may demand his release upon habeas corpus. * * * This was implied in *Nishimura Ekiu v. United States*, 142 U. S. 651 [12 Sup. Ct. 336, 35 L. Ed. 1146], relied on by the government. As was said in *Gonzales v. Williams*, 192 U. S. 1, 15 [24 Sup. Ct. 177, 180 (48 L. Ed. 317)]: 'As *Gonzales* did not come within the act of 1891, the Commissioner had no jurisdiction to detain and deport her by deciding the mere questions of law to the contrary.' Such a case stands no better than a decision without a fair hearing, which has been held to be bad. *Chin Fon Yow v. United States*, 208 U. S. 8 [28 Sup. Ct. 201, 52 L. Ed. 369]."

In *Lewis v. Frick*, Immigration Inspector, 233 U. S. 291, 34 Sup. Ct. 488, 58 L. Ed. 967, the true rule is enunciated, *viz.*:

"Where, as in this case, there was evidence sufficient to justify the Secretary of Commerce and Labor in concluding that the alien *was within the prohibitions* of the Alien Immigration Act, and the hearing was fairly conducted, the decision of the Secretary is binding upon the courts."

The court then examined the evidence and said:

"But, without regard to them, enough appears to show that he was fully justified in concluding as a matter of fact that the whole story of the marriage in Warsaw was a fabrication, and that in truth Lewis went from Detroit to Windsor upon information from which he inferred that the woman was

an alien and a prostitute, willing to accompany him to Detroit for an immoral purpose, and that he brought her to Detroit for that purpose. This being so, and there being no contention that the hearing was not fairly conducted, the finding of the Secretary upon the question of fact is binding upon the courts. *Low Wah Suey v. Backus*, 225 U. S. 460, 468 [32 Sup. Ct. 734, 56 L. Ed. 1165]; *Zakonaite v. Wolf*, 226 U. S. 272, 275 [33 Sup. Ct. 31, 57 L. Ed. 218]."

In *Gegiov v. Uhl*, *supra*, the Supreme Court said :

"It would be an amazing claim of power if commissioners decided not to admit aliens because the labor market of the United States was overstocked."

This was said in answer to the proposition advanced in that case that the aliens were subject to deportation for the reason that at that place in the United States to which they were bound there was no work to be had, the labor market being more than fully supplied, and the aliens had but little money, and therefore the aliens were likely to become a public charge, as they would not be able to obtain employment, a purely suppositious and conjectural situation. So in the instant case it is an amazing claim of power to propose to deport this alien for the reason she *may* by reason of sickness, or misfortune, or being made a defendant in a suit not brought, or even threatened, be deprived of her ample means which she now owns and possesses. There must be some fact, or facts, or conditions shown which indicate and make it "*likely*" that the alien will become a public charge. Nothing of the kind appears in this case.

I conclude and hold that there was and is no evidence whatever in this case tending to show or indicate that the alien ever has been, or was or is likely to become, a public charge; that all the evidence produced before the officials of the United States is before the court, and that it has the right and power to examine it, for the purpose of ascertaining what the undisputed facts were and are; that on the evidence it appears uncontradicted :

(1) That the alien is not a person likely to become a public charge, but is a person capable of and fully able to earn her own living and provide for herself, and that in addition she is possessed and the owner in her own right of ample property in the state of New York to care for herself.

(2) That the alien is not a person within any of the classes who may be excluded from admission into the United States, or who may be deported therefrom, and that she has not committed any act which makes her subject or liable to deportation.

(3) That she did not enter the United States in violation of any law, and is not in the United States in violation of any law.

(4) That at the time of her last coming into the United States the alien did not belong to any of the classes who might be excluded from the United States, or who, having come, are subject to deportation.

(5) That the making of the warrant or order for her deportation was in excess of the power of the Commissioner of Labor and of the department of the government making it, and is void.

(6) That the alien, the petitioner herein, is illegally restrained of her liberty, and is entitled to her discharge and to be set at liberty.

There will be an order sustaining the writ, and directing the discharge of such alien.

In re POST.

(District Court, N. D. Ohio, E. D. March 21, 1919.)

No. 6824.

BANKRUPTCY ⇨244—TESTIMONY BEFORE REFEREE—"DEPOSITION."

In General Order No. 22 (89 Fed. x; 32 C. C. A. x), providing that depositions taken before a referee shall be taken down in writing, read over to the witness, and signed by him, the word "deposition" applies to all hearings in bankruptcy matters before a referee, in which the bankrupt or other witnesses are examined.

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

In Bankruptcy. In the matter of L. B. Post, bankrupt. On review of order of referee. Affirmed.

The opinion of Referee Friebolin is as follows:

This matter comes before me upon the application of the trustee for an order requiring bankrupt to sign testimony previously given by him before the referee in the general examination of the bankrupt by the trustee, and the objection raised by the bankrupt to the granting of such order. The sole question to be determined is the power of the referee to order bankrupt to sign testimony given by him and taken down in writing.

When the application came on for hearing, bankrupt questioned the accuracy of the testimony as written by the stenographer which was changed so that no objection was made to the signing of the testimony for that reason. Coming to the question of the power of the referee to order a witness to sign his testimony, the only authority in the law is General Order 22 (89 Fed. x, 32 C. C. A. x) which reads as follows:

"The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of narrative, unless he determines that the examination shall be by question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just."

The only possible question there can be is whether the word "deposition," used in the sentence, "A deposition taken upon an examination shall be taken down in writing," which in the next sentence is required to be read over to the witness and signed by him, refers to the examination of the witness before the referee.

The attorney for the bankrupt claims that the word "deposition," as here used, means a deposition which has been taken under other provisions of the law, and does not refer to a general examination of a bankrupt or a witness in the jurisdiction where he lives. After considering the matter carefully, I have concluded that the word "deposition," as here used, means written testimony given upon the examination of a witness in a bankruptcy proceeding whether upon general examination or not, and that the witness can be required to sign the same.

There are no cases that I can find that are exactly in point. Several decisions, however, assume the accuracy of the position I have taken. For example, see In the matter of Kaplan Bros. (C. C. A. 3d Cir.) 32 Am. Bankr. Rep.

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

305, 213 Fed. 753, 130 C. C. A. 267; In re Bard (D. C. N. Y.) 5 Am. Bankr. Rep. 810, 108 Fed. 208, and the Petition of Moulthrop, decided by the Circuit Court of Appeals for the Sixth Circuit, and found in 41 Am. Bankr. Rep. 654, 249 Fed. 468, 161 C. C. A. 426.

In the last case, the testimony was taken by a stenographer in a general examination. The question at issue was the right of the bankrupt to have a copy. The court held that the bankrupt was entitled to a copy and then used these words: "Neither the fact that the testimony has not been read over and signed by the witness (as provided by General Order No. 22), nor that it cannot be used as evidence against the bankrupt, can affect the right to inspection and copy."

Collier on Bankruptcy, in commenting upon the duty of the bankrupt to submit to an examination, as provided by section 7 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 548 [Comp. St. § 9591]), says on page 267: "The examination, when reduced to writing, should be read over by the bankrupt and subscribed by him; but it has been held that, where the testimony was not signed, it could be received in evidence on the testimony of the person who took the minutes."

Brandenburg on Bankruptcy, § 491, in treating the manner of examination says: "When completed, shall be read over to and signed by the witness in the referee's presence. * * *"

I ordered the bankrupt to sign the testimony as corrected, which he refused to do, and he excepted to my ruling. I granted him 10 days to file a petition for review, which he has filed, and which is transmitted herewith.

L. A. Perry, of Cleveland, Ohio, for bankrupt.

White, Johnson, Cannon & Neff, of Cleveland, Ohio (A. V. Cannon, of Cleveland, Ohio, of counsel), for trustee.

WESTENHAVER, District Judge. The referee's order, requiring bankrupt to sign his testimony given before the referee on bankrupt's general examination, is affirmed, for the reasons and on the grounds stated in the referee's opinion.

Supporting this conclusion is the fact that a referee is not an officer before whom depositions generally may be taken under sections 863, 864, 865, 866, Revised Statutes (Comp. St. §§ 1472-1474, 1477). Nor is he a person authorized to administer oaths, except in bankruptcy proceedings pending before him. The word "deposition," as used in General Order 22 (89 Fed. x, 32 C. C. A. x), can only apply to hearings in bankruptcy matters pending before the referee, and must of necessity include all hearings in which the bankrupt or other witnesses are examined.

The referee's order is affirmed. An exception may be noted on behalf of petitioner.

CONSOLIDATED GAS CO. OF NEW YORK v. NEWTON, Atty. Gen., et al.
(District Court, S. D. New York. February 24, 1919.)

1. EQUITY ⇨114—PARTIES—INTERVENTION.

The settled practice in equity is that a person cannot be made a party defendant on his own application, unless so required by statute.

2. COURTS ⇨343—FEDERAL COURTS—PARTIES—INTERVENTION—"INTEREST."

Under equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii), authorizing the court to permit any one claiming an interest in the litigation to intervene, the "interest" claimed must be a legal interest, which will, or may, be affected by the decree.

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

3. COURTS ⇨343—FEDERAL COURTS—PARTIES—INTERVENTION.

To a suit to enjoin enforcement of Act N. Y. April 3, 1906 (Laws 1906, c. 125), known as the Eighty-Cent Gas Law, which applies only to rates charged private consumers, the city of New York is neither a necessary nor a proper party, and the court is not authorized by equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii) to permit its intervention, since it has no interest in its corporate capacity which can be affected by the litigation, and the duty of protecting the interests of consumers and of defending in such case is devolved upon the Public Service Commission by Laws N. Y. 1907, c. 429, creating such commission, and upon the Attorney General by Executive Law, § 68, effective May 2, 1913.

4. COURTS ⇨343—EQUITY RULES—PARTIES—"COMPLETE DETERMINATION."

A "complete determination" of the cause, within the meaning of equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii), providing that any person may at any time be made a party, if his presence is necessary or proper to a complete determination of the cause, refers to a determination of every issue in such manner and as to such parties as to render the decree *res judicata*.

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

In Equity. Suit by the Consolidated Gas Company of New York against Charles D. Newton, Attorney General of the State of New York, Edward Swann, District Attorney of New York County, and Travis H. Whitney, Charles S. Hervey, and Frederick J. H. Kracke, constituting the Public Service Commission of the State of New York, First District. On motion by the Corporation Counsel of the City of New York for an order allowing said city to intervene as a party defendant. Denied.

Shearman & Sterling, of New York City (E. Henry Lacombe, John A. Garver, and William L. Ransom, all of New York City, of counsel), for plaintiff.

Godfrey Goldmark, of New York City, for defendant Public Service Commission, First District.

Charles D. Newton, Atty. Gen., Robert S. Conklin, Deputy Atty. Gen., Edward Swann, Dist. Atty., and Felix C. Benvenega, Asst. Dist. Atty., both of New York City, for other defendants.

William P. Burr, Corp. Counsel, of New York City (Vincent Victory, Asst. Corp. Counsel, of New York City, of counsel), for city of New York.

MAYER, District Judge. This is a motion by the corporation counsel, on behalf of the city of New York, for an order, under equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii), to allow the city of New York to intervene as a party defendant in a suit brought by plaintiff to have declared unconstitutional and void the so-called Eighty-Cent Gas Law. The defendants in the present suit are the Attorney General of the state of New York, the district attorney of the county of New York, and the officials constituting the Public Service Commission of the State of New York, First District.

An outline of the history of the litigation in respect of the statute here concerned, and a statement of the status, as matter of law, of the various defendants and the city of New York, are desirable in order clearly to understand the subject-matter of this motion, for the question before the court is solely a question of law, and not one of public or administrative policy, and the only power which the court has is to determine whether or not, under equity rule 37, the city has the right, as matter of law, to intervene, and the court has the right to make its order accordingly.

By chapter 736 of the Laws of 1905, all corporations or persons engaged in the business of furnishing or selling illuminating gas in the city of New York were forbidden to charge said city a higher price therefor than 75 cents per 1,000 cubic feet. This statute dealt solely with the price of gas to the city of New York in its capacity as a municipal corporation. Under section 3 of this statute, it was provided that:

"Any corporation * * * violating any provision of this act shall forfeit the sum of one thousand dollars for each offense to be sued for and recovered in the name of and by the city of New York for its benefit."

On April 3, 1906, the New York Legislature enacted chapter 125 of the Laws of 1906, which fixed the price of gas for all persons or corporations manufacturing, furnishing, or selling the same in the borough of Manhattan, and certain other parts of the city of New York, at 80 cents per 1,000 cubic feet. This latter statute has become familiarly known as the Eighty-Cent Gas Law. Under section 3 of this statute it was provided that:

"Any corporation * * * violating any provision of this act shall forfeit the sum of one thousand dollars for each offense to the people of the state."

And by section 4 it was provided that:

"This act shall not apply to gas furnished or sold to the city of New York."

Under section 1962 of the New York Code of Civil Procedure it is provided that, where a penalty is incurred to the people of the state pursuant to a provision of law:

"The Attorney General, or the district attorney of the county in which the action is triable, must bring an action to recover the * * * penalty, in a court having jurisdiction thereof."

Chapter 737 of the Laws of 1905 established a state "commission of gas and electricity," appointable by the Governor, by and with the ad-

vice and consent of the state senate. The statute conferred upon this commission, among its other powers and duties, certain regulatory powers in respect of gas manufacture and sale, and certain powers and duties in relation to corporations or persons manufacturing or selling gas.

Chapter 125 of Laws of 1906 was to take effect on May 1, 1906. Prior to that date, Consolidated Gas Company brought suit in the then Circuit Court of the United States for the Southern District of New York, asserting that the rate under both statutes, *supra*, was confiscatory, and therefore unconstitutional, as in violation of the Fourteenth Amendment, and also asserting that the difference in rate between that established for the municipality and that established for individual consumers created an unreasonable classification, which amounted to a denial of the equal protection clause of the Fourteenth Amendment.

Plaintiff in that suit (which is the same plaintiff as in this suit) joined as parties defendants the public officers and official bodies upon whom was cast the duty of enforcing, in one respect or another, the carrying out of both statutes, the constitutionality of which plaintiff was then attacking. The result was that, at the beginning of the suit, the defendants were the Attorney General of the state of New York, the district attorney, the commission of gas and electricity, and the city of New York.

While the personnel of the public officers changed during the progress of the litigation, the only change in respect of the official character of any defendant was that occasioned by the abolition of the commission of gas and electricity and the creation of the Public Service Commissions. In due course, after the enactment of the Public Service Commissions Law (Consol. Laws, c. 48), the officials constituting the Public Service Commission of the State of New York, First District, were substituted as defendants in place of those who had constituted the commission of gas and electricity.

The statute was vigorously defended by the Attorney General, the Public Service Commission, and the city of New York, through its corporation counsel. The district attorney, although a necessary party, was, for all practical purposes, a formal party, and with entire propriety, in the circumstances, left the activities of the case to the other public officers and bodies.

The history of the litigation (the details of which need not be recited at length) will be found in outline in *Consolidated Gas Co. v. Mayer et al.* (C. C.) 146 Fed. 150, *Consolidated Gas Co. v. City of New York et al.* (C. C.) 157 Fed. 849, and *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382. The Supreme Court of the United States in *Willcox v. Consolidated Gas Co.*, *supra*, held as follows:

"Upon a careful consideration of the case before us, we are of opinion that the complainant has failed to sustain the burden cast upon it of showing beyond any just or fair doubt that the acts of the Legislature of the state of New York are in fact confiscatory.

"It may possibly be, however, that a practical experience of the effect of the acts by actual operation under them might prevent the complainant from obtaining a fair return, as already described, and in that event complainant

ought to have the opportunity of again presenting its case to the court. To that end we reverse the decree, with directions to dismiss the bill without prejudice; and it is so ordered."

From the foregoing it is apparent that the opportunity was left open to plaintiff to bring another suit in the future, when and if it thought it could show a state of facts which would render unconstitutional the statutes in question.

In the present suit chapter 736 of the Laws of 1905 is not attacked. No relief whatever is sought against the city of New York, and this suit is brought for the sole purpose of attacking the constitutionality of chapter 125 of the Laws of 1906, in so far as that statute limits the rate for gas sold to private consumers in the city of New York to 80 cents per 1,000 cubic feet. It is further stated under oath, on behalf of plaintiff, that no attack will be made by plaintiff in this suit upon chapter 736 of the Laws of 1905.

At the outset, therefore, it will be seen that the actual situation in the present suit differs from that which obtained in the previous suit in some important particulars: First, as above set forth, the statute fixing the price of gas to the city of New York is not now in controversy; and, secondly, the Public Service Commission, First District, which only became a party after the first suit had been in progress for some time, is the official body of local jurisdiction under existing law which is charged with safeguarding the rights and interests of those affected by the 80-cent rate secured under chapter 125 of the Laws of 1906. The Public Service Commissions Law, being chapter 429 of the Laws of 1907, went into effect on July 1, 1907. The general plan and purpose of that statute was to create a new body of public officials, upon whom was conferred new and important powers in respect of the regulation and supervision of certain classes of public utilities, some of which powers had theretofore been confided to municipal or other local authorities. The Legislature provided for two public service districts, and for a commission in each district; the first district including those counties which constitute the city of New York.

It is unnecessary to set forth in detail the important powers conferred upon these commissions, and it is sufficient in that connection to refer to section 74 of the Public Service Commissions Law to point out the comprehensive and responsible duties of the commissions in regard to gas corporations. That section provides as follows:

"Whenever either commission shall be of opinion that a gas corporation * * * or municipality within its jurisdiction is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the Supreme Court of the state of New York in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the Supreme Court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. * * *"

From the foregoing it appears that the commission in a proper case is authorized to proceed not only against gas corporations, but even against a municipality itself. On the other hand, where a municipal corporation makes complaint through its mayor, the commission must investigate and take such steps as may be appropriate; for it is provided in section 71 of the Public Service Commissions Law as follows:

"Sec. 71. *Complaints as to Quality and Price of Gas and Electricity—Investigation by Commission.* * * * Upon the complaint in writing of the mayor of a city, * * * in which a person or corporation is authorized to manufacture, sell or supply gas * * * for heat, light or power, or upon the complaint in writing of not less than one hundred customers or purchasers of such gas * * * in cities of the first * * * class, * * * as to the illuminating power, purity, pressure or price of gas, * * * sold and delivered in such municipality, the proper commission shall investigate as to the cause for such complaint."

Any attempt, therefore, by any gas corporation, either by way of omission or commission, to do an act contrary to law, was safeguarded by the Legislature by imposing upon the Public Service Commission of either district, as the case might be, the affirmative duties set forth in sections 71 and 74, supra: and it was the legislative will that this body should be held responsible for the taking of any steps necessary to obtain redress for or protection against the violation of relevant statutes, such, for instance, as the statute here in controversy.

In other words, the statutory law of New York has erected a system whereby it has charged Public Service Commissions with certain duties and responsibilities in local communities, such as municipalities, which, at least prior to chapter 737 of Laws of 1905, would have been imposed upon municipal officials. The Public Service Commissions Law was a new departure in state policy, and as one of its results the responsibility in law of defending the statute here concerned rests, not upon the municipal corporation known as the city of New York, but upon a commission having jurisdiction within a defined territory coterminous with the city of New York.

In addition to the duty of the Attorney General or the district attorney of the county to prosecute for penalties as above pointed out, section 68 of the Executive Law (Consol. Laws, c. 18) which became effective May 2, 1913, exhibits the policy of the state of New York in desiring that its Attorney General shall resist attacks against the constitutionality of its statutes—a statutory responsibility which did not exist when the case of Consolidated Gas Co. v. Mayer, supra, was begun, unless the Attorney General was made a party to a suit by reason of a statutory duty:

"Sec. 68. *Attorney General to Appear in Cases Involving the Constitutionality of an Act of the Legislature.*—Whenever the constitutionality of a statute is brought into question upon the trial or hearing of any action or proceeding, civil or criminal, in any court of record of original or appellate jurisdiction, the court or justice before whom such action or proceeding is pending, may make an order, directing the party desiring to raise such question to serve notice thereof on the Attorney General and that the Attorney General be permitted to appear at any such trial or hearing in support of the constitutionality of such statute. The court or justice before whom any such ac-

tion or proceeding is pending may also make such order upon the application of any party thereto, and the court shall make such order in any such action or proceeding upon motion of the Attorney General. When such order has been made in any manner herein mentioned it shall be the duty of the Attorney General to appear in such action or proceeding in support of the constitutionality of such statute."

Of course, the courts referred to in section 68 are necessarily the state courts, but, in view of this important state statute, the United States courts might very well regard the Attorney General as having a legal interest in a case in which the constitutionality of a state statute was involved, even though he were not charged with some specific duty under the statute. Indeed, the safeguards with which Congress has surrounded cases involving the constitutionality of state statutes, is illustrated by section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. § 1243]) by which it is provided, *inter alia*, that no interlocutory injunction suspending or restraining the enforcement of a state statute shall be issued or granted unless due notice has been given to the Governor and the Attorney General of the state and unless a majority of three judges, of whom at least one shall be a justice of the Supreme Court or a Circuit Judge, shall concur in granting such application. The result is that in the case now pending here, while the effect of the statute in controversy is purely local, and the Attorney General may well look to the Public Service Commission for the fullest aid and co-operation, yet the responsibility rests upon the Attorney General of being one of those public officers who must defend the constitutionality of this act. This responsibility is fully appreciated both by the Attorney General and by the Public Service Commission, First District, and they each intend vigorously to defend the enactment.

What active part the district attorney is called upon to take is for him to determine, but there can be no question that he also will properly discharge such duty as is cast upon him.

The attitude of the Attorney General, the district attorney, and the Public Service Commission, First District, upon this motion, is that, while each, of course, is earnest in the performance of and the intention to perform his or its respective duties, they have no objection to the intervention of the city of New York as a party defendant and necessarily leave the matter to the decision of the court to be disposed of as the law may require.

From the foregoing, it is apparent that every officer or public body, who or which is charged by law with a duty in respect of the defense of the 80-cent gas statute and of this lawsuit, has been made a party defendant. The question, then, for the court to determine, is whether, as matter of law, over the objection of plaintiff, the court can order that the city of New York be made a party defendant.

Preliminarily, it may be pointed out that the Supreme Court of the United States has held that—

"The only mode of judicial relief against unreasonable rates is by suit against the governmental authority which established them or is charged with the duty of enforcing them." *Re Engelhard & Sons Co.*, 231 U. S. 646, 34 Sup. Ct. 258, 58 L. Ed. 416.

Such was the procedure in *Willcox v. Consolidated Gas Co.*, supra.

The city of New York, in the previous litigation, was not regarded as a party defendant, so far as chapter 125 of the Laws of 1906 was concerned. *Consolidated Gas Co. v. Mayer* (C. C.) 146 Fed. 150; *Richman v. Consolidated Gas Co.*, 114 App. Div. 216, 224, 100 N. Y. Supp. 81; *Buffalo Gas Co. v. City of Buffalo* (C. C.) 156 Fed. 370.

In the *Richman* Case, supra, the New York Appellate Division of the First Department held:

"Of course, the city of New York does not represent the private consumers of gas."

This view sustained the contention of Mr. (now Mr. Justice) Shearn, who insisted that the restraining order of the United States Circuit Court did not run against *Richman*, a private consumer, because neither he nor any private consumer was a party to the suit in the United States court.

The question, then, is whether the city of New York is a "proper" party defendant or has "an interest in the litigation," within the meaning of equity rule 37. That rule, which, with the other new equity rules, became effective on February 1, 1913, is as follows:

"Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when any one refuses to join, he may for such reason be made a defendant.

"Any one claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination, and in recognition of, the propriety of the main proceeding."

The rule is a new rule and the part as to intervention, according to *Hopkins' Federal Equity Rules*, was suggested by the bar committee of the Circuit Court of Appeals of the Eighth Circuit. Speaking generally, and not technically, the rule is the same in character as rules found in the statutes of various states. See, for instance, Code Civ. Proc. N. Y. § 447. All but the last paragraph clearly refers to those who must or may be made a party defendant by the plaintiff.

[4] A "complete determination" of the cause obviously refers to a determination of every issue in such manner and as to such parties as to render the decree *res adjudicata*.

[1] The long-settled practice in equity is that a person cannot be made a party defendant on his own application, unless so required by statute. *Toler v. East Tennessee, V. & G. Ry. Co.* (C. C.) 67 Fed. 168, per *Lurton, J.*, afterwards a Justice of the Supreme Court; *Coleman v. Martin*, 6 Blatchf. 119, Fed. Cas. No. 2,985; *Drake v. Goodridge*, 6 Blatchf. 151, Fed. Cas. No. 4,062; *Gregory v. Pike*, 67 Fed. 837, 15 C. C. A. 33.

That the city of New York is not a necessary party defendant has already been made clear. That it is not a proper party defendant, in the sense of the law, will be at once appreciated, when it is understood what is meant by a "proper" party.

The subject is carefully discussed by Street in his Federal Equity Practice, vol. 1, § 507, where he accepted the rule laid down by Judge Sanborn in *Donovan v. Campion*, 85 Fed. 72, 29 C. C. A. 30, as follows:

(1) All those whose presence is necessary to a determination of the entire controversy must be made parties to the suit; and (2) all those who have such an interest in the subject-matter of the litigation that the decree, if it should be *res adjudicata* against them, would cause them gain or loss through the direct operation and effect of the decree, may be made parties thereto, if the complainant or the court is of the opinion that their interest in the litigation may be conveniently settled at the same time as the rights and interests of the "necessary" parties and thus the decree made to run against all those potentially affected by it.

Parties embraced under (1) above, the author quotes Judge Sanborn as pronouncing "necessary" parties; those under (2) above, as "proper" parties, within the concepts of a court of equity.

In section 509 Street deals with "proper parties," and defines them as follows:

"A proper party, as distinguished from one whose presence is necessary, to the determination of the controversy, is one who has an interest in the subject-matter of the litigation that may be conveniently settled therein."

In view of the foregoing, and to illustrate, it may very well be that a beneficiary of a trust is a proper party, while the trustee is a necessary party.

Thus, under old rule 49, in suits concerning real estate, the trustee was a necessary party, while a beneficiary might be made a defendant in the court's discretion, because a proper party.

"In such cases," the rule stated, "it shall not be necessary to make the persons beneficially interested * * * parties to the suit; but the court may, * * * if it shall so think fit, order such persons to be made parties."

Section 255 of the Greater New York Charter (Laws 1901, c. 466), which defines the duties and powers of the corporation counsel, does not confer upon that official rights or duties which the municipality or its departments and officers do not possess, and does not make the municipality a necessary or proper party, where it has no legal interest in a litigation. If plaintiff had joined the city of New York as a party defendant in this suit, and such joinder had been resisted, there can be no question that the court would have been bound to hold that the city of New York could not be made a party defendant.

[2] Referring now to the last paragraph of rule 37, it is plain that "interest" means a legal interest. Indeed, the word "interest" is used four times in rule 37 and must be construed *ejusdem generis*. In every instance, it is manifest that the interest must be a "legal interest," as those words are understood in the law. There never can be a legal

interest in a suit in equity unless, as the result of the litigation, the decree affects the person or corporation claiming the interest.

An illustration of interest is *Weatherly v. Perkins*, 160 N. W. 611, where the court, under the Michigan law, allowing interventions in cases at law and equity, granted the petition to intervene of a liquor dealer, in an action brought against his surety on a bond, which rendered the surety company liable in the event that there was an illegal sale of liquor by the dealer.

Another illustration is *Central Trust Co. v. Chicago, R. I. & P. R. Co.*, 218 Fed. 336, 134 C. C. A. 144, where the interveners were bondholders who would be directly affected by the decree.

[3] The city of New York, however, in its corporate capacity, will in no manner be affected by any decree which can be made herein. The rights of the consumers will be affected, but the city of New York as a municipal corporation is not their legal representative in this suit, but their rights under the laws of the state of New York must be safeguarded by other public officials, viz. the Attorney General, the district attorney, and the Public Service Commission. *Village of South Glens Falls v. Public Service Commission for the Second District* (Court of Appeals, decided January 18, 1919) 121 N. E. 777; *Re Engelhard & Sons Co.*, supra.

Indeed, the fact that the function of the city of New York, so far as concerns chapter 125 of Laws of 1906, is confined to the filing of a written complaint by the mayor, as provided in section 71 of the Public Service Commissions Law, supra, has, in principle, been fully recognized by the New York courts. *Quinby v. Public Service Comm.*, 223 N. Y. 244, 119 N. E. 433; *Village of South Glens Falls v. Public Service Comm. for Second District*, supra.

In all the cases cited, where the city of New York or some other city or governmental subdivision was a party, it will be found that the city had a legal interest, either (1) because a legislative act directly affecting it was attacked; or (2) because, by reason of some franchise or some statutory provision, the city had an interest or a duty as matter of law. But in this case there is neither legal interest nor legal duty. It appearing, therefore, that the court is without power, and that the application is not one in respect of which the court may exercise judicial discretion, the motion is denied.

In conclusion, it may be observed that, of course, it is the practice of this court to permit briefs to be submitted *amicus curiæ*, and, no doubt, any judge of this court, before whom the case shall hereafter be presented, will be glad to receive such brief or briefs as the learned corporation counsel may be pleased to submit.

Settle order on three days' notice.

UNITED STATES v. KAMBEITZ et al.

(District Court, N. D. New York. March 7, 1919.)

1. RAILROADS ⇨5½, New, vol. 6A Key-No. Series—FEDERAL CONTROL—INTERFERENCE WITH OPERATION.

An employé, assisting in operating cars of an express company which has been taken over and is being operated by the government under Act March 21, 1918 (Comp. St. 1918, §§ 3115¼a-3115¼p), who steals express matter being carried by it for hire knowingly interferes with and impedes the "possession, use, operation, or control of * * * transportation system," which is made a criminal offense by section 11 of the act (section 3115¼k).

2. STATUTES ⇨241(1)—CONSTRUCTION—PENAL STATUTES.

A penal statute is to be strictly construed, but not so narrowly as to defeat the purpose of its enactment.

3. RAILROADS ⇨5½, New, vol. 6A Key-No. Series—FEDERAL CONTROL—LARCENY OF PROPERTY BEING TRANSPORTED—"DERIVED FROM."

Express matter being carried by an express company, while it is being operated by the government under Act March 21, 1918 (Comp. St. 1918, §§ 3115¼a-3115¼p), is "property derived from or used in connection with the possession, use, or operation of" the transportation system, and its larceny by employés constitutes a criminal offense against the United States, under section 11 of the act (section 3115¼k).

4. LARCENY ⇨7—GOVERNMENT OWNERSHIP—EXPRESS MATTER—"PROPERTY OF THE UNITED STATES."

The United States has a special property in express matter being carried for hire by an express company operated by the government under Act March 21, 1918 (Comp. St. 1918, §§ 3115¼a-3115¼p), which will sustain a prosecution for larceny of such property under Criminal Code, § 47 (Comp. St. § 10214), making it an offense to steal any property or valuable thing whatever of the money or property of the United States.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property of the United States.]

5. RAILROADS ⇨5½, New, vol. 6A Key-No. Series—FEDERAL CONTROL—"TRANSPORTATION SYSTEM."

A "transportation system," within Act March 21, 1918, § 11 (Comp. St. 1918, § 3115¼k), making it a criminal offense to interfere with or impede the possession, use, operation, and control of the transportation system, is a system which transports something from one place to another.

6. RAILROADS ⇨5½, New, vol. 6A Key-No. Series—FEDERAL CONTROL—"USE" OF TRANSPORTATION SYSTEM.

The "use" of the system, within Act March 21, 1918, § 11 (Comp. St. 1918, § 3115¼k), making it a criminal offense to interfere with or impede the possession, use, operation, and control of the transportation system, consists in taking up, carrying, and putting down property.

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

7. RAILROADS ⇨5½, New, vol. 6A Key-No. Series—FEDERAL CONTROL—"OPERATION" OF TRANSPORTATION SYSTEM.

The "operation" of the system, within Act March 21, 1918, § 11 (Comp. St. § 3115¼k), making it a criminal offense to interfere with or impede the possession, use, operation, and control of the transportation system, consists in running the cars and carrying therein property being moved from one point or place to another.

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

Criminal prosecution by the United States against Otto Kambeitz and another. On demurrer to indictment. Overruled.

The defendants demur to the indictment in this case, which charges them with a violation of section 11 of the Act of March 21, 1918 (40 Stat. 457, c. 25 [Comp. St. 1918, § 3115¾k]), known as the Railroad Control Act, and also with a violation of section 47 of the Criminal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1097 [Comp. St. § 10214]), on the ground the indictment, which contains three counts, does not state facts constituting a crime or criminal offense under said sections of the laws referred to. The facts charged will be stated in the opinion.

D. B. Lucey, U. S. Atty., of Ogdensburg, N. Y., for the United States.

Philip J. Doherty, Counsel Property Protection, U. S. R. R. Administration, of Washington, D. C., *amicus curiæ*.

Lester W. Bloch, of Albany, N. Y., for defendants.

RAY, District Judge. The New York Central Railroad Company owns and operates a railroad line extending from the city of New York, N. Y., up the Hudson river valley to Albany, N. Y., and thence westerly up the Mohawk valley to Rome, N. Y., and thence on to Buffalo, N. Y. From thence on westerly by means of contracts and agreements and leases it operates its road and cars to Chicago and has connections across the continent. This railroad company is engaged in both interstate and intrastate and also in foreign commerce, as one of its lines runs into and through Lower Canada, via Suspension Bridge, to Detroit, Mich. The American Railway Express Company, Incorporated, is a transportation line and system operating on and over this line of railroad and its connections from New York City to San Francisco, and is engaged in transporting both interstate and intrastate commerce and also foreign commerce. It has suitable and effective contracts and leases for this purpose with the said railroad company. It is an independent transportation system, and carries for hire what is known as express matter, goods and chattels, some owned by itself, some by the railroad company, but mainly by the general public desiring to have its property carried by this transportation line and system to the different points reached by it. Goods and merchandise sent over this line and carried or transported by this transportation system may be consigned to Albany, Schenectady, Utica, Syracuse, Rochester, Buffalo, Cleveland, Detroit, Chicago, or to intermediate points, or to more distant points. If packages are stolen from the cars used in such transportation, it is many times difficult to ascertain the point to which consigned.

Prior to the times mentioned in this indictment against these defendants the President of the United States, by virtue of and pursuant to the act of Congress authorizing such action, took over, not only this railroad line and system, but this transportation line and system, and at the times mentioned was actually operating both of same for the carriage and transportation of passengers, freight, and express matter, both in interstate and intrastate commerce, and employed men

of all grades in so operating them. The indictment charges this, and charges that the defendants were two of such employés engaged at the time in operating and running, or in assisting to operate and run, certain cars as a part of such transportation system, containing certain express packages and matter, which were being conveyed and transported for hire from New York City to Syracuse, N. Y., or beyond, and that the United States, by virtue of such facts and of the liability and engagement to use reasonable care to supply, transport, and deliver, and the right to demand and receive compensation therefor, and claim and enforce a lien on such property for the charges, had a special property in such goods and merchandise so being transported. The indictment alleges that the said railroad and said transportation system were at the time engaged in the movement and transportation of both interstate and intrastate commerce, but does not charge that the goods stolen and hereafter mentioned were or constituted a part of an interstate shipment or package. The indictment then charges that at some point in the state of New York, between Albany and Syracuse, the exact point being unknown, and while such goods contained in one of such cars were being so transported, the defendants, said employés, on such train and engaged in operating and running such cars containing such goods, wrongfully and unlawfully broke and entered one of such cars and stole therefrom and carried away and appropriated to their own use certain express matter being so transported for hire, and consisting of a fur collar and a fur coat, and in one count the indictment charges that in so doing the defendants knowingly interfered with and impeded the possession, use, and operation of such transportation system, and in another count charges that the defendants in so doing took and converted to their own use property derived from and used in connection with the possession and use and operation of such transportation system.

The defendants contend, first, that the indictment is demurrable, in that it fails to charge that the goods so stolen and converted to their own use by the defendants were an interstate, or part of an interstate, shipment or consignment, and, secondly, that such an act, the stealing and conversion by employés of goods so being carried for hire, does not constitute an interference with or an impeding of the possession or use or operation of the transportation system; and they also contend that such stealing and conversion of such property, so being transported for hire, is not the stealing or conversion of property derived from or used in connection with the possession, use, or operation of such transportation system.

It is contended such goods are not derived from the possession, or use, or operation of the system, and that they are not used in connection with the possession, or use, or operation of such transportation system. Lastly, it is contended that the United States has no interest or ownership in such goods so being transported, and that the stealing of same is not within section 47 of the Criminal Code of the United States.

[1] Each of these defendants was a "person" employed by the "carrier," the transportation line or system which was in the possession of

and being operated by the United States, through the President of the United States and the Director General of Railroads appointed by the President, all pursuant to law. The acts were "knowingly" done by such defendants. Did such acts "interfere with," or "impede the possession," or "impede the use," or "impede the operation," or "impede the control" of the "transportation system"? What is the "transportation system"? Does the system consist of a roadbed, railroad ties and rails, and engines and cars drawn thereby and moved from point to point on such rails, together with stations and offices at various points; or does the "transportation system" include such system when in operation, doing the things and effecting the objects it was created and established to do and bring about, viz. the transportation of goods and merchandise from point to point, and the movement of the property intrusted to it to be carried or transported in operating the system? Does it interfere with or impede the use, or the operation, or the control, or the possession of the transportation system to steal and carry away and convert to the use of the thief the property intrusted to and being carried by the one lawfully possessing and operating the system? Does the system "operate," and is it "used," when the cars move, whether or not it carries the goods and merchandise intrusted to it to be carried and transported thereby?

A "transportation system" is not organized or created to run empty cars or vehicles from place to place, but to transport or carry from place to place goods and merchandise. The system operates when it is engaged in doing this work, and it seems to me that he who unlawfully takes the goods contained in and being transported in and by such cars therefrom, and converts same to his own use and purposes, not only interferes with, but impedes, the possession, use, operation, and control of the system. The possession, use, and operation of the system includes the right to carry and transport the goods intrusted to the carrier without unlawful obstruction or interference, and he who unlawfully interferes with and impedes the exercise of this right interferes with and impedes such possession, use, and operation of the system itself. If the goods being transported by the operation of the system are unlawfully taken and carried away, the system ceases to operate. The instrumentalities used in operating the system may still move, but the "transportation system" does not operate.

[5] In *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203, 5 Sup. Ct. 826, 828 (29 L. Ed. 158), the court said:

"Transportation implies the taking up of persons or property at some point and putting them down at another."

Therefore a "transportation system" implies the taking up of persons or property at some point and putting them down at another as a part of such system, as well as a part of the operation of the system. "Transportation" is carriage from one place to another. *U. S. v. Hamburg American Line*, 159 Fed. 104, 105, 86 C. C. A. 294. A transportation system, then, is a system which transports something from one place to another. The "use" of the system, or the "opera-

tion" of the system, consists in carrying persons, or property, or both, from place to place, and he who unlawfully takes the goods being carried in operating the system from the cars or vehicles which form a part of such system, not only interferes with the use, but with the operation and the possession, of the system.

[6, 7] Section 11 of the Act of March 21, 1918, provides:

"That every person * * * or person acting for or employed by a carrier, * * * or other person, who * * * shall knowingly interfere with or impede the possession, use, operation, or control of any railroad property, railroad, or transportation system hitherto or hereafter taken over by the President, * * * shall be guilty of a misdemeanor, and shall, upon conviction, be punished," etc.

It is noted that this part of the section makes it a misdemeanor for an employé to knowingly interfere with, or impede, either the possession, or the use, or the operation, or the control of the transportation system. If, then, either the use or the operation of the transportation system calls for the transportation—that is, the taking up of property at some point and putting it down at another—and the carrier who is operating the system is actually engaged in doing this, having the property in custody and moving it on the cars, how can it be claimed that an employé of the carrier engaged in operating such cars, who breaks and enters a car and steals and carries away and converts to his own use a part of such property so being carried, does not interfere with the possession of the system, or impede the possession, or both interfere with or impede the use and also the operation and the control of such transportation system? The use of the system consists in taking up, carrying, and putting down property, and the operation of the system consists in running the cars and carrying therein such property so being moved from one point or place to another.

[2] It seems too clear for argument that the employé who commits the act mentioned, not only interferes with the possession of the system by the carrier, but interferes with and impedes the use and operation of the transportation system. To come within this part of the section, must the employé or other person tear up a rail, or take a wheel from a car or the engine, or blockade the tracks, or blow up a bridge, or burn a trestle? Is this part of the section aimed at such acts as these alone, and not at the unlawful taking and carrying away of the property being transported by the carrier in operating the system? I think not. The purpose of Congress was to protect the possession, and the use, and the operation, and the control of the transportation system. This would not be done, should we give to this part of the section the narrow and restricted construction contended for by these defendants. It is a penal statute, and is to be strictly construed, but not so narrowly construed as to defeat the purpose of its enactment. *United States v. Ash Sheep Co.* (C. C. A.) 250 Fed. 592; *Johnson v. Southern Pac. Co.*, 196 U. S. 18, 25 Sup. Ct. 158, 49 L. Ed. 363; *United States v. Lacher*, 134 U. S. 624, 10 Sup. Ct. 625, 33 L. Ed. 1080.

Circular No. 14, dated March 26, 1918, and signed by W. G. McAdoo, Director General of Railroads, contains the following:

"Officers and employes must understand that all property being transported by the railroads is in the custody of the United States and they owe an especial duty to guard and protect the same and to report promptly any person who tampers therewith; and the United States looks to the officers and employes to do their duty in this behalf."

Obviously it was the purpose of Congress not only to protect the instrumentalities used in operating a transportation system, such as engines, cars, vehicles of any kind, and other equipment, but the goods and property carried in operating and using the system, and to protect the government in its possession, use, operation, and control thereof and from interference therewith. Strange indeed would it be, if the government should pile alongside the empty cars used in operating a transportation system a million dollars' worth of army and navy supplies ready to be placed in and on such cars for transportation to some designated point, to have it held that thieves, who happen to be employed by the government in loading same, cannot be punished under this act, when they steal, carry away, and convert to their own use and benefit such goods of the government, on the ground and theory that they, in so doing, did not interfere with, or impede the possession, use, operation, or control of, such transportation system. Such acts would not only interfere with and impede, but absolutely prevent, the "use" of the system for the time being, unless it be held that such acts would not offend against the act of Congress we are considering, inasmuch as the thieves did nothing to prevent the engineer and fireman from getting up steam and running the empty train to its destination.

Congress authorized the President to take over railroads, railroad systems, and transportation systems, and the President took them over, not for the mere purpose of running trains, and merely to operate the instrumentalities used in effectively possessing, using, operating, and controlling these transportation systems and railroad systems, but for the purpose of expediting and controlling commerce, and for the effective and expeditious transportation of goods, merchandise, and other property, as well as people, especially troops; and when Congress in this act spoke of the use and operation of a transportation system it intended the words to include the ordinary and effective use and operation of the system for the accomplishment of the ends for which such systems were established and taken over by the government. And I cannot doubt that Congress intended to include in this protection, not only every instrumentality belonging to and forming a part of the system permanently, but all property and persons being carried when the instrumentalities of the system are in operation. Let us suppose that a train load of troops was on its way from Buffalo to New York, for oversea service, and that a band of ruffians at Syracuse, with the train at a standstill, had thrown offensive or dangerous matter through the windows amongst the soldiers, driving them from the cars even temporarily; can it be said that such acts did not inter-

fere with the possession or use of the railroad or transportation system? I think there is a difference between a railroad system in operation, or a transportation system in operation, and such systems established, but not in operation. When put in motion to effect the object or purpose for which constructed or established, they are in use or operation. When the transportation system, consisting of road-bed, rails, cars, engines, and other apparatus, takes on merchandise or express matter for transportation, it is being operated and used, and to my mind any act which interferes with and prevents this merchandise or express matter from being carried as intended is an interference with, or an impeding of, the use, operation, and control of the system.

[3] Section 11 of the act of March 21, 1918, further provides:

"For the taking or conversion to his own use or the embezzlement of money or property derived from or used in connection with the possession, use, or operation of said railroads or transportation systems, the criminal statutes of the United States, as well as the criminal statutes of the various states where applicable, shall apply to all officers, agents and employes engaged in said railroad and transportation service, while the same is under federal control, to the same extent as to persons employed in the regular service of the United States."

It then provides:

"Prosecutions for violations of this act or of any order entered hereunder shall be in the District Courts of the United States, under the direction of the Attorney General in accordance with the procedure for the collection and imposing of fines and penalties now existing in said courts."

Section 47 of the Criminal or Penal Code of the United States provides as follows:

"Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

This makes it a crime to embezzle, or steal, or purloin any money or property or valuable thing whatever of the moneys, goods, chattels, or property of the United States.

This indictment charges in a separate count the taking over by the President pursuant to law of the railroad and transportation systems hereinbefore described, and that it was being run and operated by the United States through the Director General of Railroads, and that the defendants were employes engaged in running cars forming a part of such systems, which were carrying from New York City to Syracuse, or beyond, certain packages of express matter for hire, and that for reasons heretofore stated the United States had not only the possession of, but a special property in, such goods or packages. The indictment then charges that the defendants broke and entered one of such cars then being run and operated and carrying such goods and packages, and stole, took, and carried away and converted to their own use certain of such goods in which the United States had a special property, the property so taken being described and its value

stated. It is not charged that the United States was the sole owner of such goods, or that the goods stolen were interstate packages, but it is charged that the transportation systems and cars were then being operated by the United States in both interstate and intrastate commerce.

First. Did these defendants, in doing what they did do, take or convert to their own use "property derived from or used in connection with the possession, use, or operation of said transportation systems"?

Second. If so, was the property so stolen, taken, and converted to their own use by the defendants "of the goods, chattels, records or property of the United States"?

Was this property, then in the possession of the United States and so being transported by it, and which was so taken by the defendants, "property derived from" the "operation" of said transportation system? The operation of this transportation system consisted and consists in drawing or obtaining or receiving from others goods, chattels, or other property for transportation for a compensation, and the transportation of such property. This is the main thing the transportation system does when in operation. It does not operate unless it does this, and only operates when it does this. Hence this property and its possession was derived from the operation of this transportation system. "Derive" means (see Century Dictionary):

"(3) To draw or receive, as from a source or origin, or by regular transmission; as to derive ideas from the senses; to derive instruction from a book; his estate is derived from his ancestors."

Clearly the property stolen by defendants was derived from the operation of the transportation system; that is, by means of and because of the operation and use of the system. It was by operating this transportation system that the United States obtained and came into possession of such property. But for such operation of the system the United States would not have had it. So this property so stolen was derived from the possession and use of such transportation system. In operating such a transportation system the one in possession and operating it holds himself or itself out as a common carrier for hire and invites custom—the delivery to it of property for transportation. This is a necessary part of the use and operation of the system of transportation. The words "derived from" do not imply that the property stolen or converted by the employé must have been purchased with money earned in carrying on or operating or using the system, or that such property must be a part of that which came to the possession of the government when the transportation system was taken over.

Assume a deficiency in earnings to carry on, use, and operate the transportation system, and an appropriation by Congress to continue its operation and use. Assume that a part of such appropriation is placed in the hands of a disbursing officer of the transportation company for the payment of employés or the purchase of necessary supplies for operating such system of transportation. Assume that an

officer, agent, or employé engaged in such transportation service takes such money or a part of it and converts it to his own use. May or may not such officer, agent or employé be punished under the provisions of this act of Congress for such stealing, conversion, and embezzlement? It seems to me clear that the moment such money is paid over for use in carrying on, using, and operating the transportation system it becomes money and property derived from the possession, use, and operation of such transportation system. It is money drawn and received from the public treasury for use in connection with the possession and use and operation of the transportation system. It seems to me it would be a very refined construction to say that such money is not "money or property derived from or used in connection with the possession, use, or operation of said railroads or transportation system," for the reason it was not actually earned by the United States in operating the system. This would be adopting a narrow construction, for the purpose of defeating the operation of the statute, instead of a sensible and natural one, which would make it operative and effective.

When the government has taken over the transportation system, and is engaged in using and operating it, the money being used and set apart to be used, and the money earned in such use and operation, together with all property delivered to the government to be transported in using and operating the system, becomes "property derived from or used in connection with the possession, use or operation of said railroads or transportation systems," and the officer or agent or employé who steals or converts to his own use such money or property, or any of it, comes under the provisions of the act and may be punished accordingly. For the purposes of the act the United States is made not only the custodian, but the owner, of the property so coming into its possession for transportation. "The criminal statutes of the United States * * * shall apply to all officers, agents and employés engaged in said railroad and transportation service, while the same is under federal control, to the same extent as to persons employed in the regular service of the United States." This, to all intents and purposes, makes such persons employés in the regular service of the United States, so far as "the taking or conversion to his own use or the embezzlement of money or property derived from or used in connection with the possession, use, or operation of said railroads or transportation systems" is concerned.

[4] Is such property so received and so being transported by the United States for hire "property" or "valuable thing whatever of the * * * goods, chattels, * * * property of the United States"? How far and to what extent must the United States be the owner of such property? This indictment charges that the United States had a special property in the goods so being transported, and so stolen and converted by the defendants, and states the nature of such ownership.

In *Dimmick v. United States*, 135 Fed. 257, 70 C. C. A. 141, it was held, under what is now section 47 of the Criminal Code of the United States, that an averment in the indictment that the stolen money "be-

longed" to the United States was sufficient. It is of course necessary that the property stolen shall be "property or valuable thing whatever of the goods, chattels or property of the United States"; but I do not think it necessary to allege or prove on the trial that the United States was the sole and exclusive owner of the entire property in the thing. If the United States has the actual rightful possession of, and is the owner of a special property in, the thing of value stolen, it is all-sufficient. To steal property from the custody and possession of the United States, in which the United States has and owns a special property, is to steal property of the United States. Section 47 of the Criminal Code, above quoted, does not say that the United States must be the sole and exclusive owner of the entire property in the thing stolen.

"To sustain an indictment for larceny, the goods alleged to have been stolen must be proved to be the absolute or special property of the alleged owner, who cannot be the defendant." Wharton on Criminal Law, § 1818; Commonwealth v. Morse, 14 Mass. 217, 218; Commonwealth v. Manley, 12 Pick. (Mass.) 173, 174; Jones v. Commonwealth, 17 Grat. (Va.) 563; State v. Furlong, 19 Me. 225.

"The proper practice is to insert counts charging the ownership in as many ways as there are parties interested; but, as a general rule, it will be sufficient if either general or special ownership be alleged. Hence, when bailed goods are stolen by a stranger, the ownership may be laid either in bailor or bailee." Wharton on Criminal Law, § 1918; R. v. Vincent, 2 Den. C. C. 464; R. v. Bird, 9 C. & P. 44.

When goods are intrusted to a carrier to carry, such carrier while in possession has a special property in such goods, and the property ownership may be laid in the carrier. *People v. Smith*, 1 Parker, Cr. R. (N. Y.) 329. Says Wharton, § 1824:

"Whenever a person has a special property in a thing, or holds it in trust for another, the property may be laid in either."

See *State v. Somerville*, 21 Me. 14; *State v. Grant*, 22 Me. 171; *R. v. Remnant*, R. & R. 136, 4 C. & P. 391; *Langford v. State*, 8 Tex. 115; *Huling v. State*, 17 Ohio St. 583; *People v. Bennett*, 37 N. Y. 117, 93 Am. Dec. 551; *Commonwealth v. O'Hara*, 10 Gray (Mass.) 469; *State v. Mullen*, 30 Iowa, 203; *Commonwealth v. McLaughlin*, 103 Mass. 435; *Yates v. State*, 10 Yerg. (Tenn.) 549.

In *Yates v. State*, supra, the indictment alleged the watch stolen to be that of A. On the trial it appeared that B. owned the watch, but that he had exchanged it with A. for a few weeks, and that it was stolen from the possession of A. It was held that A. had a special property in the watch sufficient to sustain the indictment. One who has the property in goods may be guilty of larceny in stealing them from one to whom he has given them in custody in special possession, thereby conferring a special property. See *Palmer v. People*, 10 Wend. 165, 25 Am. Dec. 551; *State v. Dewitt*, 32 Mo. 571. In *Pierson v. State*, 78 Tex. Cr. R. 275, 180 S. W. 1080, and *Tyler v. State*, 78 Tex. Cr. R. 279, 180 S. W. 687, in a prosecution for larceny from a freight car in local railroad yards, it was held that ownership

of freight was properly alleged in the local freight agent in the one case and in the station agent in the other case; it being shown that such officials had charge and control of such yards.

In this case the indictment alleges that the United States had and has a special property in the goods stolen, and that the government had the possession of the goods, and that the property was stolen and taken from that possession. In *People v. Bennett*, 37 N. Y. 117, 93 Am. Dec. 551, the court held:

"Property purchased for the support of the poor by the direction of the superintendent of the county, and kept for that purpose, if stolen, may be laid in the indictment either as the property of the county or of the superintendent.

"The office of superintendent of the poor, though invested with corporate powers, is, notwithstanding, a mere agency of the county, and the relation between the county and its superintendent is that of principal and agent."

In the opinion the court said:

"It is undeniable that in an indictment for larceny it is essential that the pleader should aver title or ownership in the property stolen to be in the true owner, if known, and, if not known, then it should be averred that the owner was to the jurors unknown. This is a general rule in criminal pleading, and, in applying it, it has been held, that the owner was one who had a general or special property in the thing taken. * * *

"The cases abundantly sustain the position that an averment of ownership in the person having the actual possession and control of the thing stolen at the time of the theft is all that is required."

In *Phelps v. People*, 72 N. Y. 334, 357, the court held:

"It is not necessary that an indictment for larceny should name as owner one who has the general ownership; it is sufficient if one be named who has a special property in the property stolen.

"So a bailee of property may be named as owner, and this as well where the character of bailee arose from the fact that the thing came into his actual possession and control fortuitously or by mistake, as where it was created by express agreement."

In the opinion, Folger, J., said:

"Nor is it necessary that it be held that the state acquired an absolute property in the draft. Whatever right its public agents acquired in it, they acquired for it. If that was a special and limited interest in it, still it was such an interest as that it made a proper averment to allege that the state was the owner.

"It is not necessary that the indictment should name that person as owner, and him only, who has the general ownership of the property, a title absolute, which he can maintain against the whole world. It is enough, if any one be named who has a special property in the thing stolen. A special property is a qualified or limited right, such as a bailee of it has; and a bailee of property is one to whom the thing has been delivered, to be held according to the purpose or object of the delivery, and to be returned to the bailor, or delivered over to some other, when that object has been accomplished, or for the purpose of accomplishing it; and the obligation of the bailee may arise by implied contract, as well as express agreement."

It is undeniable that the United States, pursuant to act of Congress, has taken over this New York Central Railroad and railroad system, and also this transportation system, the American Railway Express

Company, and that the government is, and at the time of the commission of the acts constituting the alleged offense was, actually in possession and using and operating them for the transportation of persons and property for its own purposes and also for hire. This had been done through or by act of the President of the United States duly authorized thereto, who, by like authority, put same in the actual custody of Wm. G. McAdoo, who was named Director General of Railroads. Neither the United States, nor the President, nor the Director General, is doing this as agent for the railroads or the transportation companies. The United States, through its officers and agents, is doing all this on its own account, and to accomplish its own purposes, including service to and for the general public. The United States is not in partnership with these transportation or railroad systems. The earnings for the time being, and until such time as these properties are turned back to the possession and control of the corporations owning them, belong to the United States. He who steals such earnings steals the money of the United States. The property received by those in charge of these transportation systems for transportation is received by the United States, to be transported by the United States, and is in the custody and under the protection of the United States as bailee and carrier, and the United States has a property therein. Congress had power to enact laws for the protection of this possession, use, and operation and of all property coming into its possession in operating the systems, and it was not so short-sighted as to enact a statute for the protection of the mere operation of the instrumentalities forming the physical part of the systems and such instrumentalities, leaving the United States powerless, except as it might resort to local state courts, to protect the millions of dollars' worth of merchandise in the custody of the United States as bailee and carrier, and being transported by it, against the depredations of robbers and thieves. As was said by Judge Booth in *Dooley v. Pennsylvania Railroad Co.* (D. C.) 250 Fed. 142:

"In the statute above quoted, the President was authorized to 'take possession, assume control and utilize any system of transportation.' It needs no argument to show that it was necessary, in order that these powers be made effective, that the possession, the control, and the utilization of the property should be exclusive, and not subject to interference by private parties."

It is unnecessary to enter into a discussion of the exact relations existing between these transportation companies and the government of the United States, or into a minute statement of the obligations owing by the one to the other. Under the decisions, as we have seen, it is all-sufficient that the United States is in the lawful possession and control of these transportation systems and of the property belonging thereto, and is operating same, and that in so operating them the United States invites and receives into its possession shipments of freight, express matter, goods, and chattels, which as a common carrier and bailee it undertakes to carry and deliver, and that the United States, in such capacity and occupying such relations, has a special property in such goods. It is entirely immaterial whether or not the

goods in question in this case and stolen by the defendants constituted in whole or in part an interstate shipment. The power of the United States to take over, control, and operate these railroad and transportation systems carries with it as incident thereto the power to protect and preserve them in every part, and also to protect and preserve all property lawfully received into its custody in so operating same. The United States may protect its property, and all property in its possession and under its control in which it has a property interest, anywhere and everywhere within the limits of the United States.

In this case the railroad bed, right of way, tracks, engines, cars, appliances, and stations, with power houses, etc., are all in the possession and under the exclusive control of the United States, and subject to its jurisdiction. It is true that we must find some statute denouncing it as a criminal offense to intermeddle with the possession and control and operation of these systems and of the property carried thereby, while under government control, before such acts can be punished by the federal courts as crimes. In the United States courts we have no common-law crimes, but Congress has undertaken to cover this whole subject by the act of March 21, 1918, and in my judgment has done so effectively. The proclamation of the President, taking over the transportation systems, declared:

"And whereas, it is provided by section 1 of the act approved August 29, 1916, entitled 'An act making appropriations for the support of the army for the fiscal year ending June 30, 1917, and for other purposes,' 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.'

"And whereas, it has now become necessary in the national defense to take possession and assume control of certain systems of transportation and to utilize the same, to the exclusion, as far as may be necessary, of other than war traffic thereon, for the transportation of troops, war material, and equipment therefor, and for other needful and desirable purposes connected with the prosecution of the war:

"Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto me enabling, do hereby, through Newton D. Baker, Secretary of War, take possession and assume 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 cars, private cars and private 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 transfer and transportation of troops, war material, and equipment, to the exclusion so far as may be necessary of all other traffic thereon, and that so far as such exclusive use be not necessary or desirable such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers."

General Order No. 1 declared:

"3. All transportation systems covered by said proclamation and order shall be operated as a national system of transportation, the common and national needs being in all instances held paramount to any actual or supposed corporate advantage. All terminals, ports, locomotives, rolling stock, and other transportation facilities are to be fully utilized to carry out this purpose without regard to ownership.

"4. The designation of routes by shippers is to be disregarded when speed and efficiency of transportation service may thus be promoted.

"5. Traffic agreements between carriers must not be permitted to interfere with expeditious movements."

I am well aware of the decision of the Supreme Court that there can be no constructive offenses, and the court cannot extend or broaden a criminal statute, for the reason it thinks Congress should have made it broader and more comprehensive. *United States v. Bathgate*, 246 U. S. 220, 38 Sup. Ct. 269, 62 L. Ed. 676; *United States v. Weitzel*, 246 U. S. 533, 543, 38 Sup. Ct. 381, 62 L. Ed. 872; *Todd v. United States*, 158 U. S. 278, 282, 15 Sup. Ct. 889, 39 L. Ed. 982; *United States v. Harris*, 177 U. S. 305, 20 Sup. Ct. 609, 44 L. Ed. 780.

However, when the acts done and complained of are *malum in se*, criminal in their nature, and plainly within the words of an existing applicable statute, giving them their ordinary meaning, and clearly within the spirit and intent of the statute, the court should not seek for and adopt a possible and narrow construction, which will permit the commission of lawless and immoral acts, destructive of property rights and detrimental to the public interests.

In *United States v. Corbett*, 215 U. S. 233, 242, 243, 30 Sup. Ct. 81, 84 (54 L. Ed. 173), the court held:

"The rule of strict construction of penal statutes does not require a narrow, technical meaning to be given to words, in disregard of their context, and so as to frustrate the obvious legislative intent."

In the opinion the court said:

"But the argument is that, however cogent may be the considerations just stated, they are here inapplicable, because the statute is a criminal one, requiring to be strictly construed. The principle is elementary, but the application here sought to be made is a mistaken one. The rule of strict construction does not require that the narrowest technical meaning be given to the words employed in a criminal statute, in disregard of their context and in frustration of the obvious legislative intent. *United States v. Hartwell*, 6 Wall. 385 [18 L. Ed. 830]. In that case, answering the contention that penal laws are to be construed strictly, the court said (page 395):

"The object in construing penal as well as other statutes is to ascertain the legislative intent. * * * The words must not be narrowed to the exclusion of what the Legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. * * * The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular, instead of the more narrow technical, one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent."

"It is to be observed that the rule thus stated affords no ground for extending a penal statute beyond its plain meaning. But it inculcates that a

meaning which is within the text and within its clear intent is not to be departed from because, by resorting to a narrow and technical interpretation of particular words, the plain meaning may be distorted and the obvious purpose of the law be frustrated. *Bolles v. Outing Co.*, 175 U. S. 262, 265 [20 Sup. Ct. 94, 44 L. Ed. 156], and especially *United States v. Union Supply Company*, decided this term [215 U. S.] 50 [30 Sup. Ct. 15, 54 L. Ed. 87]."

In *United States v. Union Supply Co.*, 215 U. S. 50, 30 Sup. Ct. 15, 54 L. Ed. 87, it was held:

"Where corporations are as much within the mischief aimed at by a penal statute and as capable of willful breaches of the law as individuals, the statute will not, if it can be reasonably interpreted as including corporations, be interpreted as excluding them."

The demurrer to the indictment is overruled.

Since writing the above, the defendants have been put on trial and convicted. The proof on the trial sustained every allegation of fact stated in the indictment and in the above opinion, and the above may be regarded as giving my reasons for refusing to set aside the verdict of the jury.

BURR et al. v. CITY OF COLUMBUS, OHIO, et al.

(District Court, S. D. Ohio, E. D. October 29, 1918.)

No. 106.

1. CARRIERS ⇐12(9)—RATE OF FARE—CHARTER CONTRACT.

A franchise contract between a city and a street railroad company for a term of 25 years, fixing the rate of fare, is binding on both parties throughout the term, and cannot be terminated by the company on the ground that the continuance of normal labor conditions was an implied term, and that the abnormal increase in wages caused by the war and the action of the War Labor Board renders further performance at the fixed rate of fare impossible, because it would bankrupt the company. In such case, while such abnormal conditions were not contemplated by either party, the company might have guarded against them in the contract.

2. CARRIERS ⇐12(9)—CHARGES—FRANCHISE—RELEASE FROM PERFORMANCE—ACTION BY WAR BOARD.

The fixing of wages to be paid by a street railroad company in arbitration by the War Labor Board, although at a rate which, under the charter contract between the company and the city, is confiscatory, is not such a direct interference with the contract by the government as to excuse the company from performance.

In Equity. Suit by I. Tucker Burr and others against the City of Columbus, Ohio, and others. On motion of complainants for preliminary injunction and by defendants to dismiss bill. Motion for injunction denied, and bill dismissed.

Affirmed 249 U. S. —, 39 Sup. Ct. 354, 63 L. Ed. —.

[Editor's Note.—With this opinion should be read Judge Westenhaver's opinion in *Columbus Railway, Power & Light Co. v. City of Columbus, Ohio, et al.* (D. C.) 253 Fed. 499.]

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

William O. Henderson, Henry J. Booth, Henderson & Burr, and Booth, Keating, Pomerene & Boulger, all of Columbus, Ohio (Joseph S. Clark and Henry A. McCarthy, both of Philadelphia, Pa., of counsel), for complainants.

Henry L. Scarlett, City Atty., of Columbus, Ohio (Pugh & Pugh, of Columbus, Ohio, of counsel), for defendants.

HOLLISTER, District Judge. Heard on motion of complainants for a preliminary injunction restraining the defendants, pending the suit, from in any way forcing or compelling, or attempting to force or compel, the Columbus Railway, Power & Light Company, a corporation of Ohio, hereinafter called the company, to operate its lines of street railway in the city of Columbus under the certain ordinances set out in the bill, and on defendants' motion to dismiss the bill.

The complainants are owners of mortgage bonds of the series of first mortgage bonds executed by the company. It is assumed for the purposes of this case that complainants have the capacity to bring the suit, and, being citizens of states other than Ohio, the court has jurisdiction to entertain it and make appropriate orders.

With the exception of parties plaintiff, this bill is in substance, and almost exactly in language, the same as the bill filed by the company in the suit instituted by it, in which Judge Westenhaver found, in an exhaustive opinion handed down September 20, 1918, that the court had no jurisdiction, in that no federal question was involved, and that the bill, on the facts alleged, was without merit.

The changes in the bill are designed to make a stronger case than the allegations in the bill in the suit brought by the company presented. To the statement in that bill, "The further operation of said company's street railway property at said rates of fare would be not only impracticable, but impossible, both financially and otherwise," is added, "and would bankrupt said company within a short time." This bill includes also allegations, not found in that bill, showing that the franchise rate of fare is unfair, unreasonable, and confiscatory, and the injury that would result to complainant's security in the event of bankruptcy. From the prayer is omitted the prayer in the company's bill that the city be enjoined from interfering with the possession or control of the street railway property. Other minor changes need not be noticed.

With the exception of the question of complainants' capacity to sue, Judge Westenhaver's opinion in the company's case is applicable to every issue presented in this case. Since I agree with his conclusions, it would be a useless task to again discuss all of the principles involved, or to set out at length the numerous authorities dealing with them. I have considered all of them, and the elaborate briefs of counsel, worthy of so important a case, which, as one of counsel for complainants remarked at the opening of the argument, presents some novel considerations.

[1] Some observations appropriate to these may not, however, be amiss. The novel feature of prime importance lies in the claim of

complainants that the doctrine of implied conditions in the law of contracts is applicable to the facts stated in the bill. The diligence of counsel has not discovered a case like it. The able opinion of Judge Killits in the Toledo Street Railway Case (D. C. August 2, 1918) 254 Fed. 597, of Judge Tuttle in the Detroit Street Railway Case (August 12, 1918),¹ of Judge Chatfield in the Brooklyn Case (D. C. September 9, 1918) 253 Fed. 453, and of Judge Allread in the Village of Fort Loramie Case (July 9, 1918), not-as yet reported, are not applicable, for the reason that in all of these the street railway franchises had expired, or the road was in the hands of a receiver, or was operated by a third party, a purchaser at judicial sale. Here the primary question in the case is whether or not they have come to an end. If they have, then the consideration of these cases would be necessary, as well as the highly important Case of the Denver Waterworks, decided by the Supreme Court of the United States March 4, 1918. 246 U. S. 178, 38 Sup. Ct. 278, 62 L. Ed. 649.

If the conclusion is right that, under the authorities, the offer and acceptance of the franchises in question constitute a contract binding on both parties for the 25 years of their respective lives, then these cases have no application, unless the circumstances alleged are such as to bring into operation rules which excuse the performance of a contract solemnly entered into. If such circumstances exist, it might be said, as it is in this case, that, the franchises having come to an end by the nonfulfillment of conditions implied when the contracts were made, an attempt to enforce the contracts and require the carrying of passengers at the agreed upon rate is the same as if the council had passed an ordinance prescribing confiscatory rates.

Whether or not there may be a difference between agreed rates and prescribed rates accepted by the grantee in such franchises as these, and whatever views may be entertained by courts of last resort in some of the states on the propriety of the grantee's bringing a contract, binding on the grantor, to an end because the agreement only requires operation at prescribed rates while the franchises are being enjoyed, is not, in Ohio, important; for, under the decisions to which Judge Westenhaver called attention, and especially the decision of the Supreme Court of the United States in the Cleveland Street Railway Case, 194 U. S. 517, 536, 24 Sup. Ct. 756, 763 (48 L. Ed. 1102), in which Chief Justice White said, "We can see no escape from the conclusion that the ordinances were intended to be agreements binding upon both parties definitely fixing the rates of fare which might be thereafter charged," the question is no longer, in a District Court, open to debate.

At the conclusion of the arguments of counsel, the legal questions being presented at length and with much clearness, I had no doubt that the franchises were contracts for their full terms, but had some doubt of the correctness of the defendants' contention that the doctrine

¹ Judgment reversed by Supreme Court 248 U. S. 429, 39 Sup. Ct. 151, 63 L. Ed. —.

of implied conditions was not applicable to the facts of this case, both as to complainants' claim that the pending world war and the consequential increased wage of labor to an extent that would bankrupt the company, unless it received higher rates than the contract rates, and as to the action of the War Labor Board in fixing wages in an amount so large as to bring about the same result, could not have been in contemplation of either party at the time the contracts were entered into, and that therefore the contracts were at an end.

That doubt lingers still. It must be conceded by defendants that, when the contracts were made, the parties could not have had in mind the possibility that years thereafter such a catastrophe as this war would have befallen the world, and that the extraordinary rise in the cost of living, resulting therefrom, would have required an advance in the cost of labor so great as, if operation under the franchises were continued at the contract rate, to bankrupt the company, or that what was in effect a governmental compulsory war board of arbitration would fix a confiscatory wage for labor.

If to the facts involved in this concession is applied what was said by Mr. Justice Jackson in *Railway v. Hoyt*, 149 U. S. 1, 15, 13 Sup. Ct. 779, 37 L. Ed. 627, and by Vaughan Williams, L. J., in *Krell v. Henry* [1903] L. R. 2 K. B. 740, it will be appreciated that much may be said in support of complainants' position. In the former case it was said (149 U. S. 15, 13 Sup. Ct. 784, 37 L. Ed. 627):

"But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to, the possibility of the particular contingency which afterwards happens."

And in the latter (page 749):

"I do not think that the principle of the civil law as introduced into the English law is limited to cases in which the event causing the impossibility of performance is the destruction or nonexistence of something which is the subject-matter of the contract or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things."

It is urged that when the contracts were made the city wished to get their benefits for 25 years, and the company expected to obtain the advantage of operation for 25 years. Thus the contracts were to be of mutual advantage for that length of time. It is argued that both parties knew, agreeing on the terms accordingly, that bankruptcy would make impossible the fulfillment of the contracts, and that its consequence would be disastrous to both parties; that they knew that wages were the greatest single item in the cost of operation; that they had in mind only such increases or decreases as might be expected in normal times; that if the rate of fare per passenger were low, such increases of labor as normal conditions might bring about

would be compensated by the increased number of fares in a growing city, such as was Columbus at the time the contract was entered into, and is now; and that the wages of labor in normal times was a condition implied from a consideration of the parties, the entire contract, its peculiar character, and from all the circumstances.

This argument carries counsel further than the circumstances of this case require, and, if sound, would lead to the conclusion that any abnormal labor conditions of such a character as to bring about the bankruptcy of the contractor by rendering compliance impossible would excuse him from performance and bring his contract to an end. This cannot be. A frequent illustration of abnormality in labor conditions is strikes, and their often disastrous financial consequences to the employer of labor. No one would now say that strikes and their results, however serious the financial consequences, bring to an end the contractor's obligation to perform his contract requiring the employment of labor. For still less cause could one affirm that if, upon adjustment of the controversy, the contractor agrees on a wage so high that it would bankrupt him within a short time, he could terminate his contract.

The case finds no analogy in those cases in which it is held that a contract for personal service comes to an end on the death of him who has contracted to perform it, or in those cases in which a fact must have been in the minds of the parties without which the express contract, silent on the subject, would not have been entered into, such as *C. & O. R. Co. v. McKell*, 209 Fed. 514, 522, 126 C. C. A. 336 (C. C. A. 6), and *Wheeling & L. E. R. Co. v. Carpenter*, 218 Fed. 273, 285, 134 C. C. A. 69 (C. C. A. 6), in which express contracts by a railroad company with the proprietor of a coal mine on its road to take for itself for fuel purposes, or to haul away, a stipulated amount of coal, were held to embody implied agreements that the railroad company would supply sufficient cars to haul the stipulated amount of coal away, or in such cases as *Krell v. Henry*, [1903] 2 K. B. 740, in which the conclusion was that, inasmuch as the letting of the windows was, as well understood by both parties, to permit the user to see King Edward's coronation procession, the indefinite postponement of that ceremony, because of the illness of the King, brought the contract to an end, or in the *Seamen's Case* (*Liston v. Steamship Carpathian*, [1915] L. R. 2 K. B. 42), in which it was held that the seamen's contract for the entire voyage was, at their election, brought to an end before completion by the danger of capture by enemy ships, the threat of which was learned by the seamen at a port at which the ship touched during progress of the voyage, and from which the sailors refused to proceed except at an increased wage.

If there is any analogy presented by the *Seamen's Case*, it lies in the fact that in that case the danger of capture during the voyage was not in the minds of the shipowner or the seamen when the shipping articles were agreed to, while in this case the certainty of bankruptcy, growing out of conditions affecting wages brought about by the same war, could not have been contemplated by either party.

Logically, if the Seamen's Case, is applicable to this, and should be adopted as the law of such a case as this (it was decided in February, 1915), the way would be open for the destruction of innumerable contracts, to carry out which the employment of labor is necessary, and which the parties expected, and agreed, to carry out, whatever the condition of the labor market might be during performance. In my judgment, the Seamen's Case does not apply to this, nor do I think what was said by Mr. Justice Jackson and Vaughan Williams, L. J., hereinbefore quoted, do apply or were intended to apply to any possible case which might arise. In those cases the parties did not have in mind, and there was no reason why they should, that in one the particular circumstances over which they had no control might prevent the storing of the grain the railroad company agreed to deliver and was ready and willing to deliver, and in the other that the procession, to see which was the object of the contract, might not take place.

But the circumstances here present a different case. In the preparation for the bidding there were a number of prime factors the company had in mind in determining the rate at which it was willing to carry each passenger. That was based on a number of considerations: The then population of Columbus; the rate of increase in the city's population, as shown by the census, and perhaps by interim statistics; the cost of operation, including salaries, supplies, and especially wages. The great item of cost each year would be wages, seldom subject to diminution, and having in it even at that time potentialities of tremendous increase. What labor in this country would be demanding during 25 years was one of the most important questions to be debated by the promoters of complainants' predecessors.

On the figure to be paid in wages each year depended the great question of dividends, without at least the hope of which the franchises would not have been sought. Unexpected conditions in the labor market, growing out of a war of such character as to have been beyond the anticipation of any one, have thrown the carefully considered plan, which involved revenues greater than cost, out of adjustment, have reversed the contemplated ratio of revenues to cost, and have defeated the plan.

While the parties did not anticipate the happening of this war, yet the contractor might well have anticipated such rising wages, possible during 25 years, from whatsoever cause, as might wreck the plan and precipitate bankruptcy. As in the law he would be required to guard himself against the consequences of nonfulfillment by reason of strikes, so here the contractor could have guarded itself against an increase in the cost of labor so great as to prevent its doing what it agreed to do. Contracts for future performance often contain a clause excusing the contractor from performance made impossible by future happenings over which he has no control.

Of course, the grantee here intended, expected, and contracted to operate under the franchises for 25 years at the contract rate. Since to do this it was necessary that wages should be always at a figure which made performance possible, it was necessary, in my judgment,

for the grantee of these franchises to have guarded against a situation which might happen, namely, the failure of revenue to meet expenses through circumstances unanticipated and over which the grantee had no control.

This brings into application what was also said by Mr. Justice Jackson in *Railway v. Hoyt*, 149 U. S. 1, 14, 15, 13 Sup. Ct. 779; 784 (37 L. Ed. 627):

"There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the nonperformance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor."

If this conclusion is sound, and I think it presents the better argument in the debate, then the doubt must be, and it is, so far as this court is concerned, resolved in favor of the defendants.

[2] But, it is said, these wages were fixed at a confiscatory rate by the War Labor Board, and thereby the case is brought within the principle of *Metropolitan Water Board v. Dick*, Appeal Cases [1917] H. of L. 119, 2 K. B. 1, and of Judge Ray's decision in the *Knitting Company Case* (D. C.) 250 Fed. 278, in each of which a contractor was excused from performance. In one, the English government commandeered the plant of a contractor to build waterworks, making it impossible for him to proceed with his contract. In the other, the Knitting Company's mill was, in effect, commandeered by the United States government, rendering the performance of its contracts with others impossible.

This is a different case. Here the government did not interfere directly with the contract, or appropriate in any way the complainants' plant to any of the government's purposes. The *vis major* apparent in those cases is wholly lacking here. It is true that the requirement to submit to the arbitration of the War Labor Board was, in effect, compulsory, and its award binding; but it was not the award which brought about the condition which threatens the company with bankruptcy. It was the condition which made the award necessary which brought about the result. Presumably the award was just. Any proper adjustment between the company and its employes would necessarily have been substantially, so far as results are concerned, the same sum as the award.

From what has been said, the conclusion must be that these franchises constitute valid contracts for 25 years from their date, binding on both parties, that the doctrine of implied conditions is not applicable to the circumstances of the case, that no federal question is involved, and that the bill is without merit.

It is urged that, since the court has acquired jurisdiction through the diverse citizenship of the parties, a preliminary restraining order may issue, in view of the great existing public emergency growing out of the controversy between the city and the company. Whatever might be the power of the court in an action by the city against the com-

pany for specific performance to hold the situation in statu quo until the legal rights of the parties are determined, it is not called into exercise here, for reasons dealt with by Judge Westenhaver, and for the reason that the court should not issue a preliminary restraining order in a case in which the court, on hearing the motion to dismiss, is of opinion that the complainant has no cause of action.

The bill will be dismissed at complainants' costs. Necessarily, the motion for a preliminary injunction is denied.

We have been discussing legal rights cognizable by a court of equity. The allegations in the bill, however, present other aspects and involve considerations of the highest moment to the people of Columbus, to the public comfort, convenience, and peace, as well as to the large interests of complainants now jeopardized by a situation unforeseen by it and the city when the franchises were granted, and which, unhappily, the company's predecessors did not safeguard, although they should have done so. "The present emergency," Judge Westenhaver said in the company's case, "calls urgently for some kind of accommodation or temporary compromise between the parties." In that, and all that he says in that behalf, I agree, and may be permitted to express the hope that the city's representatives will meet with the representatives of the company in a spirit of accommodation and compromise, and that the representatives of the company will meet with them and frankly disclose such facts as the city's representatives should know when the question of what would be a reasonable rate, under the present conditions, is discussed and agreed upon.

CREWS v. ILLINOIS COMMERCIAL MEN'S ASS'N.

(District Court, D. Nebraska, Hastings Division. December 21, 1916.)

INSURANCE Ⓒ627(1)—SUIT AGAINST FOREIGN CORPORATION—SERVICE OF PROCESS.

Under Nebraska statutes relating to service on insurance companies and other corporations, Rev. St. Neb. 1913, §§ 7635, 7636, and section 3172, providing that any one, who by authority receives money from another to be transmitted to an insurance company for a policy, shall be deemed an agent, a policy holder of a foreign mutual assessment life company, who, having a single blank application, procured another to fill it out, and forwarded it with the initial fee but without letter, to the company, cannot, by reason of such transaction, be considered an agent on whom service may be made a year afterward in an unrelated case.

At Law. Action by Anna D. Crews against the Illinois Commercial Men's Association. On objection by defendant to jurisdiction. Objection sustained.

Stiner & Boslaugh, of Hastings, Neb., for plaintiff.

Tibbets, Morey, Fuller & Tibbets, of Hastings, Neb., for defendant.

MUNGER, District Judge. An objection to jurisdiction over the defendant is based on the service of summons in this case. The de-

fendant is a foreign insurance company. The plaintiff relies on section 7635, Rev. St. Neb., providing, "When the defendant is an incorporated insurance company, and the action is brought in a county in which there is an agency thereof, the service may be upon the chief officer of such agency," and on section 7636, "When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent," and also on section 3172, which provides that "any person, * * * who shall with authority receive or receipt for money from other persons to be transmitted to any such company * * * for a policy or policies of insurance, * * * shall be deemed to all intents and purposes an agent * * * of such company."

The plaintiff shows that there was service in this case upon a policy holder, who had presented a blank application to another person, and solicited him to fill out the application, had received \$2 from such person for the initial payment, and had transmitted the application and money to the insurance company, who accepted it and issued a policy thereon to the third person.

The defendant shows that it is a mutual assessment company, organized under the laws of Illinois, and having its headquarters there, and accepting as policy holders only traveling salesmen, and it has but one method of doing business in procuring new members. That method is to have the applicant mail to the company his written application, with membership fee of \$2, and then having the board of directors act upon the application. No solicitors or agents, in the common meaning of the word, are employed. In this case the company had sent out a circular letter to the policy holders, in September, 1914, relating to a railway mileage question pending before the Interstate Commerce Commission, and one of them came into the hands of William Ray a policy holder in Nebraska. The following words were a part of this letter:

"Won't you kindly use the inclosed application to get one new member for the association? It will help us out on the extra expense of getting out this letter, which is done for the good of all traveling men. \$2 will pay his membership fee and carry his insurance to January 15th."

William Ray solicited John Ray to become a member, and John Ray filled out the blank application and paid William Ray \$2, and this was sent to the company at Chicago, in an envelope which contained nothing else. The company accepted of John Ray the application, and issued him a policy, and thereafter dealt with him as a policy holder.

No other act of William Ray appears, upon which is based a claim of his agency for the company. The date of the application by John Ray was in October, 1914, and the policy was issued to him in the same month.

The date of service of summons in this case was in October, 1915, and the return shows it was served on "William W. Ray, agent of the said Illinois Commercial Men's Association, no president, secretary, or other chief officer found in said county."

It is unnecessary to discuss the question whether a service is shown upon a "chief officer" of an agency, or service upon a "managing agent," if the service was upon one who was not an agent of any kind. Was William Ray an agent of the company when he was served? Accepting the definition of section 3172 of the Nebraska statutes and conceding that his receipt of money from John Ray was with authority, how long thereafter did his agency for the company continue? That transaction was completed as soon as the company issued the policy to John Ray. There was nothing in the transmission indicative of an intention to obtain other applications of insurance. No reason is perceived why William Ray should not be held to have been an agent of the company for 5 or 10 years after obtaining the application of John Ray, if he is held to be an agent after it was accepted.

John Ray and William Ray treated the transaction as closed when the policy was issued, and the proofs show that the company did not know that William Ray had acted in soliciting, obtaining, or remitting the application of John Ray. Certainly William Ray could not be said to continue to be the agent of the company, because of that transaction, so as to be amenable to service of summons a year thereafter, in a case arising upon an entirely different policy of insurance issued four years before. As his agency, if it had existed, had ceased, service of summons upon him was not service on the company. *Campbell Printing Press & Manufacturing Co. v. Marder, Luse & Co.*, 50 Neb. 283, 69 N. W. 774, 61 Am. St. Rep. 573; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; *Continental Wall-Paper Co. v. Lewis Voight & Sons Co.* (C. C.) 106 Fed. 550; 19 Encyc. Pl. & Pr. 658. The objections to jurisdiction will be sustained.

ESSANAY FILM MFG. CO. v. KANE.

(District Court, D. New Jersey. March 12, 1919.)

COURTS ⇒508(1)—FEDERAL COURTS—INJUNCTION—STAY OF PROCEEDINGS IN STATE COURT.

Under Judicial Code, § 265 (Comp. St. § 1242), formerly Rev. St. § 720, a federal court is without jurisdiction to grant an injunction to stay an action in a state court on the ground of want of service on the defendant, unless a final judgment capable of being enforced has been rendered therein.

In Equity. Suit by the Essanay Film Manufacturing Company against William R. Kane. Bill dismissed.

Linton Satterthwait, of Trenton, N. J. (Wm. M. Seabury, of New York City, of counsel), for plaintiff.

Alexander M. MacLeod, of Patterson, N. J. (Wm. C. Gebhardt, of Jersey City, N. J., of counsel), for defendant.

RELLSTAB, District Judge. The plaintiff, an Illinois corporation, by its bill alleges that the defendant is prosecuting an action at law against it in the New Jersey Supreme Court, without having served it with process, and without its having entered an appearance in that suit, and prays that he may be enjoined from further prosecuting said action. The suit thus sought to be enjoined has proceeded to an interlocutory judgment, and under the practice prevailing in the New Jersey Supreme Court no final judgment can be entered therein until an assessment of damages has been made. See article VIII, rules 87 to 91, of Rules of the Supreme Court of New Jersey, 1913.

The following question, though not expressly raised in the pleadings, emerges therefrom: Does this suit fall within the prohibition of section 265 of the Judicial Code? This section, a re-enactment of section 720, R. S. U. S., provides:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

This limitation upon the power of a United States court to restrain proceedings in a state court originated in Act March 2, 1793, c. 22, 1 Stat. 333, 335, and has been a part of the United States judicial system ever since.

The plaintiff relies solely upon *Simon v. Southern Ry. Co.*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492, and contends that under it the case at bar is not within the limitation referred to. However, the *Simon* case dealt with an attempted enforcement of a final judgment. This difference is vital. Mr. Justice Lamar in that case (236 U. S. 123-125, 35 Sup. Ct. 258, 59 L. Ed. 492) expressly noted that, with the rendering of a final judgment and an attempt to enforce it, "a new state of facts, not within the language of the statute, may arise"; that

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

the federal court's control over the judgment was to be determined by well-recognized equity powers to prevent an improper enforcement or inequitable use of it; and that to enjoin a judgment obtained without service was within its jurisdiction, notwithstanding the limitations of the statute.

As the suit in the state court has not reached a stage where it can be enforced, what is there in the proceedings to take it out of the limitation of the statute? The power of the equity courts to prevent threatened injury is based on the fact that, unless they act, a wrong will be perpetrated, irremediable at law. *National Surety Co. v. State Bank* (C. C. A. 8) 120 F. 593, 597, 56 C. C. A. 657, 61 L. R. A. 394. In an action in personam, such injustice cannot result until the entry of final judgment and an attempt is made to enforce it.

What will be done in the state court in the suit here drawn into question cannot now be known. If no further proceedings are taken, no possible legal injury can result to the plaintiff here. If judgment final be taken, and an attempt be made to enforce it, the plaintiff here may, as was said by Mr. Justice Pitney in *Western Indemnity Co. v. Rupp*, 235 U. S. 261, 273, 35 Sup. Ct. 37, 40 (59 L. Ed. 220), "ignore the proceeding as wholly ineffective, and set up its invalidity if and when an attempt is made to take his property thereunder, or when he is sued upon it in the same or another jurisdiction," or, if unwilling to take a defensive attitude and merely await proceedings based on such judgment, he may take the more aggressive action under *Simon v. Southern Ry. Co.*, *supra*, and seek to enjoin its enforcement.

I have been unable to find any case where a federal court has enjoined a suitor in a state court from proceeding to final judgment in an action in personam, except where the former had first obtained jurisdiction of the subject-matter. I am of the opinion that, until the proceedings here sought to be enjoined have developed into a final judgment, they are literally within the prohibition of section 265 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. § 1242]), and that until the entry and attempted enforcement of such judgment a federal court cannot take cognizance of the plaintiff's allegation of lack of service as a ground for enjoining the defendant from prosecuting his suit in the state court.

The bill is premature, and must be dismissed.

C. C. HARTWELL CO., Limited, et al. v. MILLER et al.

(Circuit Court of Appeals, Fifth Circuit. December 17, 1918. On Petitions for Rehearing, March 15, 1919.)

No. 3255.

1. MORTGAGES ⇨151(3)—PRIORITY OVER MECHANIC'S LIEN—RECORDING.

Under Civ. Code La. art. 3274, a mechanic's lien is subject to a later mortgage, unless the lien is recorded as therein required within seven days after the act or obligation of indebtedness.

2. MECHANICS' LIENS ⇨312—SUBCONTRACTORS—"CONCURSUS" UNDER LOUISIANA STATUTE—BANKRUPTCY PROCEEDINGS.

Proceedings in a bankruptcy court, after sale by the trustee of a building contractor of property on which bankrupt held a lien, requiring subcontractors holding liens to show cause why their inscriptions should not be erased and their claims referred to the proceeds, *held* not to operate as a "concursum," under Act La. No. 134 of 1906, requiring subcontractors to object to the sufficiency of contractor's bond or be remitted to their remedy thereon.

[Ed. Note.—For other definitions, see Words and Phrases, Concurso.]

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

In Bankruptcy. C. C. Hartwell Company, Limited, and others, appeal from an order in favor of Mrs. Izabel Danziger Miller and others. Modified.

William Grant, Wm. B. Grant, J. C. Henriques, Robert H. Marr, and Henry P. Dart, all of New Orleans, La., for appellants.

A. D. Danziger and Charles Payne Fenner, both of New Orleans, La., for appellees.

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

GRUBB, District Judge. This is an appeal from an order of the District Court in bankruptcy, made upon oppositions to the trustee's account, and which disallowed the liens of appellants, and directed the payment of a mortgage claim out of the sale fund ahead of the claims of appellants. The liens were disallowed by the District Judge, because they were found to have been not seasonably filed.

[1] The appellants' claims were for materials furnished in the construction of an improvement on the realty of the bankrupt. The materials furnished prior to February 26, 1912, were furnished to the bankrupt as owner of the real estate direct. Article 3274 of the Civil Code of Louisiana provides that—

"No privilege shall have effect against third persons, unless recorded in the manner required by law in the parish where the property to be affected is situated. It shall confer no preference on the creditor who holds it, over creditors who have acquired a mortgage, unless the act or other evidence of the debt is recorded within seven days from the date of the act or obligation of indebtedness, when the registry is required to be made in the parish where the act was passed or the indebtedness originated and within fifteen days if the registry is required to be made in any other parish of this state. It shall, however, have effect against all parties from date of registry."

As to materials furnished the owner, before a certain building contract was entered into on February 26, 1912, the mortgage of appellees would prime the claims unless a lien was acquired by the recording of the act or other evidence of the debt within seven days from the date of the act or obligation of indebtedness, as provided for by article 3274. *Whitney-Central Trust & Savings Bank v. General Fire Extinguisher Co.*, 240 Fed. 631, 153 C. C. A. 429; *Whitney-Central Trust & Savings Bank v. Luck*, 231 Fed. 431, 145 C. C. A. 425; *Hibernia Bank & Trust Co. v. C. F. Knoll Planting & Mfg. Co.*, 133 La. 698, 63 South. 288; *Carolina Portland Cement Co. v. Southern Wood D. & F. Co.*, 137 La. 470, 68 South. 831; *Wheelwright v. St. L., N. O., etc., Co.*, 47 La. Ann. 533, 17 South. 133; *Allen-Wadley Lbr. Co. v. Huddleston*, 123 La. 522, 49 South. 160; *Shreveport Nat. Bank v. Maples*, 119 La. 42, 43 South. 905. The record fails to show that any of the claims for materials furnished prior to February 27, 1912, the date of the recording of the building contract, were recorded so as to create a lien under the terms of article 3274, and the District Court rightly directed payment of the mortgage as against them.

[2] On February 26, 1912, the bankrupt conveyed the real estate to one Singer, and entered into a building contract with Singer to complete the building for him, which contract was duly recorded February 27, 1912. Some of the materials were furnished to the bankrupt after this trade had been consummated, and while he was a contractor, and no longer owner. The rights of the materialmen for materials, thereafter furnished, ceased to be controlled by article 3274 of the Civil Code, but came under the influence of Act No. 134 of the Legislature of Louisiana, approved July 10, 1906, relative to building contracts. By the terms of this act, the building contract having been recorded before the day fixed on which the work was to commence, and not later than 7 days after the date of the contract, a lien is created in favor of those furnishing material to the contractor on the building ground, etc., as their interests may appear. The owner must require of the contractor the execution of a bond, with good and sufficient surety, for not less than one-half of the contract price, to be recorded with the contract, and conditioned, among other things, that the contractor pay all subcontractors and furnishers of materials; the bond to be made in their favor as their interests may appear. All persons with claims against the contractor may perfect their liens by filing a sworn statement with the owner, and recording a similar one with the recorder of mortgages in the parish where the work is done, within 45 days after the completion of the contract.

Under this act the appellants, who furnished materials after the building contract was executed and recorded, acquired a lien for the portion furnished the building contractor, which they perfected as required by the act, within 45 days from the completion of the contract, and were entitled thereby to prime the mortgage. *Brown v. Staples*, 138 La. 602, 70 South. 529. The appellees, however, rely on subsequent provisions of the act to show that the appellants were remitted to the surety on the bond required by the act to be executed in favor of the subcontractors and material furnishers as their interest may ap-

pear. The act further provides that if, at the expiration of 45 days, no recorded claims are filed, the recorder of mortgages shall, upon written demand of any party in interest, cancel and erase from the books of his office all inscriptions resulting from the recordation of the contract and bond. In the event there are recorded claims filed, the owner is required to file a petition in a court of competent jurisdiction citing all claimants and the surety on the bond for the assertion of all claims in concursus. The act then provides that, if no objection is made by any of the claimants to the sufficiency or solvency of the surety on the bond, within 10 days after the filing of the concursus, the clerk of the court shall give to any party in interest a certificate to that effect, and, on presentation of such certificate to the recorder of mortgages, he shall cancel and erase all inscriptions created by the recordation of said contract bond or said claim. If objection is made to the sufficiency or solvency of the surety, a summary method of hearing the objection is provided for.

Appellees claim that they are entitled to the benefit of the cited provisions of the act. It is not claimed that either the owner or the bankrupt filed a concursus. The contention is that the bankruptcy proceeding operated as one. Possibly if the appellants, in the bankruptcy proceeding, had been called upon by the trustee of the bankrupt to object to the sufficiency and solvency of the surety, and had failed to do so within the 10 days, the contention might prevail, though, in this instance, the bankrupt was the contractor and not the owner. However, an examination of the bankruptcy proceedings fails to reveal any proceeding or petition on the part of the trustee in which the appellants were either called upon, or given the right, to interpose the objection to the sufficiency or solvency of the surety on the bond, which the statute of Louisiana accords them, before they are remitted to the surety, as the only recourse for the collection of their claims. In this state of the record, we do not think the bankruptcy proceeding was a substitute for the concursus.

The order of the District Court should be modified, so as to provide for the payment out of the sale fund prior to the payment of the mortgage claim of those portions of the claims of appellants which are for materials furnished after the recordation of the building contract, and the cause remanded for the ascertainment of the proper amounts and the modification of the order accordingly and conformably to this opinion; and it is so ordered. Costs on appeal to be equally divided between appellants and appellees.

On Petitions for Rehearing.

Both parties are dissatisfied with the disposition of the appeal, and each asks for a rehearing.

The appellees contend that the bankruptcy proceeding brought the appellants and the mortgage creditor in concursu, and that the failure of the appellants in that proceeding to affirmatively assert any objection to the solvency of the surety company has the effect of remitting them to their remedy against the surety company, and of releasing any claim they might otherwise have upon the proceeds of the sale of the

property to which the liens attached. The property was sold by the trustee in bankruptcy, and the appellants and other lienholders were called upon, on motion of the trustee, to show cause why they should not have their inscriptions erased and their claims referred to the proceeds of the sale of the property to which the liens had attached. The bankruptcy court, upon such motions, and after service thereof on appellants and appellees, entered an order directing the erasure of the inscriptions of mortgages and liens, and that "the rights of the holders of the mortgage notes and lienors are referred to the proceeds of the sale of said property" "for the satisfaction of their respective mortgage and lien rights in the premises." Thereafter the trustee filed his account, distributing the fund, and oppositions were filed thereto by the mortgage and lien creditors, and the order of the District Court, based on such oppositions, is the order presented for review.

Conceding that a proceeding in bankruptcy, where lien creditors were called in to assert their liens upon the property sold, might be a proceeding in concursu, within the meaning of Act No. 134 of 1905, though the lienholders were not expressly required to come in and object to the solvency of the surety for the performance of a building contract, yet in the instant case we think the bankruptcy proceedings cannot be so construed. The trustee in bankruptcy, by his motion to erase the appellants' inscription of liens, expressly prayed that their liens might be transferred from the property sold to the proceeds of the sale, and the court so directed by the order made on the trustee's motion. The litigation thereupon proceeded in the bankruptcy court, upon the theory that appellants, by virtue of their liens, had an interest in the fund that arose from the proceeds of the sale of the property. The appellees participated in this litigation long after the 10 days the appellants had within which to object to the sufficiency of the surety had expired. In view of this state of the record, it is apparent that the trustees and appellees have both treated the appellants as having an interest in the proceeds of the sale, and as being entitled to have their liens satisfied out of them, if they were held to prime appellees' mortgage.

In response to appellants' petition for a rehearing, the decree appealed from confirmed the referee's order dismissing the oppositions filed by the lien creditors, and establishing the priority of the mortgage, and directed the payment of the mortgage and costs out of the proceeds of the sale. By reference to the opinion of the District Judge, it appears that he found that none of the liens had been seasonably recorded. The appellants appealed from this decree. Their appeal presented the issue of the existence of the appellants' liens and the extent of them, and no cross-appeal by appellees was necessary to present that issue.

The case of *Equitable Real Estate Co. v. National Surety Co.*, 133 La. 474, 63 South. 104, cited by appellants, is to be distinguished from the instant case, in that the material in that case was unused when the second building contract was entered into, and was thereafter used by the second contractor in the construction of the building. In this case, on the contrary, the material furnished the owner before the building contract was made was used by the owner, and was part of the building before the building contract was entered into. It was

therefore furnished to the owner, and not taken over by the contractor, and a lien could be perfected to secure it only by the method provided by law in cases of material furnished the owner. Failing to seasonably adopt that method, the furnisher became an unsecured creditor of the owner.

Interest at 5 per cent. from the date material was furnished should be allowed lienholders whose liens are held to prime the mortgage. With this modification, the previous order of the court is confirmed, and the petitions for rehearing denied; and it is so ordered.

CONWAY v. FIRST NAT. BANK OF ROME, GA.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1919.)

No. 3329.

1. BANKS AND BANKING ⇨246—NATIONAL BANKS—RENEWING CHARTER—WITHDRAWAL OF STOCKHOLDER—NOTICE.

Under Act July 12, 1882, § 5, providing that a stockholder, not assenting to amendment of articles of a national banking association, extending its existence, may give notice to directors of desire to withdraw, whereupon he shall be entitled to receive the value of his shares, ascertained by appraisers selected by him and the directors, notice to the president, unless shown to have been communicated to the directors, is insufficient.

2. BANKS AND BANKING ⇨246—NATIONAL BANKS—RENEWING CHARTER—WITHDRAWAL OF STOCKHOLDER—NOTICE.

Resolution of directors of national bank, authorizing president to apply to Comptroller of Currency for approval of amendment of its charter extending its existence, did not authorize him to receive or waive notice for them, under Act July 12, 1882, § 5, from a nonassenting stockholder, of desire to withdraw.

3. BANKS AND BANKING ⇨246—NATIONAL BANKS—RENEWING CHARTER—WITHDRAWAL OF STOCKHOLDER—NOTICE.

Under Act July 2, 1882, § 5, as to notice of desire to withdraw, which a stockholder, not assenting to amendment of articles of national banking association extending existence, is authorized to give "within 30 days from date of the certificate of approval," notice can be given only when and after the amendment has been approved by the Comptroller.

4. BANKS AND BANKING ⇨246—NATIONAL BANKS—RENEWING CHARTER—WITHDRAWAL OF STOCKHOLDER—NOTICE.

That letter of stockholder, in answer to request of president for consent to disposition of certain assets, preparatory to examination by Comptroller, as preliminary to renewal of charter, stating that he had bought his stock with intention to liquidate it, and was not in position to carry it permanently, was not intended as the formal notice of desire to withdraw, required by Act July 12, 1882, § 5, to be given by stockholder not assenting to extension of existence of national banking association, is apparent from the language used.

5. BANKS AND BANKING ⇨246—NATIONAL BANKS—RENEWING CHARTER—WITHDRAWAL OF STOCKHOLDER—NOTICE.

That letter by stockholder to president of national banking association, relative to disposition of certain assets preliminary to extension of existence, was not intended to be treated, even by the stockholder, as a substitute for the formal notice of desire to withdraw, required by Act July 12, 1882, § 5, is apparent from subsequent efforts of stockholder to ascertain when the notice must be given, and his actual attempt to give it.

6. **BANKS AND BANKING** ⇨246—**NATIONAL BANKS—RENEWING CHARTER—WITHDRAWAL OF STOCKHOLDER—NOTICE—USE OF MAILS.**
 Notice of desire to withdraw, which Act July 2, 1882, § 5, required a nonassenting stockholder of a national banking association to give within 30 days from the date of the Comptroller's certificate of approval of amendment of its articles extending its existence, is too late, though mailed within that time, not having reached destination till after expiration thereof; the post office becoming the stockholder's agent exclusively, his use of the mails being his selection.
7. **BANKS AND BANKING** ⇨246—**NATIONAL BANKS—RENEWING CHARTER—WITHDRAWAL OF STOCKHOLDER—NOTICE—ADDRESSEE.**
 Notice of desire to withdraw, which Act July 2, 1882, § 5, provides that a nonassenting stockholder shall give the directors of a national banking association extending its existence by amendment of its articles, is improperly addressed to the bank.
8. **BANKS AND BANKING** ⇨246—**NATIONAL BANKS—RENEWING CHARTER—WITHDRAWAL OF STOCKHOLDER—NOTICE—ESTOPPEL.**
 Want of authority of president of national banking association to represent it in respect to notice of desire to withdraw, which stockholder not assenting to renewal of its charter must, under Act July 12, 1882, § 5, give to the directors, prevents the bank being estopped to deny sufficiency of a notice too late under the statute, but within the time that the president is claimed to have told the stockholder's representative that it could be given, especially where this was in a casual conversation, and the president did not assume to act for the bank, and had no reason to believe he was talking to a representative of the stockholder.
9. **BANKS AND BANKING** ⇨246—**NATIONAL BANKS—RENEWING CHARTER—WITHDRAWAL OF MEMBER—NOTICE—INFORMATION AS TO TIME.**
 The directors of a national banking association, to whom, within 30 days after approval by Comptroller of Currency of amendment of its articles extending its existence, a nonassenting stockholder must give notice of desire to withdraw, entitling him to receive from the bank the appraised value of his shares, are under no duty to give information of the approval, in the absence of request.

Appeal from the District Court of the United States for the Northern District of Georgia; Beverly D. Evans, Judge.

Suit by J. W. Conway against the First National Bank of Rome, Georgia. Bill dismissed, and plaintiff appeals. Affirmed.

Robert C. & Philip H. Alston, of Atlanta, Ga., for appellant.

G. E. Maddox, of Rome, Ga., for appellee.

Before WALKER and BATT'S, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. The appellant, a citizen of North Carolina, filed his bill in equity in the District Court of the United States for the Northern District of Georgia against the appellee, which was a national banking corporation, doing business at Rome, Ga. The purpose of the bill was to enforce against the defendant bank the right given a stockholder in a national bank, upon the amendment of the charter of the bank, to withdraw from membership and compel the bank to liquidate his shares at an appraised value, provided he gives notice of his intention to withdraw within 30 days from the date of the approval of the amendment to the bank's charter by the Comptroller of the Currency.

The charter of the defendant bank expired by operation of law August 14, 1917. On June 6, 1917, the directors of the defendant bank passed a resolution providing that an amendment to the charter should be applied for, extending it for an additional period of 20 years, and the president or cashier was authorized to apply to the Comptroller of the Currency to have the amendment approved. Upon application to the Comptroller, the law requires the Comptroller to cause a special examination of the bank to be made to determine its condition, and if, after such examination, it appears to him that the bank is in a satisfactory condition, he shall grant the certificate of approval of the amendment extending the charter; otherwise, withhold it. After the resolution of the directors was adopted, and on June 30, 1917, a circular letter was addressed to each of the stockholders, including the appellant, who had then recently purchased 122 shares of the bank's stock, calling attention to the necessity for renewing the bank charter, and for the disposition of certain assets before doing so, and suggesting the declaration of a dividend payable in these undesirable assets. A copy of the circular letter was sent appellant, and, failing to respond to it promptly, the president of the bank wrote him a personal letter on July 7th, asking him for the return of the circular letter with signature, evidencing his consent to the proposed disposition of assets by way of dividend, in preparation of the examination of the bank by the Comptroller, known to be a preliminary to the renewal of its charter. Replying to this letter, the appellant wrote a letter, addressed to Mr. Reynolds, who was the bank's president, personally, in which he acknowledged receipt of the letter of inquiry, and stated that he had bought the stock having in mind to liquidate it, as he had understood from the seller that he would have that privilege, and that he was not in shape to carry the stock as a permanent investment. In reply, Mr. Reynolds wrote appellant that he was sorry to receive his letter of July 10th, as he had hoped to have the pleasure of working with him in years to come. Here the correspondence ceased until September 12, 1917.

In the meantime, application for the renewal of the bank's charter was filed, pursuant to the resolution of its board of directors, and a certificate of renewal was approved by the Comptroller of the Currency on August 14, 1917, which was the date of expiration of the old charter. The certificate of renewal, at the suggestion of the Comptroller, but not as a legal requirement, was published in a local newspaper at Rome for a period of 30 days. On September 14th the officers of the defendant bank received a letter addressed to "First Nat'l Bank, Rome, Ga.," signed by the appellant, giving the bank notice of his desire to withdraw from the bank his 122 shares of stock, and, upon appraisal of their value, to be paid by the bank the amount thereof. The letter also inquired as to the date of expiration of the bank's charter, and whether application had been made for its renewal to the Comptroller. The letter was dated September 12th, and mailed in Atlanta September 13th, but not delivered to the defendant bank at Rome until September 14th. To this letter, Mr. Reynolds, the bank's president, for it, replied, acknowledging receipt of the notice, and ad-

vising that the time for notice of withdrawal had expired September 13th, and that the charter had been renewed on August 14th. This was treated by appellant as a refusal to permit withdrawal, and he thereupon filed this suit.

Some time in July, 1917, the appellant contended that the president of the defendant bank had stated to one Goodrum, a stockbroker, who bought the stock for him, and who, as appellant contended, still remained his agent to effect its withdrawal, that the time for giving notice of withdrawal was September 15th; that this statement was communicated by Goodrum to appellant, who acted upon it in refraining to give notice until after September 13th, and that the bank was estopped by its president's statement from claiming that the notice was not timely. Reynolds denied giving Goodrum any misinformation as to the date of expiration, and denied that he knew that Goodrum had any connection with appellant with reference to the stock, on the occasion of the conversation between Goodrum and himself in which Goodrum testified the wrong information was given him by Reynolds. The District Judge, after hearing the evidence, dismissed the bill upon the merits, and from this decree the appeal is taken.

[1, 2] The appellant complains of three adverse findings of the District Judge: First, that the correspondence that passed between the appellant and Reynolds in July did not amount to a substantial compliance with the Act of Congress as to notice; second, that the notice sent to the bank, after the charter was renewed, was not given within 30 days of the date of the certificate of approval, as required by the statute; third, that the acts and conduct of the president, Reynolds, relied upon as an estoppel against the bank, did not constitute an estoppel against the bank. We think the District Judge correctly ruled in all three of the findings.

First. The pertinent part of section 5 of the Act of July 12, 1882, chapter 290 (22 Stat. 162), the act which authorizes the renewal of the charters of national banks and the withdrawal of nonassenting stockholders, reads as follows:

"When any national banking association has amended its articles of association as provided in this act, and the Comptroller has granted his certificate of approval, any shareholder not assenting to such amendment may give notice in writing to *the directors*, within thirty days from the date of the certificate of approval of his desire to withdraw from said association."

Section 5 then provides that he shall be entitled to receive from the association the value of the shares held by him, to be ascertained by an appraisal made by a committee of three persons, one to be selected by the shareholder, one by *the directors*, and the third by the first two. It provides, further, for an appeal to the Comptroller by the shareholder, but not by the bank, and that the shares appraised and surrendered by the withdrawing stockholder shall, after due notice, be sold by the bank at public sale within 30 days after the final appraisal.

The correspondence between the appellant and Reynolds, the president of the bank, that occurred in July, was insufficient to constitute a statutory notice of withdrawal by appellant, because: (1) It was

not a notice to the directors of the bank, nor shown to have been communicated to them; (2) it happened before the amendment was applied for, and before the certificate of approval was signed by the Comptroller; (3) it was not understood by the parties to it to have been intended as a notice of withdrawal.

(1) The act provides for written notice to the directors. It provides that the directors shall select one appraiser. This is enough to show that notice to the president, unless shown to have been communicated to the directors, is insufficient. No such showing is made in the record. The resolution of June 6th authorized the president or cashier, merely following the language of the act, "to apply to the Comptroller of the Currency to have this amendment approved." It did not authorize the president to do anything else, and therefore did not authorize him to either receive or waive notice for them. The important duty of selecting the appraiser is vested in the directors, and not in the president. It is a duty which the directors could not delegate to the president. It is a duty which the directors could exercise only after personal receipt of the notice of withdrawal. We conclude that the directors were the only officers of the bank who could receive the statutory notice, and that the president could neither receive nor waive it for them.

[3] (2) The statute provides for the notice of withdrawal to be given "within thirty days from the date of the certificate of approval." A reading of section 5 clearly indicates that the notice can only be given when and after the amendment has been approved by the Comptroller. If the amendment is not approved, there can be no withdrawal, and until it is approved there is no reason for the giving of the notice. The president being without authority to waive the statutory notice for the directors, it is unnecessary to consider whether his reply of July 11th to appellant's letter of July 10th could be considered as waiving it.

[4, 5] (3) However, it seems clear that the July correspondence was not treated by either party to it as either the formal statutory notice or as a waiver of the giving of it. That it was not intended as the statutory notice is apparent from the language used; that it was not intended to be treated as a substitute for it, even by the appellant, is apparent from the subsequent efforts of appellant to determine when the statutory notice must be given, and the actual attempt made by him in September to give it.

The appellant acquired no standing, predicated on the July correspondence.

[6, 7] Second. The District Judge was also right in his conclusion that the notice of September 13th, received by the bank September 14th, was not within the permitted 30 days. The July correspondence related to the consent of the appellant to a plan for the disposition of undesirable assets before application was made by the bank for a renewal of its charter. The proposition was declined by appellant, and that transaction came to an end in July. The use of the mails in September by the appellant, to convey the statutory notice to the bank, was by appellant's selection, and the post office, therefore, became his

agent exclusively, and the notice was not brought home to the bank till it actually received the letter in Rome. *Haldane v. United States*, 69 Fed. 819, 823, 16 C. C. A. 447, and cases cited. The notice of September 13th was also insufficient, in that it was not addressed to the directors, but to the bank. Presumably it would have reached the executive officers of the bank only, and it was incumbent on the appellant to show that it reached or was communicated to the directors within the 30 days, to show a compliance with the statute. No showing to that effect is made.

[8] Third. The District Judge also correctly ruled that the alleged statement made by Reynolds, the president of the bank, in July, to Goodrum, did not estop the bank from afterwards disputing the sufficiency of a notice, made within the time alleged to have been stated by Reynolds to be sufficient, but not in fact sufficient. The power to act being vested by the statute exclusively in the directors, in matters of such withdrawals, the president was without authority to commit the bank by any statement relative to notice of withdrawals. Want of such authority to represent the bank would prevent an estoppel. The resolution of June 6th did not purport to confer on the president any authority, except to apply to the Comptroller for the certificate of approval. It would not be competent for the directors to vest the president with authority to waive the statutory requirement of notice, in advance, and no estoppel could be predicated on his mere failure to convey correct information in a casual conversation.

Nor does it appear from the evidence of Goodrum that Reynolds assumed to act for the bank in reference to the conversation between them. Goodrum's evidence also shows that, whatever the real fact may have been, and it does not seem to have been to the contrary, Reynolds had no reason to believe, at the time of the conversation, that he was talking to an agent of the appellant, or that the information given was intended to be communicated to appellant by Goodrum when it was disclosed by Reynolds. Reynolds, therefore, had no reason to believe it was to be relied upon or acted upon by appellant, when he made the statement, and, for that reason, Reynolds himself would not be estopped to thereafter dispute it—much less, the defendant bank. The District Judge may also well have found from the evidence that no erroneous statement was made by Reynolds to Goodrum.

The appellant contends that the order upon the motion to dismiss the bill of complaint as amended fixes the law of the case, except as to the sufficiency of a notice mailed on the thirtieth day but not reaching the bank till the thirty-first day, in favor of the appellant. The amended bill asserts the full authority of Reynolds, as president of the bank, to act for the bank in all matters affecting the renewal of the charter, which would include the withdrawal of nonassenting stockholders. The decree dismissing the bill on the merits, in other respects than the sufficiency of the notice of September 13th, was based upon the failure of the proof to establish such authority, and to satisfy the court of the acts and conduct of the president relied upon by the appellant to constitute an estoppel.

[9] The appellant also contends that it was the duty of the directors of the defendant bank to give its stockholders notice of the approval of the amendment by the Comptroller, and that this duty arises from the fiduciary relation between the directors and the stockholders. The statute provides for no such notice, and this seems to be a sufficient reason for holding it unnecessary. While the directors are trustees for the stockholders in many ways, it does not follow that they represent the nonassenting stockholders in the matter of the amendment of the bank's charter. In this case the bank, as a corporate entity, had decided to renew its charter by corporate action. It was the duty of the directors, made so by the statute, to handle this matter for the bank. If a stockholder desired to withdraw from the bank, it was his statutory right so to do. The exercise of the right was, however, against the interest of the bank and the two-thirds assenting owners of the bank's shares. The bank was required to buy the non-assenting shareholder's stock at its appraised book value, and sell it, within 30 days of the final appraisal, at what it would bring. The record shows that the market value of the shares of the defendant bank was less than their book value. The bank and its assenting shareholders were forced, by the terms of the statute, to lose the difference. In view of this situation, while the directors would owe non-assenting stockholders the duty of disclosing to them fairly, on request, any information necessary to enable them to properly exercise their right, we do not think they would owe a nonassenting stockholder the affirmative duty to supply him with information, unsolicited by him, which would assist him, to the disadvantage of the bank of which they were directors and trustees. The bank could be represented by the directors only; the nonassenting stockholder could look out for himself. The necessary information could have been acquired by him by inquiry from the bank or from the Comptroller. We do not think, in the absence of a statutory requirement, it was the duty of the directors to supply it, in the absence of a request.

The decree appealed from is affirmed, with costs.

Affirmed.

HARDY et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1919.)

No. 3262.

1. WITNESSES \Leftrightarrow 269(15)—CROSS-EXAMINATION—REBUTAL OF INFERENCE.

Testimony adduced on direct examination of defendants' witness being calculated to impress the jury that F., a coindictee, whose guilt was shown by the evidence, had been permitted to escape trial after giving a bond in an unnamed amount, and that this might have occurred because of his co-operation in procuring evidence, and that as to him the prosecution was not in good faith, the government, to rebut this, could on cross-examination show he secured his release by giving a \$5,000 bond, and that he fled and a forfeiture was entered on his bond.

2. CRIMINAL LAW \Leftrightarrow 356—EVIDENCE—DEFENSE—ADVICE OF PROSECUTING ATTORNEY.

Defendant, prosecuted for conspiracy to transport liquor into the part of Oklahoma formerly the Indian Territory, *held* not entitled to show that before the conspiracy he was advised by the district attorney that a certain previous transaction was not criminal; identity between the transactions in material respects not being shown, so as to make the advice apply to the transaction in issue.

3. CONSPIRACY \Leftrightarrow 43(12)—VARIANCE—NUMBER OF PERSONS CONSPIRING.

One charged with conspiring with several may be convicted on proof of his conspiracy with some of them.

4. CONSPIRACY \Leftrightarrow 38—DEFENSES—ACTS AS EMPLOYÉ.

Defendant's participation in a criminal conspiracy is not excused by showing that what he did was in performance of duties of his employment.

5. CONSPIRACY \Leftrightarrow 43(12)—VARIANCE—PARTICIPANTS IN OVERT ACTS.

The doing by one of an overt act to effect the object of a previously formed conspiracy being sufficient, under Criminal Code, § 37 (Comp. St. § 10201), to complete the offense, variance between indictment and proof as to number participating in such act is immaterial.

6. CRIMINAL LAW \Leftrightarrow 717—TRIAL—ARGUMENT—READING LAW TO JURY.

Arguing to jury intent of wholesale liquor dealer to aid purchasers to ship to forbidden territory, from fact of his not entering in books sales for such territory, while making entries of other sales, and in this connection reading to them statutes requiring entries of all sales, *held* not objectionable.

In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

D. M. Hardy and others, were convicted of conspiracy to make illegal shipments of liquor, and bring error. Affirmed.

J. H. Barwise, Jr., of Ft. Worth, Tex., Wm. H. Atwell, of Dallas, Tex., and W. F. Weeks, of Wichita Falls, Tex. (Thompson, Barwise, Wharton & Hiner, of Ft. Worth, Tex., and Weeks & Weeks and A. H. Britain, all of Wichita Falls, Tex., on the brief), for plaintiffs in error.

W. M. Odell, U. S. Atty., of Ft. Worth, Tex., and William B. Harrell, of Dallas, Tex., and Charles C. Robey, Asst. U. S. Attys., of Ft. Worth, Tex.

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

WALKER, Circuit Judge. This is a writ of error sued out by D. M. Hardy, J. R. Young, and J. O. Elliott to obtain a review of a judgment convicting them on each of the 15 counts of an indictment against them and Eugene Flowers, alias J. B. Flowers.

Each count of the indictment charged a conspiracy to commit an offense against the United States, that one or more of the alleged conspirators did a stated act or acts to effect the object of the conspiracy, and that the alleged conspiracy was entered into on or about the 1st day of July, 1917, and continued to the 15th day of April, 1918. The conspiracy charged in some of the counts was to commit the offense denounced by section 8 of the Act of March 1, 1895 (28 Stat. 693, c. 145 [Comp. St. § 4136b]), prohibiting the transportation of intoxicating liquors into that part of Oklahoma which at the time of the enactment of that statute was known as the Indian Territory. The conspiracy charged in the remaining counts was to commit the offense created by the provision of Act Cong. March 3, 1917, c. 162, 39 Stat. 1069 (Comp. St. 1918, §§ 8739a, 10387a-10387c), known as the Reed Amendment.

That there was evidence to sustain the charges contained in the indictment is not questioned. There was evidence tending to prove that the persons indicted, by concerted action, aided others who bought intoxicating liquors from the defendant Hardy at Wichita Falls, Tex., where Hardy conducted a wholesale and retail liquor business, in getting the liquor bought transported from that place into that part of Oklahoma which formerly was a part of the Indian Territory. In behalf of the plaintiffs in error it is contended that reversible errors were committed in rulings made on objections to evidence and in giving and refusing instructions to the jury.

[1] On the cross-examination of J. A. Lantz, a witness for the defendants, he was permitted, over objections made by the defendants, to testify that J. B. Flowers, who was named in the indictment as a co-conspirator with the three persons who were tried and convicted, had fled the country after giving a \$5,000 appearance bond, upon which a forfeiture was entered. The admission of this evidence was accompanied by the court's instruction to the jury that it should not be considered as any proof of the guilt of the persons who were on trial. On the direct examination of the witness, who was United States commissioner and deputy clerk at Wichita Falls, the facts were elicited that H. M. Splawn was a posseman employed in the Indian service for the suppression of the liquor traffic; that said Flowers and one Langford worked with and helped Splawn in his work in that service; that Flowers and the defendant Elliott were arrested and taken to Ft. Worth on the same day or about the same time; and that Flowers was arrested on March 12 and made bond on March 13. The following was part of the direct examination of the witness:

"Q. Do you know where Mr. Langford and Mr. Splawn had their room during the time that they were working together in that work? A. They roomed at—I believe it is called—the Alta Rooms; I am not sure; it is a place over a garage; I think it was over a garage.

"Q. Do you know whether it cornered on an alley, was a room on the second floor in a building which cornered on the alley that ran back of Hardy's wholesale liquor house, cornered by a corner of that alley and Seventh street, in Wichita Falls? A. No, no; I was not there but on one occasion, and the room that they had then was on the second floor of the street on Ohio street or avenue, and overlooked the street, and the room was near the center of the building; it was not a corner room.

"Q. If they moved from that place, and took a room over a pool hall, from which room they could look right down this alley back of Hardy's place, do you know it if such a thing occurred? A. No, sir.

"Q. You do not know that they changed their room? A. No, sir.

"Q. Do you know how long Flowers was confined in jail after he was arrested on March 12th? A. I think that I can tell. His bond was made on March 13th, and he was put in on March 12th.

"Q. Sir? A. His bond was made on the 13th.

"Q. Arrested on the 12th and the bond was made on the 13th? A. Yes, sir; now, I am not sure whether he was put back in jail again on the indictment or not. I am not sure about that, but I don't think so.

"Q. Do you know what the arrangement was between Flowers and Splawn and Langford, personally, yourself? A. No, sir.

"Q. Or what kind of a deal he had with them? A. No, sir."

The evidence adduced on the direct examination of the witness was well calculated to make the impression on the jury that Flowers, who was named in the indictment as one of the conspirators, and whose guilt was shown by evidence introduced by the prosecution, had been permitted to escape trial after giving bond in an unnamed amount, that this might have occurred because of his co-operation with the agents of the government in procuring evidence of the commission of the crimes alleged, and that as to him the prosecution was not in good faith. The government was entitled to rebut that evidence, introduced by those on trial. It was permissible on cross-examination to bring out other features of the transaction, a part only of which had been disclosed by the testimony elicited by direct examination of the witness.

Proof of the facts that Flowers secured his release from custody by giving a \$5,000 appearance bond, that thereafter and before the case was called for trial he had fled, and that a forfeiture was entered on his bond, had some tendency to prove that the prosecution was not at fault in failing to bring him to trial with his alleged co-conspirators. Whether the jury could or could not properly have been influenced by evidence introduced by the defendants on trial which indicated that one who was jointly indicted with them had been enabled to get away before the case was brought to trial, it was permissible for the prosecution to show that the transaction which had been testified to in behalf of the defendants on trial was not such a one as would support an inference that the prosecution consented to or connived at one of the alleged conspirator's escaping a trial and conviction. It was not error to admit the evidence in question for the purpose stated.

[2]. On the objection of the prosecution the court refused to permit the introduction of testimony of Edgar Scurry, a witness for the defendants, to the following effect: That the witness as a lawyer represented the defendant Hardy when the latter, in the spring of 1916, was charged with some offense of importing liquor into the Indian

Territory; that he was present when the evidence on which that charge was based was stated to the then United States district attorney; that that evidence, as so stated, was to the effect that Hardy directed one or more of his employes to deliver to an automobile liquor bought from Hardy by two men in reference to whom Hardy stated to the district attorney, "I knew that these men lived in Oklahoma, and I had probably heard that they had had trouble in Oklahoma, for introducing liquor into Oklahoma;" that Hardy stated to the district attorney that he did not participate in the hauling of the liquor to Oklahoma, and was not going to do so, and had no financial interest in the transaction other than the sale of the liquor to the two men; and that the district attorney said in the presence of Hardy that the transaction, as reflected in the above-indicated statement of the facts to him, was not a violation of the law, and for that reason he had the charge dismissed.

It may be assumed, without being conceded, that it is permissible for one charged with having conspired with others to commit a stated criminal offense to prove that, before taking part in the transaction upon which that charge is based, he had been informed by the prosecuting officer that such a transaction is not a violation of law. The excluded evidence in question was not to that effect. The transaction which the proposed testimony showed was passed on by the district attorney was not shown to have had the features which give criminality to the transactions now in question. In material respects it differed from the transactions shown by the evidence introduced by the prosecution in this case. That transaction occurred before the enactment of the Reed Amendment, which made it a crime to cause intoxicating liquor to be transported in interstate commerce into a state or territory the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes.

The statement made to the district attorney did not show the commission, or an attempt or conspiracy to commit, the offense created by the above-cited statute of March 1, 1895, as it did not show that the liquor in question was intended to be carried into that part of Oklahoma which formerly was known as the Indian Territory. Whether the questioned action of the court is or is not sustainable on another ground, it is sustainable on the ground that the evidence offered had no tendency to prove that what the district attorney did amounted to advising Hardy that there was no criminality in such transactions as those relied on to support the charges made in this case.

[3] Complaint is made of the court's refusal to give a requested charge which was so expressed as to forbid a conviction unless the jury found from the evidence that all the defendants were parties to the alleged conspiracy. It was not error to refuse that instruction, as one charged with conspiring with others may be convicted on proof of his conspiring with any of such others, without proof of a conspiracy participated in by all of them. *Jones v. United States*, 179 Fed. 584, 600, 103 C. C. A. 142; 12 Corpus Juris, 627.

[4] Charges requested by two of the alleged conspirators, who were shown by the evidence to have been employes of another alleged

conspirator, asserted that such employes could not be convicted, if what they did in furtherance of the alleged conspiracy was done in performing the duties of their employment. Those charges were properly refused. One's participation in a criminal conspiracy is not excused by showing that the service he was employed to render required or called for such participation.

[5] The overt acts alleged in the several counts of the indictment were charged to have been committed by two or more of the alleged conspirators. Such overt acts by one only of such conspirators were testified to. The court ruled to the effect that the just stated difference between allegation and proof in the particular in question did not constitute a material variance. This was not error. The doing by one or more of the conspirators of "any act to effect the object of the conspiracy" is made an element of the statutory offense. Criminal Code (Act March 4, 1909, c. 321) § 37, 35 Stat. 1096 (Comp. St. § 10201). The doing by one only of the parties to a previously formed conspiracy of an act to effect its object is as effective to complete the offense as the doing of that act by all of the conspirators. There being no difference in legal effect between the doing by one of the conspirators of the alleged act to effect the object of the conspiracy and the doing of that act by all of the conspirators, such a variance between allegation and proof as the one in question cannot properly be regarded as material.

[6] Over the objection of the defendants, the district attorney was permitted in his closing argument to read to the jury section 3318 of the Revised Statutes (Comp. St. § 6100), which contains provisions requiring a wholesale liquor dealer to provide and keep a book as prescribed by the Commissioner of Internal Revenue, and to enter in such book specified details of the sending of any spirits out of his stock or possession. The bill of exceptions, in connection with the statement of the reservation of the exception to that ruling, contains the following statement by the court:

"That upon the issue as to the knowledge and intent of the defendants, the government was permitted to offer in evidence the wholesale records of the defendant Hardy, which the evidence showed were kept by the defendant Young, on what is known as form 52, prescribed by the Commissioner of Internal Revenue, under the provisions of section 3318 of the Revised Statutes, which provides that such wholesale dealer shall, at the time of sending out of his possession or stock any spirits, and before the same are removed from his premises, enter in said book the day when the same and the place of business of the person or firm to whom such spirits are to be sent, etc.; it being shown from the evidence that large quantities of such liquors had been frequently delivered to persons to be transported to Oklahoma, directed from the wholesale establishment of D. M. Hardy, and that no entry had been made of such sales in said record, unless they were covered by entries of sales to 'D. M. Hardy, Retail.' Counsel for the government, in the opening argument, had argued these facts as evidence of the efforts of the defendants to conceal these transactions, and of their knowledge of the fact that the sales were being made for an unlawful purpose, as the record did show entries of sales to other parties at places where such sales were not prohibited by law. In reply to this evidence and this argument, counsel for defendants had stated to the jury that the records were correctly kept and that agents of the Internal Revenue Department had checked the records and had made a report to Washington of the manner in which they were kept, and that no one in Wash-

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ington had ever said it was a violation of the law or an improper way of keeping the record; that in reply to this argument the district attorney used the language quoted in the bill of exceptions and stated the law referred to, which the court deemed to be a proper reply to the argument of counsel for defendants, and a proper argument as to the knowledge and intent of the defendants in failing to enter in the records referred to the names and places of business of the persons to whom such liquors were sent."

The part in question of the district attorney's argument, made under the circumstances stated, was not subject to the objection interposed to it. On the question of Hardy's intent in doing what had the effect of aiding persons who made wholesale purchases of liquor from him in getting that liquor transported from Texas into Oklahoma, it was permissible to consider an attending circumstance which had a tendency to prove that he concealed or attempted to conceal those transactions. In this connection it was pertinent to call attention to the existence of a legal requirement that such transactions be disclosed in a prescribed way, and to the circumstance that the requirement was complied with as to other similar transactions which did not involve a criminal intent, but was not complied with as to the transactions in question.

The record does not disclose any reversible error. The judgment is affirmed.

FREDERICK LEYLAND & CO., Limited, v. HORNBLOWER.

(Circuit Court of Appeals, First Circuit. February 11, 1919.)

No. 1362.

1. SHIPPING ⇔140—CONTRACTS OF AFFREIGHTMENT—LIMITATION OF LIABILITY.

It is competent for a steamship company as a carrier of goods to limit its liability to a certain amount in case of loss or damage, even as against its own negligence, where the valuation is the basis on which freight is charged and this fact was fully known to the shipper.

2. SHIPPING ⇔140—BILLS OF LADING—PRESUMPTION OF AGREEMENT TO TERMS.

A provision in a bill of lading limiting liability of the carrier to a certain amount raises a presumption that the shipment was made upon the agreed valuation, and that opportunity was afforded of shipping at a higher valuation by payment of a higher rate.

3. SHIPPING ⇔140—ACTION FOR DAMAGE TO GOODS—DAMAGES—EFFECT OF INSURANCE.

Under a provision of a bill of lading that the carrier, if liable for loss or damage, should "have the benefit of any insurance effected upon the goods," where a policy on the goods clearly did not cover the risk from which the loss occurred, an arrangement by which the insurer advanced a sum to the insured on a borrowed and loan receipt does not inure to the benefit of the carrier.

4. EVIDENCE ⇔555—OPINION EVIDENCE—COMPETENCY.

The opinion of an expert, based upon his general knowledge as to the effect of a strain upon a winch after its jaws had been worn, was properly admitted, although he had not examined the winch involved in the case.

5. EVIDENCE ⇨123(12)—RES GESTÆ—STATEMENTS AFTER EVENT.

Statements of the captain of a steamship with respect to an accident which had previously occurred in the unloading of cargo by stevedores, as to which the captain was charged with no duty, held incompetent as part of the *res gestæ* as against the shipowner.

In Error to the District Court of the United States for the District of Massachusetts; Clarence Hale, Judge.

Action at law by Henry Hornblower against Frederick Leyland & Co., Limited. Judgment for plaintiff, and defendant brings error. Reversed.

Stephen R. Jones, of Boston, Mass. (Blodgett, Jones, Burnham & Bingham, of Boston, Mass., on the brief), for plaintiff in error.

Harold P. Williams, of Boston, Mass. (Williams & Copeland, of Boston, Mass., on the brief), for defendant in error.

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

JOHNSON, Circuit Judge. In the court below the plaintiff, a citizen of Massachusetts, recovered judgment for damages to an automobile shipped by him from Liverpool, England, to Boston, Mass., on the defendant's steamer *Cestrian*.

While the automobile was being raised by a winch from the hold of the steamship at a wharf in Boston on September 30, 1909, and after it had reached the level of the deck, the clutch in the winch became disengaged, and the automobile fell between 30 and 40 feet to the bottom of the hold.

The defendant, a foreign corporation established under the laws of Great Britain, is a common carrier of passengers and freight between the ports of Liverpool, England, and Boston, Mass.

The assignments of error relate to the instructions of the presiding judge as to the effect to be given to a provision in the bill of lading limiting the amount of the liability of the carrier, to the admission of evidence and to the receipt of certain money by the plaintiff from the Boston Insurance Company with whom the plaintiff had insured the automobile.

[1] The provision by which the liability of the carrier is sought to be limited is as follows:

"Not accountable for any goods of whatever description beyond the sum of 20 pounds per package, unless the value be herein expressed and extra freight as may be agreed on paid."

The learned judge of the District Court instructed the jury that this provision was unreasonable and invalid, because forbidden by 27 Stat. 445 (Act Feb. 13, 1893, c. 105, § 1 [Comp. St. § 8029]), known as the "Harter Act."

The plaintiff delivered the automobile to G. W. Sheldon & Co., forwarders in Liverpool, who crated it, attended to its shipment and received a bill of lading from the defendant company containing the above provision. This bill of lading constitutes the contract of car-

riage and the rights of the parties are to be determined by it, in the absence of any testimony that an unfair advantage was taken of the shipper, or that there was fraud practiced upon him, or that he received it under a misapprehension as to its terms, or that it contained provisions which were unjust and unreasonable in view of the common-law obligation resting upon the carrier.

It was decided in *Hart v. Pennsylvania R. R.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, that a common carrier may limit its liability for damages occasioned by its negligence by a contract fairly made with the shipper, "agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier." This case has been frequently followed and its doctrine applied in construing limited liability contracts of carriers, in cases which have arisen relating to interstate shipments under the provisions of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379) and the Carmack Amendment to that act (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [Comp St. §§ 8604a, 8604aa]), and in all of them it has been held that such a provision is only valid where a choice of rates dependent upon value has been afforded the shipper.

In *Cincinnati, New Orleans & Texas Pacific Ry. v. Rankin*, 241 U. S. 319, 327, 36 Sup. Ct. 555, 558 (60 L. Ed. 1022, L. R. A. 1917A, 265), the court said:

"The essential choice of rates must be made to appear before a carrier can successfully claim the benefit of such a limitation and relief from full liability."

In that case both parties signed the bill of lading reciting that lawful, alternate rates, based on specific values, were offered; and it was held that such recitals constituted admissions by the shipper and prima facie evidence of choice. Since the passage of the Harter Act (Comp. St. §§ 8029-8035), limited liability clauses in bills of lading issued by common carriers engaged in transportation of goods between ports of the United States and foreign ports, have been held valid.

In *Reid v. American Express Co.*, 241 U. S. 544, 36 Sup. Ct. 712, 60 L. Ed. 1156, the bill of lading contained the following provision:

"It is also mutually agreed that the value of each package shipped hereunder does not exceed \$100, or its equivalent in English currency, on which basis the freight is adjusted, and the carrier's liability shall in no case exceed that sum, unless a value in excess thereof be specially declared and stated herein, and extra freight as may be agreed on paid."

And the court there held that the liability of the carrier was limited to \$100, "as stated in the bill of lading" under which the shipment was made.

In *Hohl v. Norddeutscher Lloyd*, 175 Fed. 544, 99 C. C. A. 166, a case decided in the Second Circuit, in which a writ of certiorari was denied (216 U. S. 621, 30 Sup. Ct. 575, 54 L. Ed. 641), the limited liability provision was:

"Not accountable for any sum exceeding \$100 per package for goods of whatever description, nor for any amount in respect of gold, silver, etc., * * *

unless the value of such be herein expressed and freight as may be agreed paid thereon."

The court there held that:

"It is competent for a steamship company as a carrier of goods to limit its liability" to a certain amount "in case of loss, even as against its own negligence," where the valuation "is the basis on which freight is charged, and [this fact] was fully known to the shipper."

In *Calderon v. Atlas Steamship Co.*, 170 U. S. 272, 18 Sup. Ct. 588, 42 L. Ed. 1033, the court construed the provision to be one of exemption, and not of limitation, so that under it, if lawful, the carrier would be exempted from all liability if the goods lost or damaged, were above the value of \$100 per package, but clearly intimated that if the liability of the carrier had been limited to the amount of \$100 per package, it would have been sustained.

Counsel for the plaintiff in argument admits the binding force of these decisions, but claims that the contract for valuation must be reasonable and fairly made "and that the shipper shall not be induced to assent to the same under any misapprehension." It is claimed that the automobile was delivered at the office of the steamship company in Liverpool by one Sontag, the plaintiff's chauffeur, who was asked the value of the car at the time of delivery, and said that the original price of the car was a few hundred dollars under \$10,000, and that either through design, fraud, error, or mistake the declared valuation was not set forth in the bill of lading, and that the plaintiff had the right to rely upon the rate paid by him as being based upon the value which Sontag had declared. The evidence does not support this claim, however, as Sontag testified in cross-examination that he put the automobile "into the hands of Sheldon & Co.," who were to ship it for the plaintiff, and that they took charge of the shipment; that he had nothing to do with that; and the plaintiff himself testified that he turned the car over to Sontag in Liverpool to take to the shipping agents. There was no evidence that Sontag acted as agent for the shipping agents. The automobile was delivered by Sheldon & Co., as agents of the plaintiff, to the steamship company, and the bill of lading was issued in their names. There was no evidence that fraud was practiced upon them or that they misapprehended the terms of the bill of lading, or that the defendant did not offer them an opportunity of paying a higher rate and placing a higher value upon the automobile and thus increasing the amount of the defendant's liability; nor was there any evidence that the rate was not reduced because of the restricted liability assumed by the defendant.

The only testimony in regard to the rates of the company came from Robert S. Guilford, who testified that he had general charge of the steamship office of the defendant company in Boston; that the bill of lading under which the automobile in question was forwarded was "the regular Leyland line bill of lading which had been in use by the company for the past five or six years; that the company did not publish any schedule of rates, but that its agents had certain memoranda to guide them in quoting rates; that in 1909 the company had no general rate on automobiles shipped from Liverpool to Boston, but that

the rate for their carriage was quoted subject to acceptance and a special contract made; that the general rate of the steamship company, either on east-bound or west-bound freight, was based on cubic feet of space occupied by the shipment or its weight, and also on its valuation.

[2] The plaintiff also claims in argument that the burden of proof is on the defendant to show that the rate charged the plaintiff was based on its minimum valuation of twenty pounds per package. So far as the matter has received any judicial consideration it has been held that a provision similar to that contained in the bill of lading in this case raises a presumption that the shipment was made upon the agreed valuation and that opportunity was afforded of shipping at a higher valuation by the payment of a higher rate, in the absence of evidence to the contrary. This is equivalent to saying that the bill of lading upon its face is prima facie evidence of all the facts that may be fairly and legally inferred from its terms.

In the Hart Case, supra, 112 U. S. at page 337, 5 Sup. Ct. at page 154, 28 L. Ed. 717, the court said:

"It must be presumed, from the terms of the bill of lading and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that, as the rate of freight expressed is stated to be on the condition that the defendant assumes liability to the extent of the agreed valuation named, the rate of freight is graduated by the valuation."

In Adams Express Co. v. Croninger, 226 U. S. 491, 508, 33 Sup. Ct. 148, 153 (57 L. Ed. 314, 44 L. R. A. [N. S.] 257) the court said:

"That no inquiry was made as to the actual value is not vital to the fairness of the agreement in this case. The receipt which was accepted showed that the charge made was based upon a valuation of \$50 unless a greater value should be stated therein. The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the commission."

In Cincinnati, New Orleans & Texas Pacific Ry. v. Rankin, supra, 241 U. S. at page 328, 36 Sup. Ct. 558, 60 L. Ed. 1022, L. R. A. 1917A, 265, the court said:

"Where a bill of lading, signed by both parties, recites that lawful alternate rates, based on specific values, were offered, such recitals constitute admissions by the shipper and sufficient prima facie evidence of choice."

The presumption that the shipper had knowledge that the rate was based upon the assumed value is strengthened by the fact that the evidence discloses that Sheldon & Co., as forwarders, had been shipping goods over the defendants' line for at least 15 years, and that the bill of lading which was delivered to them by the steamship company in this case was the ordinary bill of lading which had been in use in its present form by the steamship company for 5 or 6 years.

In the absence of proof to the contrary, it may be assumed, under the terms of the bill of lading, that the rate was based upon the agreed valuation, and that, if requested, the defendant would have written into the bill of lading the value given by the forwarders and charged the rate proportionate to that value. While it is true that no actual value was placed upon the automobile, yet by the terms of the bill of lading a value was assumed, and that this assumed value was far be-

low the actual value of the automobile does not alone render the limitation invalid.

It is said by the court in *Pierce Co. v. Wells Fargo & Co.*, 236 U. S. 278, 285, 35 Sup. Ct. 351, 354 (59 L. Ed. 576):

"But it is said, and this fact was the basis of the dissenting opinion in the Circuit Court of Appeals, that there was no valuation at all in this case, and that the disproportion between the actual value of the automobiles shipped—about \$15,000—and \$50 demonstrates this fact, and it is insisted that what was done was merely an arbitrary and unreasonable limitation in the guise of valuation. This argument overlooks the fact that the legality of the contract does not depend upon a valuation which shall have a relation to the actual worth of the property. None such was attempted in the *Neiman-Marcus Case* [227 U. S. 469, 33 Sup. Ct. 267, 57 L. Ed. 600], the *Croninger Case* [226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257], or the *Hooker Case* [233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593]."

In *Hohl v. Norddeutscher Lloyd*, supra, 175 Fed. at page 547, 99 C. C. A. at page 169, the court said:

"It is sought to distinguish the case at bar from the *Hart Case* on the theory that there has been no agreed valuation, but the amount has been fixed arbitrarily by the carrier, without reference to the real value; but in the *Hart Case* the amount, per horse and per carload, was fixed arbitrarily by the carrier in its general form of live stock bill of lading. The shipper in that case signed the bill of lading, but that circumstance merely made it easier to prove that he was fully informed as to its terms."

In the *Hart Case*, the court said (112 U. S. at page 337, 5 Sup. Ct. 154, 28 L. Ed. 717):

"As a minor proposition, a distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said, that, while in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was the 'agreed valuation,' the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further."

The court further said (112 U. S. at page 341, 5 Sup. Ct. 156, 28 L. Ed. 717):

"The subject-matter of a contract may be valued, or the damages in case of a breach may be liquidated in advance."

Upon the evidence at the trial we think the instruction requested in respect to the limited liability provision should have been given, but as there is to be a new trial granted upon other grounds, we may say, we think, that the provision as to limited liability is not so conclusive that it is not susceptible of proofs tending to overthrow it, and such as would justify a jury in saying that it was not entered into with a full and fair understanding as to its terms and conditions—such as proofs of fraud practiced upon the shipper, or misunderstanding as to the terms of the bill of lading, or that he was denied an opportunity to place a higher value upon his shipment and pay a higher rate of freight, or proofs as to what the rate would have been if a higher value had

been given; and while the terms of the bill of lading are prima facie evidence of a choice, proofs that the facts in respect to the essential choice of rates were not fully known to the shipper, would be admissible, as well as proofs which would warrant a jury in finding that the contract was not in fact accepted as one limiting liability under the circumstances of the particular shipment. But in the absence of some such proofs, we think the provision should be construed as one limiting liability to the £20 named in the bill of lading.

[3] The bill of lading contained the following provision in relation to insurance:

"The shipowner is not liable for any loss, detriment, or damage to any goods capable of being covered by insurance, and if liable is to have the benefit of any insurance effected upon the goods."

The shipper had insured the automobile with the Boston Insurance Company in the sum of \$5,000, and "while on board steamers" the policy states the liability of the insurance company to be for "actual loss or damage caused by marine perils."

William R. Hodges, the president of the insurance company, testified that when the plaintiff made a claim against his company it was pointed out that the damage was not covered by the policy, but that the sum of \$4,407.09 was paid to the plaintiff, for which a borrowed and loan receipt was taken, and that this was not a receipt in payment of a loss under the policy.

The defendant admits that this provision in the bill of lading is invalid in so far as it undertakes to compel the shipper to insure against loss, due to its negligence; but contends that the clause is valid which provides that the carrier shall have the benefit of any insurance that the shipper may have, even though the loss is one caused by the negligence of the carrier, and cites the leading case of Phoenix Insurance Co. v. Erie & Western Transportation Co., 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873. As the clause provides that the carrier, "if liable, is to have the benefit of any insurance effected upon the goods," clearly under the terms of the policy, the insurance upon the automobile was limited to loss by marine perils while aboard steamers, and damage in unloading was not covered by it, and therefore no insurance against loss by such damage was effected. Whatever arrangement the plaintiff may have made with the insurance company by which any sum was paid him and a borrowed and loan receipt received from him was purely a matter between him and the insurance company, and we think the jury was correctly instructed that they need not burden their minds with the question of insurance at all. *Inman v. South Carolina Railway Co.*, 129 U. S. 128, 9 Sup. Ct. 249, 32 L. Ed. 612; *Luckenbach et al. v. McCahan Sugar Refining Co. et al.* (Dec. 9, 1918) 248 U. S. 139, 39 Sup. Ct. 53, 63 L. Ed. —.

[4] The defendant has assigned as error the admission of the testimony of Robert H. Fraser, an expert called by the plaintiff, who testified from his general knowledge of winches, without an examination of the particular winch involved in this case, as to the effect of a strain upon the winch after its jaws had been subjected to wear.

The ground of the defendant's objection is that the witness did not

examine the particular winch which was used to raise the automobile; but we think his testimony was competent, in which he stated his opinion as to the cause of the clutch being thrown out of gear, upon the hypothetical question which was put to him. The objection urged by the defendant is more in the nature of an argument upon the weight to be given to the testimony than against its admissibility.

[5] The defendant has also assigned as error the admission of the testimony of Emil A. Sontag, the plaintiff's chauffeur, who was on the dock when the accident happened to the automobile. He testified that, about 15 minutes after the accident, before the automobile was raised the second time, he had a conversation with the captain of the steamship in which the latter said "that the winch had never carried that heavy weight before; that the weight was too much for the winch"; and that, in the presence of the captain, another man said "that the clutch slipped out and let go the weight."

The evidence disclosed that unloading the cargo was entirely in charge of the stevedores and the captain had no duty with reference to it. The declaration made by him, therefore, was not a part of the *res gestæ*, but was simply a narrative of a past event. As he was not charged with any duty in regard to unloading the cargo, such a declaration by him would not bind the owner of the steamship. *Packet Co. v. Clough*, 20 Wall. 528, 540, 22 L. Ed. 406.

In support of the admissibility of evidence of this declaration the plaintiff cites *The Potomac*, 8 Wall. 590, 19 L. Ed. 511; but that was a suit in admiralty, where the rule is different, and declarations of a master are received as pointed out in *The Enterprise*, 2 Curtis, 321, 8 Fed. Cas. 729, No. 4,497.

In *Packet Co. v. Clough*, *supra*, the plaintiff received an injury while boarding a steamer of the Packet Company, through the alleged carelessness of the servants of the Packet Company in putting out an improper gang plank upon which she was to board the steamer, and conversations of the captain with the plaintiff made 2½ days after the accident occurred, in which he attributed it to the carelessness of the servants of the Packet Company in putting out the plank, were received in evidence, and the court there said:

"What the captain of the boat said of the transaction two days afterwards was, therefore, but a narrative of a past occurrence, and for that reason it could not affect his principals. It had no tendency to determine the nature, quality, or character of the act done, or left undone."

It is claimed by the plaintiff in argument that the admission of evidence of the captain's declaration was harmless error in view of the additional testimony as to the condition of the winch; but we cannot hold that the jury would give no weight to such a declaration by the captain of the steamship.

The defendant had introduced testimony tending to show that the winch was in good condition at the time of the accident and that it had been recently examined by a competent engineer, and had been used to raise much heavier loads than the automobile before and on the day of the accident. This evidence of the declaration of the captain was introduced by the plaintiff in rebuttal, and if believed by the

jury must have caused them to reject as unreliable, testimony introduced by the defendant in regard to the condition of the winch and the weight of the loads which had been previously carried by it, as compared with that of the automobile. We think there was error in admitting evidence of this declaration and that it was prejudicial to the defendant.

The judgment of the District Court is reversed, the verdict set aside, and the case remanded to that court for further action not inconsistent with this opinion. The appellant to recover costs in this court.

ALDRICH, District Judge (concurring). It does not seem that the point has ever been distinctly taken that a rule of limitation in respect to "packages" should not be interpreted as referring to openly crated automobiles, but without considering such a question, the provision seems to have been accepted as applying to shipments of automobiles. Therefore I suppose that view should be followed. But if the question were an open one, I should have grave doubts whether the limitation rule in respect to packages has any reference whatever to such a shipment.

DICK CHIARELLO & BROS., Inc., v. CENTRAL R. CO. OF NEW
JERSEY et al.

(Circuit Court of Appeals, Second Circuit. January 15, 1919.)

No. 79.

1. SHIPPING ⚡177—DEMURRAGE—NECESSITY OF CONTRACT.

In the absence of contract, what the law calls demurrage is not recoverable for delay in discharging, and in order to recover damages in the nature of demurrage the carrier has the burden of proving affirmatively that the one sought to be charged was chargeable with some negligence, or exceeded some customary period which by implication is a part of whatever contract was made.

2. SHIPPING ⚡172—TIME FOR DISCHARGING—CUSTOM OF PORT—USE OF LIGHTERS BY VESSEL.

Under a rule of the New York Maritime Exchange, allowing consignees of railroad ties one running day for every 50,000 feet, board measure, of ties in receiving discharge, accepting such rule as a custom of the port, a vessel carrying ties to be delivered at consignee's wharf cannot, by unloading the ties into lighters, require consignee to accept discharge at the rate of 50,000 feet per day from each lighter at the same time.

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

Suit in admiralty by Dick Chiarello & Bros., Incorporated, against the Central Railroad Company of New Jersey and the Philadelphia & Reading Railway Company. Decree for respondents, and libellant appeals. Affirmed.

For opinion below, see 246 Fed. 327.

Respondent railways maintain a joint wharf in the Arthur Kill, where they receive for creosoting purposes ties brought to them by water. Their joint

agent bought ties throughout the Southeastern United States, the terms of purchase being in every case f. o. b. the wharf aforesaid. Vendors of some ties severally shipped their sales by three steamers, Iroquois, Mills, and Shawmut. These vessels have different owners, brought ties at differing times, and have nothing in common in respect of this litigation, except that it was convenient to unite in one suit claims respecting all the ties carried.

We infer, from such bills of lading as are in evidence, that all the ships engaged to deliver their ties at the aforesaid joint wharf, which was neither their usual berthing place nor a public wharf for discharge of general cargo. No bill of lading or any other contract in evidence makes any reference to demurrage for delay in unloading. So far as we know, neither shipper, carrier, nor these respondents, as consignees, ever agreed to or talked of unloading delay in respect of these ties, before or at their shipment.

The Shawmut and Iroquois never went to the Arthur Kill, but discharged their ties into Chiarello's lighters at their usual unloading berths; their owners agreeing to pay Chiarello for his lighter service. The Mills did go to respondent's wharf and discharged from both sides, from one directly upon the wharf, and from the other into libelant's lighters, hired by the ship owner.

Thus, at differing times, all the ties ex Shawmut and Iroquois, and some ex Mills, were in libelant's lighters, to be delivered to respondents and on their creosoting wharf. To each lot of lighters, representing or containing cargo ex one steamer, respondents assigned one berth, as they would have done to the steamer herself. Consequently, since as many as five lighters were required to carry one steamship's quota of ties, the lighters had to and did (for the most part) unload in turn.

The Maritime Exchange of New York, has promulgated a rule "regulating the delivery of railroad ties"; it was admitted that this rule expressed the custom of the port; its substance is as follows:

"Consignees shall have twenty-four hours (Sundays and legal holidays excepted) after the vessel arrives, and the master or the vessel's agent reports, in which to furnish the vessel with a berth where she can discharge. * * *

"Lay days allowed consignees for receiving cargo shall be as follows, viz.: Twenty-four hours to furnish a berth as provided in above rule, and one running day (Sundays and legal holidays excepted) for every fifty thousand (50,000) feet board measure of the ties."

There was abundant evidence that "the usual and customary rate of demurrage" in New York Harbor on lighters such as libelant furnished for these ties was \$20 per day. It also appeared that delivery of freight by lighters was frequent in the harbor, and was customary and expected, though by no means invariable, at respondents' wharf.

Libelant's demand is for payment at \$20 per day for every day's delay to each lighter, caused by failure to take cargo at the rate of 50,000 feet per day from each lighter, no matter how many lighters arrived at once, and without reference to (for instance) the fact that it required five lighters to deliver the ties ex one steamer.

Hyland & Zabriskie, of New York City (Nelson Zabriskie, of New York City, of counsel), for appellant.

De Forest Brothers, of New York City (Henry De Forest, of New York City, of counsel), for appellee Central R. Co. of New Jersey.

Macklin, Brown & Purdy, of New York City (Wm. F. Purdy, of New York City, of counsel), for appellee Philadelphia & R. Ry. Co.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The avowed object of this litigation is not so much to effect a money recovery for this particular libelant as to obtain a decision laying down some general rule covering "lighter delivery" in this harbor, and securing to lighter owners generally compensation when their vessels are

not relieved of cargo as rapidly as the various rules of the Maritime and (probably) Produce Exchanges appear to contemplate.

The attempt must fail, if for no other reason than that there is and always must be immense diversity in the contractual arrangements of many men, one small result of which is "lighter delivery" of goods. As said in *Rutherglen Co. v. Houlder*, 203 Fed. at 851, 122 C. C. A. 169, there "is a wilderness of law on the subject of demurrage. Decisions depend upon the language of the various charters." This was one way of saying that identity is rare in any two contracts, or sets of phenomena, and some controlling or crucial fact must furnish a guide through a "wilderness," not only of law, but of always varying commercial transactions. In this instance the guides are these truths:

[1] (1) No one concerned with the carriage of these ties could have any claim for what the law calls demurrage, because there was no agreement therefor. *Ben Franklin, etc., Co. v. Federal, etc., Co.*, 242 Fed. 45, 154 C. C. A. 635. The delivering carrier could never do more than demand damages for delay "in the nature of demurrage"; and in order to recover he must sustain the burden of affirmatively proving that the person sought to be charged (e. g., consignee or charterer) was guilty of "some negligence in unloading, * * * or * * * exceeded some customary period which, by implication, is a part" of whatever contract was made. *Riley v. Cargo of Iron Pipes* (D. C.) 40 Fed. 605.

(2) The only contracts in evidence affecting these respondents are the bills of lading, by which the steamships undertook to deliver ties at the creosoting wharf. It was nothing to respondents that the steamer employed Chiarello to complete their contracts. Assuming that lighter delivery was proper, it was in legal effect the steamship owners' delivery, and this libellant was their servant; respondents never had any contractual relation express or implied with the lighterman libellant.

(3) The rules of the exchanges do not affect those not members of the corporation making the rule, *proprio vigore*. Such power as they are usually said to have rests on a good general custom of observing them, and is more accurately described as a custom, expressed or defined by the rule. Like every other custom, it must usually be proved anew whenever asserted, and must always be shown to fit the facts. No court can construe a custom, as it does a general statute. Customs have legal efficacy, and often very great influence; but no one can define a custom, and then ask the courts to treat the definition like a written law.

[2] Considering the evidence in the light of the foregoing propositions, we find—

(1) That it was a usual and reasonably to be expected thing, that the steamship owners would deliver by lighters.

(2) That, had the steamer gone alongside the wharf herself, she would by custom have been entitled to (say) a delivery of 50,000 feet per day.

(3) There is no evidence whatever of any custom whereby (e. g.) a steamer having a million feet of ties on board could, after signing such bills of lading as are here in proof, put said ties on 20 lighters,

send all 20 at once to one wharf, and require the consignee to unload all the lighters in one day. Nor do we apprehend that such custom is ever likely to be provable in any port; yet such in effect is the inference libelant asks us to draw from a proven custom of unloading a "vessel" at the rate of not less than 50,000 feet per day.

(4) If we could construe a definition of custom, in this instance the exchange rule, like a statute, we should hold that "vessel" meant the vessel that contracted to carry and deliver the ties, viz., the steamship, and that therefore what was customary delivery for the steamship was proper for the lighters that represented the steamship.

But we do not ground decision on such construction, but on the broader ground that neither by contract in evidence, nor custom proved, were the respondents bound to more than they did do.

(5) In the absence of controlling contract or custom, the duty of these consignees was simply to take cargo in a reasonable time. *Milburn v. Federal, etc., Co.*, 161 Fed. 718, 88 C. C. A. 577.

"It generally happens that there is some particular fact which distinguishes every demurrage suit from every other, so that the court * * * is compelled to go back to the underlying rules." *Donnell v. Amoskeag, etc., Co.*, 118 Fed. at 15, 55 C. C. A. at 183.

The particular fact here prominent is that the steamships attempted to multiply the duties of the consignees by simultaneous presentation of numerous lighters. They could not thus depart from their bills of lading, which would control, even over a local custom. That libelant did not secure himself by contract with his employer, against the consequences of delay at the other end of the route, is his misfortune. *Ben Franklin, etc., Co. v. Federal, etc., Co.*, supra.

(6) Whether if any custom (applicable to the facts) to pay damages in the nature of demurrage, had been shown, libelant would not still be required to prove actual damages, we do not decide.

Whether a customary rate of "demurrage" of \$20 per day is a custom enabling one to liquidate "damages in the nature of demurrage," without proof of actual loss, is a question not necessary to decision.

Decree affirmed, with costs.

UNITED STATES v. ONE BAG OF PARADISE AND GHOURA FEATHERS.

(Circuit Court of Appeals, Second Circuit. January 15, 1919.)

No. 147.

CUSTOMS DUTIES ⇨133—VIOLATION OF CUSTOMS LAWS—SUIT FOR FORFEITURE
—“REASONABLE CAUSE”—“PROBABLE CAUSE.”

In a suit by the United States for forfeiture of feathers of wild birds, seized from defendant's possession, as having been imported in violation of the prohibition of Tariff Act, § 1, Schedule N, par. 347, under section 3, T. of said act. the burden rests on libelant to show “probable cause,” which is synonymous with “reasonable cause,” for the prosecution, “to be judged of by the court,” and the finding of the court thereon has the weight of the verdict of the jury in the appellate court.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Probable Cause; Reasonable Cause.]

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

Libel by the United States against one bag, containing seven packages of Paradise and Ghoura feathers, one package containing 150 feathers of the bird of paradise and 150 quills, and 43 boxes containing heads and feathers of birds of paradise and Ghoura heads; Arthur Arbib, claimant. From the decree, libelant brings error. Affirmed.

The government filed a libel asking for the forfeiture of certain plumage of wild birds alleged to have been imported contrary to law and in violation of section 3082 of the Revised Statutes (Comp. St. § 5785), claiming that the importation of such plumage was prohibited by section 347 of the Tariff Act (Act Oct. 3, 1913, c. 16, § 1, Schedule N, 38 Stat. 143 [Comp. St. § 5291]). The libel covers three lots of merchandise described as items 1, 2, and 3. The seizure of the merchandise referred to in items 1 and 2 was made at the steamship dock at the time of the arrival of the steamship Kroonland on November 26, 1916, and was taken from the custody of one Angelo Tartaglino, who had concealed the plumage in a belt which he wore about his body. Since no answer was interposed, either by way of admission or denial, as to items 1 and 2 of the libel, a forfeiture was decreed as of course.

The third item referred to in the libel consisted of a seizure of plumage taken from the claimant's premises in the city of New York on May 31, 1917. The claimant conducts a wholesale feather business at this latter place of seizure. Practically all of the feathers of wild birds that were found on his premises were seized, and were in a manufactured state; that is to say, were bound with feathers and made up into a piece, with a stick on the end, and wound around with wire, and some were upon cardboards, some in boxes, and others loose and unmanufactured.

Upon the trial, claimant's counsel made the following concessions: “I will concede, for the claimant, that the witness Tartaglino on October 23, 1916, smuggled into this country six belts of paradise feathers, and they were delivered to the claimant, Arthur Arbib, within a few days thereafter, with knowledge on the part of the claimant that six belts of feathers had been smuggled into this country.”

It will be noted that this concession was confined to the paradise feathers. Arbib's relation to Tartaglino was not only conceded by counsel, but there was Tartaglino's confession. The other evidence indicated that Tartaglino was a cook employed aboard the ship Kroonland and the Philadelphia, and made four trips upon the former and one trip upon the latter vessel. He bought the smuggled plumage from one Felice Strada, who was a steward on the American Line, and that he smuggled feathers on two of his trips from the Kroonland arriving in New York on October 23, 1916, and November 26, 1916. Each

time he took the belt containing the feathers to the home of one Ruscetta in New York City, and on one occasion, during the stay of the Kroonland in this port, at 11 o'clock at night he met the claimant, whom he identified in the courtroom, and received \$300 for his services and that of Strada. On one occasion he received feathers from the claimant's brother and brought them to this country.

Upon the trial, both the libelant and claimant asked for a decree; the former of forfeiture of the merchandise in dispute. The court decreed a forfeiture of the paradise feathers and quills to the government, and the Ghoura feathers, paradise heads, and paradise wings were awarded to the claimant, holding that as to the latter plumage there was no evidence to show that they were imported on the first trip. Both libelant and claimant, feeling aggrieved with the above decree, have sued out a writ of error, and the cause comes here for review. We shall therefore refer to the parties as libelant and claimant throughout.

Francis G. Caffey, U. S. Atty., of New York City (Harold Harper, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Barber, Watson & Gibboney, of New York City (Stuart G. Gibboney and George M. Burditt, both of New York City, of counsel), for claimant.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge (after stating the facts as above). The question presented here for review is as to the ruling of the court below regarding merchandise mentioned in item 3 of the libel.

Section 3082 of the Revised Statutes provides as follows:

"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.*"

And paragraph 347 of the Tariff Act, which imposes an import duty upon feathers and other merchandise, contains a proviso as follows:

"Provided, that the importation of aigrettes, egret plumes or so-called osprey plumes, and the feathers, quills, heads, wings, tails, skins, or parts of skins, of wild birds, either raw or manufactured, and not for scientific or educational purposes, is hereby prohibited; but this provision shall not apply to the feathers or plumes of ostriches, or to the feathers or plumes of domestic fowls of any kind."

It is claimed by the libelant on this appeal that, in the absence of exculpatory proof by the claimant, the court below should have directed the forfeiture of the entire seizure of plumage and parts, the importation of which was prohibited, and insists that it was not necessary for the libelant to establish a prima facie case, but merely reasonable grounds of suspicion. Apart from the concession above referred to, the paradise feathers, consisting of six belts of feathers, were imported on October 23, 1916, by smuggling them into this coun-

try and subsequent delivery to Arbib, and with full knowledge that they were so smuggled, the libelant did not produce evidence sufficient to establish a case of prima facie evidence (as that term is used in the law) as to the feathers seized at claimant's place of business.

We are asked to reverse the ruling below and hold that, in view of the facts as stated above, there is reasonable ground for suspicion that the plumage awarded to the claimant was smuggled in some manner in violation of the statute above referred to, and that the circumstances warrant the suspicion that the Ghoura plumage was imported on a previous trip of Tartaglino.

Paragraph T of section 3 of the Tariff Act, which is derived from section 71 of the Act to Regulate the Collection of Duties of March 2, 1799, provides as follows:

"T. That in all suits or informations brought, where any seizure has been made pursuant to any act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall lie upon such claimant, and in all actions or proceedings for the recovery of the value of merchandise imported contrary to any act providing for or regulating the collection of duties on imports or tonnage, the burden of proof shall be upon the defendant: Provided, that probable cause is shown for such prosecution, to be judged of by the court." Comp. St. § 5791.

Under this statute, the question for the district judge was what effect was to be given the words "probable cause" contained in the proviso. If there was probable cause for the seizure, the burden of proving the legality of importation was upon the claimant, who was possessed of the goods. If, in the opinion of the court, at the end of the government's proof, there was not enough evidence to go to the jury, then there was not such probable cause as to put the burden of proof upon the claimant. The term "probable cause" may be said to be synonymous with the term "reasonable cause." It was not incumbent upon the libelant to prove the allegations of the libel beyond a reasonable doubt. If the statute were to be so construed, the proviso would be useless. The answer to this contention of claimant may be found in *United States v. Regan*, 232 U. S. 37, 34 Sup. Ct. 213, 58 L. Ed. 494. There it was said:

"In *Chaffee & Co. v. United States*, 18 Wall. 516 [21 L. Ed. 908], the trial court, probably in deference to what was said in the case of *The Burdett*, had instructed the jury that proof beyond a reasonable doubt was essential to a recovery; but as the government had a verdict and judgment, and was not in a position to assign error upon the instruction, the case hardly can be regarded as settling the propriety of such an instruction, especially as in *Coffey v. United States*, 116 U. S. 436, 443 [6 Sup. Ct. 437, 29 L. Ed. 684], 13 years later, it was plainly assumed that in such actions the true measure of persuasion is not proof beyond a reasonable doubt, but the preponderating weight of the evidence. The cases of *Boyd v. United States*, 116 U. S. 616 [6 Sup. Ct. 524, 29 L. Ed. 746], and *Lees v. United States*, 150 U. S. 476 [14 Sup. Ct. 163, 37 L. Ed. 1150], are without present application, for they deal with the guaranty in the Fifth Amendment to the Constitution against compulsory self-incrimination, which, as this court has held, embraces proceedings to enforce penalties and forfeitures as well as criminal prosecutions and is of broader scope than are the guaranties in article 3 and the Sixth Amendment governing trials in criminal prosecutions. *Counselman v. Hitchcock*, 142 U. S. 547, 563 [12 Sup. Ct. 195, 35 L. Ed. 1110]; *United States v. Zucker*, 161 U. S. 475, 481 [16 Sup. Ct. 641, 40 L. Ed. 777]; *Hepner v. United States*, 213 U. S. 103, 112 [29 Sup.

Ct. 474, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739, 16 Ann. Cas. 960]. See, also, Callan v. Wilson, 127 U. S. 541, 549 [8 Sup. Ct. 1301, 32 L. Ed. 223]; Schick v. United States, 195 U. S. 65, 68 [24 Sup. Ct. 826, 49 L. Ed. 99, 1 Ann. Cas. 585].

"We conclude that it was error to apply to this case the standard of persuasion applicable to criminal prosecutions; and the judgment is accordingly reversed, with a direction for a new trial."

The present action is civil in form, involving a forfeiture, which was also criminal in its nature; but for the trial of this action the standard of the requirement of proof is that provided in the statute itself in the proviso above referred to, that, where probable cause of seizure appears, the claimant has the burden of establishing his right to its legitimate possession.

The prohibition against importation at the time of seizure was then of four years' standing, but nothing appears to show how long he owned or possessed the Ghoura feathers. Evidently, in determining the question of fact presented to him, the District Judge was of the opinion that the facts did warrant probable cause of seizure so far as the paradise feathers were concerned, but held that there was no probable cause for seizing the Ghoura feathers, and that therefore the government had not made out its case as to them, and that therefore no burden of proof lay upon the claimant. If so, this was the correct rule of law for application. *United States v. Regan*, 232 U. S. 37, 34 Sup. Ct. 213, 58 L. Ed. 494.

We have no expression of the District Judge as to what evidence persuaded him to the conclusions he arrived at, but we shall assume he applied the rule of evidence above referred to. No exception to any ruling of the District Judge in this record squarely presents the question argued by the libelant as to the shifting of the requirement or burden of proof to the claimant. We believe the District Judge to whom the facts were presented may well have found a want of probable cause after considering the libelant's proofs, and thus not required the claimant to offer evidence or explanation to show his legitimate possession. The finding of the District Judge is as conclusive upon us as would be the verdict of the jury, were the question decided by a jury in the case.

We conclude, therefore, that there is no error of law presented which requires our reversing the determination below.

Judgment affirmed.

FOUR PACKAGES OF CUT DIAMONDS v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 15, 1919.)

No. 61.

1. CUSTOMS DUTIES ⇨130—VIOLATION OF CUSTOMS LAWS—UNLAWFUL IMPORTATION—FORFEITURE.

A package sent by registered mail from Cuba to the United States, which was distinctly marked "Loose diamonds, dutiable," is not subject to forfeiture, under Tariff Act Oct. 3, 1913, § III, H (Comp. St. § 5526), as having been imported by means of a false invoice or statement.

2. CUSTOMS DUTIES ⇨130—VIOLATION OF CUSTOMS LAWS—UNLAWFUL IMPORTATION—FORFEITURE—"FRAUDULENTLY AND KNOWINGLY IMPORT."

A package containing diamonds sent by registered mail from Cuba to the United States, plainly marked "Loose diamonds, dutiable," is not subject to forfeiture under Rev. St. § 3082 (Comp. St. § 5785), as having been "fraudulently or knowingly" imported contrary to law, although the universal postal convention in force at the time, to which Cuba was a party, prohibited the mailing of dutiable articles.

3. TREATIES ⇨1—UNIVERSAL POSTAL CONVENTIONS—"LAW."

Universal postal conventions are not treaties, because not made by and with the advice and consent of the Senate, and they are not laws, because not enacted by Congress.

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

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

Libel by the United States against Four Packages of Cut Diamonds; Max Goldstein, claimant. Judgment of District Court (247 Fed. 354), forfeiting goods, affirmed (255 Fed. 314, — C. C. A. —). On rehearing. Modified.

Crim & Wemple, of New York City, for plaintiff in error.

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

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. Counsel on both sides agree that in our former opinion (255 Fed. 314, — C. C. A. —) we overlooked the fact that one package was held not forfeitable on the ground of a false or fraudulent invoice, so that we have to inquire as to it whether it was forfeitable on the further ground that it was imported from Cuba by registered mail contrary to law. The libel charged this to be an importation knowingly made "contrary to law," within section 3082, U. S. Rev. Stat. (Comp. St. § 5785), which reads:

"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.
* * *"

[1] The District Judge found the package forfeitable under section III, par. H, of the Tariff Act of October 3, 1913 (38 Stat. 183, c. 16 [Comp. St. § 5526]); but we think there was no such false statement,

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

either written or spoken, in connection with the deposit in the mails, as is contemplated by the section. On the contrary the package was distinctly marked, "Loose diamonds, dutiable," than which no statement could be more honest.

[2] Authority to make postal conventions with foreign countries is conferred by section 398, U. S. Rev. Stat. (Comp. St. § 587), which reads:

"For the purpose of making better postal arrangements with foreign countries, or to counteract their adverse measures affecting our postal intercourse with them, the Postmaster General, by and with the * * * President, may negotiate and conclude postal treaties or conventions, and may reduce or increase the rates of postage on mail matter conveyed between the United States and foreign countries."

The convention between the United States and Cuba dated June 16, 1903 (33 Stat. pt. 2, p. 2186), provides:

"Article 1. (a) Articles of every kind or nature, which are admitted to the domestic mails of either country, except as herein prohibited, shall be admitted to the mails exchanged under this convention; subject, however, to such regulations as the postal administration of the country of destination may deem necessary to protect its customs revenues.

"But articles other than letters in their usual and ordinary form, must never be closed against inspection, but must be so wrapped or inclosed that they may be readily and thoroughly examined by postmasters or customs officers.

"Except that there may be admitted to the mails exchanged between the United States and Cuba unsealed packages which contain, in sealed receptacles, articles which cannot be safely transmitted in unsealed receptacles: Provided the contents of the closed receptacles are plainly visible or are precisely stated on the covers of the closed receptacles, and that the package is so wrapped that the outer cover can be easily opened.

* * * * *
 "Art. VII. (a) Any packet of mailable correspondence may be registered upon payment of the rate of postage and the registration fee applicable thereto in the country of origin.
 * * * * *

"Art. XI. All matters connected with the exchange of mails between the two countries, which are not herein provided for shall be governed by the provisions of the Universal postal convention and regulations now in force, or which may hereafter be enacted, for the governance of such matters in the exchange of mails between countries of the Universal Postal Union generally, so far as the articles of such universal postal convention shall be obligatory upon both of the contending parties."

The universal postal convention, executed by the Postmaster General and approved by the President, dated May 26, 1906 (35 Stat. L. pt. 2, p. 1639) to which Cuba was a party, prohibits the insertion in ordinary or registered correspondence of "articles liable to customs duties." If under the earlier convention with Cuba it was allowable to send such merchandise through the mails it was subsequently prohibited by the universal postal convention.

[3] Such conventions are not treaties, because not made by and with the advice and consent of the Senate, and they are not laws, because not enacted by Congress. If we assume that as administrative regulations, made by authority of Congress they have the force of law, the package was imported contrary to law. But the section is evidently intended to prevent smuggling. The word "fraudulently" covers the acts of every one who directly smuggles, and the word "knowingly" the acts

of every one who consciously assists a smuggler. The question of intent is distinctly involved. The claimant, Goldstein, has been acquitted of any imputation of fraud, and E. Boyer, who registered the package at Havana, could not be held liable for fraudulently importing or assisting to import the package contrary to law, because he plainly marked it as containing "Loose diamonds, dutiable." He did not knowingly assist a smuggler, unless he had actual knowledge of the regulation and that the purpose of sending the package through the mails was to defraud the customs. If imputed or constructive knowledge of the regulation were thought by Congress enough to justify forfeiture, the word "knowingly" would not have been used. There being no evidence that Boyer knew of the existence of the regulation, or was conscious of assisting a smuggler contrary to law, we think this package is not subject to forfeiture.

The court below is directed to strike the package out of the decree of forfeiture, which, as so modified, is affirmed; no costs of this court to either party.

COLORADO TITLE & TRUST CO. v. CHILDERS et al.*
(Circuit Court of Appeals, Fifth Circuit. February 17, 1919.)

No. 3299.

PRINCIPAL AND AGENT ⇐123(10)—AGENCY OF PAYEE OF NOTE TO COLLECT FOR INDORSEE—EVIDENCE.

Evidence, consisting of course of dealing and correspondence, held to authorize finding that payee of notes, secured on cattle, engaged in making loans on such paper and selling the same, with guaranty, was recognized as agent for collection thereof by buyer and indorsee of some of the notes, thus relieving the maker so paying from further liability, and this though notes were in possession of buyer.

Walker, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Action by the Colorado Title & Trust Company against J. G. Childers, Jr., and others. Judgment was adverse to plaintiff, and it brings error. Affirmed.

Geo. Thompson and J. H. Barwise, Jr., both of Ft. Worth, Tex. (George M. Irwin, of Colorado Springs, Colo., and Thompson, Barwise, Wharton & Hiner, of Ft. Worth, Tex., on the brief), for plaintiff in error.

Morgan Bryan and B. B. Stone, both of Ft. Worth, Tex., and A. L. Curtis, of Belton, Tex. (Thos. C. Hall, of Temple, Tex., and A. L. Curtis, of Belton, Tex., on the brief), for defendants in error.

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

BATTIS, Circuit Judge. Notes of J. G. Childers to the Ft. Worth Savings Bank & Trust Company were sold by the payee to the Colorado Title & Trust Company, of Colorado Springs, Colo. The notes

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

*Certiorari denied 249 U. S. —, 39 Sup. Ct. 494, 63 L. Ed. —.

were given as the purchase price of, and were secured by a mortgage to the Ft. Worth bank on, cattle in the pasture of Childers in La Salle county, Tex. Upon maturity of the notes, the cattle were shipped to St. Louis, sold by a commission house there, and the proceeds remitted to the Ft. Worth Savings Bank & Trust Company. The amount was not remitted to the Colorado bank. The Ft. Worth Savings Bank & Trust Company became insolvent and a receiver was appointed. The Colorado bank instituted suit on the notes against Childers and the Ft. Worth Savings Bank & Trust Company and its receiver. The remittances to the Ft. Worth Savings Bank & Trust Company not being quite sufficient to cover the notes, Childers paid the balance to the Colorado Bank.

Answering the suit, Childers tendered the issue that the Ft. Worth Savings Bank & Trust Company was agent for the Colorado bank in the collection of the notes. He prayed, in case this defense was not established, for judgment against the Ft. Worth Savings Bank & Trust Company, to whom the payment had been made, and against the Ft. Worth National Bank, to which the proceeds of the sale of his cattle had been delivered by the Ft. Worth Savings Bank & Trust Company.

The appeal must be disposed of on a determination of whether the court properly overruled the motion of the plaintiff for an instructed verdict against Childers.

Childers was a cattle raiser, living in La Salle county, Tex., some 400 miles from Ft. Worth. He executed what is commonly spoken of as "cattle paper"; that is, promissory notes, secured by chattel mortgage upon cattle being prepared for market. When the notes were sold to the Colorado bank, the character of the security was indicated by the correspondence. So far as appears, the mortgage was retained by the Ft. Worth bank. After the sale an instrument was executed by the Ft. Worth bank, by which it undertook—

"to guarantee payment of any and all notes now held, or which may hereafter be held, by the Colorado Title & Trust Company, of Colorado Springs, Colo., which bear our indorsement, together with all interest that may accrue thereon; and we also waive presentment and demand of payment of the maker, and we also waive protest and notice to us of protest of any and all such notes for nonpayment."

On June 10, 1915, the Colorado bank wrote to the Ft. Worth bank:

"We hold two promissory notes of J. G. Childers, Jr., both falling due on the 21st inst., one being for \$7,734, and the other for \$1,634. We wish to advise you in good time that we do not expect to be in the market this month for any cattle paper, and we hope that it will be convenient for you to take these notes up promptly."

To this the Ft. Work bank replied:

"Answering your letter, will say we have notified Mr. Childers that we will expect his paper paid. We may not be able to get the money to you the day the paper is due, but it will be there either at maturity or immediately thereafter."

On July 4th the Colorado bank wrote:

"We expected ere this to receive remittance for two notes of J. G. Childers, Jr., for \$7,734 and \$1,634, respectively, both due June 21st. By your last

letter you led us to believe that the remittance to cover would have reached us long ere this. We await your prompt reply."

The Ft. Worth bank replied:

"Regarding the J. G. Childers Jr., paper, beg to advise that Mr. Childers is now shipping his cattle, and as soon as they have been sold on the market the money will be forthcoming to retire his paper which you hold. We are very sorry this matter has dragged along for so much past the maturity of the paper, but we assure you we are doing everything we can to get this money to you as promptly as possible."

On June 5th the Ft. Worth Bank wrote Childers:

"Your two notes, aggregating \$9,368, mature with us on the 21st of this month. We will very much appreciate it if you will make your arrangements to retire these notes at their maturity, as we are using every effort to liquidate our paper as it matures. Please let us hear from you in regard to this paper."

On the 24th of the month that bank wired Childers:

"When do you expect to ship cattle to take up your paper due 21st? Answer."

On the same day the Ft. Worth bank wrote Childers:

"We wired you at Cotulla to-day to know when you expected to ship your cattle to take up your paper due the 21st of this month. We received a service on our message, stating that you were en route from Denver and expected next week. We think, Mr. Childers, if you are going to let this paper run past due, you should have advised us about it, so that we might have known what to expect. Please advise us on receipt of this letter when we may expect payment of these notes."

On July 5th Childers wrote the bank:

"I have just returned from Mexico, and did not receive your message, and received your letter last night. I shipped five cars of steers to St. Louis and will have proceeds sent to your bank to be credited on my account, or rather my note that is past due. I will ship again at once, and will take up my indebtedness with next shipment. I am sorry that this delay occurred."

On the 12th of the month the bank wrote Childers:

"We are this morning in receipt of three remittances from Cassidy Southwestern, St. Louis, for your account, aggregating \$5,485.81, to apply on your note due June 25th for \$9,368."

Evidence was introduced showing that the Colorado bank had been engaged in the business of purchasing and collecting cattle paper for a number of years; that it had had various transactions of this kind with the Ft. Worth bank; that it knew that the makers of the notes did not appear in person at the bank to pay them; that it knew that it was customary for the owner of the cattle giving the notes secured by chattel mortgage to ship the mortgaged cattle to market at St. Louis, Kansas City, or Chicago, and that the owner did not, ordinarily, accompany the shipment; that instructions would be given to the commission house selling to remit the proceeds to the mortgagee; that the course of dealing between the Colorado bank and the Ft. Worth bank was, with reference to notes purchased from the latter, for the Ft. Worth bank to collect the money, "the transaction being, in a general way, similar to the Childers transaction with ref-

erence to the sale of the cattle, and the proceeds being sent to the Ft. Worth bank as the cattle were sold"; that the Colorado bank had never objected to this course of conduct on the part of the Ft. Worth bank; that, according to the ordinary course of dealing, they expected the Ft. Worth bank to collect the money from the maker, as in this case. At the time the Colorado bank wrote its first letter to the Ft. Worth bank with reference to the collection of these notes, the Colorado bank had not notified Childers that it had become the owner of his notes, and the Colorado bank knew that it was not customary for the bank taking cattle paper to notify the maker when sale of the paper was made.

The Colorado bank was informed by the Ft. Worth bank that it had notified Childers "that we will expect his paper paid." Later the Ft. Worth bank wrote the Colorado bank that—

"Childers is now shipping his cattle, and that as soon as the cattle have been sold on the market, the money will be forthcoming to retire his paper which you hold."

In this letter the Colorado bank was assured that the Ft. Worth bank was "doing everything we can to get this money to you as promptly as possible."

The Colorado bank, although it assumed that the maker of the notes had no notice of their transfer, acquiesced in the action of the Ft. Worth bank in informing Childers that it expected the paper paid. The Colorado bank could not have expected the maker of the notes to pay the Ft. Worth bank, except upon the idea that the Ft. Worth bank was authorized to collect the notes for the owner. The only proper basis for the payment by Childers to the Ft. Worth bank was either ownership by the Ft. Worth bank of the notes or agency of the Ft. Worth bank for the collection of the notes. The Colorado bank knew that the notes did not belong to the Ft. Worth bank, and was put on notice, by the letter of June 15th, that the Ft. Worth bank was exacting payment from Childers. The jury was authorized to assume that the Colorado bank recognized or acquiesced in the agency of the Ft. Worth bank, rather than that the Colorado bank was permitting the Ft. Worth bank to make a collection that it had no right to make, and permitting it to appropriate to its own use a fund dedicated to the discharge of the notes and mortgage.

The jury had before it evidence of the ordinary course of business, and evidence that the Colorado bank was entirely familiar with it; that is, the shipment of the cattle to market, and the remitting by the commission concern selling the cattle to the original payee of the notes and the person or bank named as mortgagee in the chattel mortgage.

Again, on July 6th, the Colorado bank was notified that Childers was shipping his cattle to market. This shipment from the county in which the mortgage was registered could not be made without the consent of the holder of the notes and of the mortgage to secure them. Nor could a sale be made without consent. The letter of the Ft. Worth bank to Childers clearly constituted an insistence that the shipment be made and the cattle sold. Later the Colorado bank was

notified that the shipment was being made, and it carried the necessary inference that the matter of shipment (with the resulting sale and remittance) was being looked after by the Ft. Worth bank. Considering the ordinary course of business, the letters of the Ft. Worth bank to the Colorado bank, informing the latter that the former had notified Childers that his paper must be paid, and, later, that he was shipping the cattle to market for the purpose of retiring the paper, would authorize a jury to find that the Ft. Worth bank had assumed to act for the Colorado bank, and the jury was warranted in the conclusion that the Colorado bank had acquiesced in this agency.

It is insisted that the agency to collect could not be assumed, in the absence of possession of the notes by the Ft. Worth bank. Possession by the Ft. Worth bank of the notes belonging to the Colorado bank would be conclusive, in so far as the maker was concerned, of the right of the Ft. Worth bank to collect the notes; but the absence of the notes would not be conclusive of the absence of authority to collect. The circumstances in this case are such that no special significance should be attached to the fact that the notes were not at the Ft. Worth bank. The Colorado bank and the Ft. Worth bank were both familiar with the ordinary course of business, and Childers acted in accordance with this ordinary course. He did exactly what he contracted to do, and exactly what he was expected by both banks to do. It is true that he executed negotiable paper, and thereby knew that his payment might have to be made to a person other than the original payee of the notes. It is on this account that agency of the Ft. Worth bank was essential to his protection, notwithstanding he did exactly what it was assumed he would do at the time he executed the notes.

A consideration of the entire record would authorize the conclusion which the jury reached. It sufficiently appears that, in the ordinary course of business the Ft. Worth bank was making loans to cattlemen. The character of security taken enables the payees, as in this case, to discount the paper with a small profit to themselves. The Colorado bank, acting as other purchasers of this class of paper, made no investigation of the particular loan, but depended upon the general or usual quality of such paper, and especially relied upon the assumed responsibility of the sellers of the paper. It supplemented the ordinary effect of an indorsement of the paper by taking a guaranty of payment of any such paper as might come into its hands from the Ft. Worth bank, and by this contract relieved itself of even the necessity of informing the indorser of the notes when payment was not made at maturity. That which was done in this case, and the ordinary course of business, would indicate that the Colorado bank did not expect to have any character of relation with the maker of the notes, but depended upon the seller. Under these conditions, the seller did those things which the owner of the notes would, in the ordinary course of business, do. With full knowledge of the conditions, and of the effect of that which was being done by the Ft. Worth bank, the Colorado bank completely acquiesced. Agency may

as well be inferred from such fact as from the direct giving of authority.

The jury was warranted in the conclusion reached, and the judgment is affirmed.

WALKER, Circuit Judge (dissenting). The holder of the notes was the creditor of both maker and indorser of them. The correspondence between the holder and the indorser shows that the former was insisting on the latter paying the notes, and that the latter attributed delay in payment to its failure to receive a remittance of the proceeds of the sale of the maker's cattle. There is nothing in the evidence to indicate that the holder consented to such delay, that it authorized or even acquiesced in any dealing between the indorser and the maker, or that it did not continue to look to the indorser and guarantor itself to make payment, as it was obligated to do, without regard to whether it did or did not receive a remittance from or on account of the maker. When a creditor demands payment of one of two debtors, the fact that the one called on for payment makes it known that he expects to get from his codebtor the money with which to satisfy the demand is not enough to make him the creditor's agent for that purpose. The cattle mortgage given by the maker was not mentioned. Its enforcement or foreclosure was not suggested in the correspondence, which shows all that occurred between the holder and indorser of the notes. That correspondence shows that the parties to it were dealing with each other as creditor and debtor, not as principal and agent. It does not seem permissible to give to the single circumstance that the holder of the notes was made aware that the indorser of them was expecting to get the proceeds of the sale of the maker's cattle before complying with its obligation to pay the effect of making the indorser the holder's agent to collect from the maker of the notes the amount due on them, which was equally due from the indorser, of which the holder was demanding payment. In the opinion of the writer, there was no evidence tending to prove that the payee and indorser was the agent of the holder of the notes, and, as such, received the proceeds of the sale of the maker's cattle.

STATE OF ALABAMA v. MARTIN.
In re THOELE-PHILLIPS MFG. CO.

(Circuit Court of Appeals, Fifth Circuit. February 26, 1919.)

Nos. 3313, 3314.

BANKRUPTCY \Leftrightarrow 350—DEBTS WHICH HAVE PRIORITY—DEBTS DUE STATE—
LAWS OF STATE.

The law of Alabama does not give priority to a debt due to the state from an insolvent debtor or decedent, except for taxes, and a contract debt due to the state from the estate of a bankrupt is not entitled to priority, under Bankruptcy Act July 1, 1898, § 64b(5), being Comp. St. § 9648.

Appeal from and Petition to Superintend and Revise Decrees of the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

In the matter of the Thoele-Phillips Manufacturing Company, bankrupt; W. H. Martin, trustee. The State of Alabama appeals from, and petitions to review, an order of the District Court denying priority to a claim by the State. Affirmed.

Fred S. Ball and Emmett S. Thigpen, both of Montgomery, Ala., and Lawrence Cooper, of Huntsville, Ala., for appellant and petitioner.

J. T. Kirk, of Tuscombua, Ala., and J. L. Andrews, of Sheffield, Ala., for appellee and respondent.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

WALKER, Circuit Judge. What is complained of is a ruling to the effect that a debt owing by the bankrupt corporation to the state of Alabama for the hire of convicts was not entitled to priority of payment.

The common law of England, so far as not inconsistent with the Constitution, laws, and institutions of Alabama, prevails in that state. Code of Alabama 1907, § 12. The Bankruptcy Act gives priority to—"debts owing to any person who by the laws of the states or the United States is entitled to priority." Bankruptcy Act July 1, 1898, c. 541, § 64b, 30 Stat. 563 (Comp. St. § 9648).

It is claimed that the state has the priority which the common law accorded to debts owing to the sovereign. There are Alabama statutes, the enactment and existence of which seem to us to be inconsistent with the hypothesis that the priority claimed exists under the law of that state. Alabama statutes make all the property of decedents, except as otherwise provided, chargeable with the payment of their debts, and prescribes the following order for their payment:

- (1) The funeral expenses.
- (2) The fees and charges of administration.
- (3) Expenses of the last sickness.
- (4) Taxes assessed on the estate of the decedent previous to his death.

(5) Debts due to employés, as such, for services rendered the year of the death of the decedent.

(6) The other debts of the decedent.

It is provided that there shall be no preference in the payment of debts of the same class. Code of Alabama 1907, §§ 2596, 2597, 2598. The proceeds of the sale of the assets of insolvent estates of decedents are required to be distributed in the above-stated order. *Id.* § 2755. Statutes provide for the administration of express trusts created for the payment or security of debts, including general assignments for the benefit of creditors. *Id.* § 6054 et seq. In such case distribution is required to be made to creditors as in the case of insolvent estates of decedents. *Id.* § 6071.

A result of the statutes mentioned is that a demand in favor of the state, unless it is one for taxes, is not entitled to priority, when asserted against the estate of a deceased debtor, or against the property of one who has made a general assignment for the benefit of his creditors. It is not to be supposed that the Legislature intended to give to a debtor's death, or to his creation of an express trust for the payment or security of his debts, the effect of depriving a creditor of a priority which he has so long as the debtor lives and does not himself devote his property to the payment of his debts. The fact that the statutes which deal with the distribution of property among the creditors of its insolvent owner provide for the state having a priority only for taxes furnishes some basis for an inference that the lawmakers recognized that debts owing to the state are not entitled to priority except when expressly provided for. It seems more reasonable so to infer than it is to infer that the existence of a general rule that all debts owing to the state have priority was recognized, and that the lawmakers intended that the priority, except for taxes, should cease to exist if the debtor dies or makes a general assignment for the benefit of his creditors. Ordinarily, existing liens or priorities are not destroyed by such happenings. A statute is not to be so construed as to have that effect, unless it is clear that it was so intended. So far as we are advised, the priority claimed in the instant case has never been judicially recognized in Alabama. In view of that circumstance, and of the statutory provisions above referred to, we think the conclusion is warranted that the priority claimed does not exist under the law of that state. The court did not err in disallowing the state's claim as a prior claim, and in allowing it as an unsecured and unpreferred claim.

Affirmed.

DUNN v. ECKHARDT.

In re C. ECKHARDT & SONS et al.

(Circuit Court of Appeals, Fifth Circuit. February 27, 1919.)

No. 3080.

1. COURTS ⇨366(19) — FOLLOWING STATE DECISIONS — ABANDONMENT OF HOMESTEAD.

Whether bankrupt prior to bankruptcy abandoned any part of his Texas homestead is to be determined solely by the law as decided by Texas courts.

2. HOMESTEAD ⇨181(1)—ABANDONMENT—BURDEN OF PROOF.

Under Texas decisions, the burden of showing abandonment of a homestead once existing rests on those contesting its continuance.

3. HOMESTEAD ⇨162(1)—ABANDONMENT—REMOVAL—INTENT.

Under Texas decisions, removal from homestead, to constitute abandonment of it, must be shown to have been coupled with an intention never to return.

4. HOMESTEAD ⇨165—ABANDONMENT—USE FOR OTHER PURPOSES.

Under Texas decisions, for use of homestead for other than homestead purposes to constitute abandonment, the use must clearly show an intention no longer to use it for purposes of a homestead.

5. HOMESTEAD ⇨165—ABANDONMENT—NATURE OF USE.

Under Texas decisions, where one erected on part of his homestead lot a building, and, from its completion, used at least part of the second story as a bedroom for members of the family or guests, there was no abandonment of such portion as part of the residence homestead.

6. HOMESTEAD ⇨165—ABANDONMENT—ERECTION OF BUILDING FOR OTHER PURPOSES.

Under Texas decisions, erection of a building on part of the homestead lot, with intention of using it for a purpose other than a homestead, does not divest such part of the lot of its homestead character; but there must be an actual inconsistent use.

7. HOMESTEAD ⇨168—ABANDONMENT—TEMPORARY RENTING.

By express provision of Const. Tex. art. 16, § 51, no temporary renting of the homestead constitutes an abandonment.

8. HOMESTEAD ⇨165—ABANDONMENT—USE OF PART OF BUILDING FOR INCONSISTENT PURPOSE.

Under Texas decisions, use of part of a building on the homestead lot for purposes inconsistent with the homestead, the balance being used for homestead purposes, does not divest it of the homestead character; it being an inseparable part of the building.

Petition to Superintend and Revise from the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

In the matter of C. Eckhardt & Sons and William Eckhardt, bankrupts. Petition by W. H. Dunn, trustee of bankrupts, to superintend and revise a decree sustaining homestead exemption of William Eckhardt. Affirmed.

H. W. Wallace, of Cuero, Tex. (C. F. Carsner, of Victoria, Tex., and R. J. Waldeck, of Cuero, Tex., on the brief), for petitioner.

John H. Bailey, of Cuero, Tex. (A. B. Davidson, N. M. Crain, and A. C. Hartman, all of Cuero, Tex., and J. T. Linebaugh, of Victoria, Tex., on the brief), for respondent.

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

BATTS, Circuit Judge. William Eckhardt, adjudged a bankrupt, claimed as exempt the property in controversy as part of his homestead. The trustee scheduled the property as part of the estate to be administered. An order of the referee, substantially confirming the action of the trustee, was reviewed by the District Judge. The bankrupt's exemptions were sustained, and the property decreed to be the business homestead of the bankrupt. The trustee has filed with this court a petition for review.

In 1866, William Eckhardt and family established their residence and business homestead on the west half of block 58 of the town of Yorktown, Tex. A storehouse was erected on the northwest corner, and the balance of the half block was used in connection with the residence. In the store building a grocery business was started, which was extended to other lines of merchandise and cotton buying, and in 1868 a private bank was added to the business. Adjoining the store building on the east a warehouse was erected, which was thereafter continuously used in connection with the business. About 1902 a two-story brick building, called the "bank building," was constructed; the foundation of the east wall of the warehouse being used as a part of its west wall.

[1] It is admitted that all of block 58 was exempt as homestead prior to the construction of the bank building. The question for determination is whether any part of this homestead had been abandoned prior to the bankruptcy. The question is to be determined solely by a consideration of the Texas decisions. No general principles of jurisprudence are applicable. The efforts of this court will be directed to an ascertainment of the law as developed by the courts of Texas.

[2-4] The rules for the determination of abandonment of a homestead are announced in a long and consistent line of decisions. The radical character of these rules is indicated by the following excerpts: Robinson v. McGuire (Tex. Civ. App.) 203 S. W. 416:

"When it is shown that the homestead once existed, the burden of proof rests upon those who contest its continuance to show that it had been abandoned, and that, in order to constitute an abandonment, it is not sufficient to show a mere discontinuance of the use of the property as a residence, but it must also be shown that such discontinuance was accompanied by an intention never to resume its use as a homestead."

Armstrong v. Nevill (Tex. Civ. App.) 117 S. W. 1012:

"To constitute an 'abandonment' of the homestead, it must affirmatively appear that there was not only a removal from the home, but a removal coupled with an intention never to return."

In Rollins v. O'Farrell, 77 Tex. 91, 13 S. W. 1021, the court held not erroneous the following language of the charge:

"And if from all the testimony it clearly appears that the same was permanently abandoned," etc.

The court quoted from Newton v. Calhoun, 68 Tex. 451, 4 S. W. 645:

"Before either of them will cease to be a part of it * * * it must be applied to uses inconsistent with the uses for which the homestead is protected—to uses which clearly show an intention no longer to use it for purposes of a home."

This language is quoted approvingly by Justice Gaines in *Langston v. Maxey*, 74 Tex. 161, 12 S. W. 27. Chief Justice Hemphill used stronger language in *Gouhenant v. Cockrell*, 20 Tex. 98:

"Admitting, however, * * * that where there is an abandonment with a fixed intention not to return, the property may be open to creditors; yet it must be undeniably clear and beyond almost the shadow at least of all reasonable ground of dispute that there has been a total abandonment, with an intention not to return and claim the exemption."

Sykes v. Speer (Tex. Civ. App.) 112 S. W. 426:

"Abandonment is accomplished, not merely by going away without any intention of returning at any particular time in the future, but by going away with the definite intention never to return."

See, also, *Drought v. Stallworth*, 45 Tex. Civ. App. 159, 100 S. W. 189; *Bogart v. Bank* (Tex. Civ. App.) 182 S. W. 681; *Woeltz v. Woeltz* (Tex. Civ. App.) 57 S. W. 906.

[5, 6] *Was the Property Abandoned as a Residence Homestead?*—The following facts appear from the uncontradicted evidence:

At the time the construction of the bank building was determined upon, all of the west half of block 58 was in use as a residence and business homestead of the bankrupt and his family. Upon the half block were the residence, barns, a garden, the storehouse on the northwest corner and warehouses adjoining, all within the same inclosure, and a few steps only between them. The family consisted of the bankrupt, his wife, a daughter, and several sons. The latter had slept in a small house which the grandmother occupied. As they grew up, the available space became inadequate, and it was determined to construct a new building, a part of which should be used by them. The new building was constructed adjoining the old warehouse, on land that had been used by the children as a playground. It was only a few yards from the residence, and the steps into the upper story were on the outside in the home yard. When the building was completed, all of the upper story was furnished as a bedroom. The mother and daughter of the family testified that they considered it as a part of their home, and that it was kept in order as the balance of their residence; the rooms being given daily attention, just as the other rooms of the home, either by the mother or daughter, or by the hired help. The room was occupied by the boys until they became grown and were married, and one of them used it for a short time after his marriage. During this period they were regarded members of the family, and had their meals in the old residence. When the boys left, the room was maintained as before, being kept in order at all times. It was used by the boys when they visited the family, and by other guests, and sometimes by the mother and daughter when they desired to be by themselves, or when there was a family consultation.

Some years after the construction of the building, the upper story was partitioned, and the front part rented from month to month to

a dentist. The rear, used as before, containing bedsteads, wardrobes, tables, chairs, and other furniture which had been and continued to be used by the family. The building was considered as a part of the home. The ladies of the family covered its walls with ivy, and vines, flowers, and other shrubbery were placed along the rear and side. The rear room has never been used for any purpose other than those indicated, except that some sewing machines and shoes belonging to the business were stored there for a short time.

There can be no question that, after the construction of the "bank building," the second story was, for a while, used as a part of the residence homestead. Even if it be determined that the balance of the building was used for purposes inconsistent with the residence homestead, this part of the building was, as soon as the building was completed, for a time used for purposes of the residence homestead, and the rear part of the second story was never at any time otherwise used. The lot upon which this building was constructed had been a part of the residence homestead. In order to divest it of its residence homestead character, there must have been a use definitely in conflict with the use of the property as a residence homestead, and a definite intention not to again use it for residence homestead purposes.

Whatever may be said with regard to the balance of the building, it is, of course, clear that the part which, after construction, was at once used for residence homestead purposes, could not be said to be used for a purpose in conflict with such use. The construction of a building, with the intention of using it for a purpose other than a homestead, does not divest the lot upon which it is placed of a homestead character that has been fixed. There must be an actual inconsistent use. *Woeltz v. Woeltz* (Tex. Civ. App.) 57 S. W. 906. Even if it were possible to abandon by mere intention, in the absence of inconsistent use, the upper story could not be held abandoned, for the testimony of the wife and daughter of the bankrupt clearly indicates that this story was constructed for homestead uses. Their statement of intention is admissible as evidence thereof (*Thigpen v. Russell*, 55 Tex. Civ. App. 211, 118 S. W. 1081), and their testimony is confirmed by subsequent use. As soon as the building was completed, this story was used for purposes, not only not inconsistent with the homestead use, but definitely a use to which a residence homestead would be placed.

The suggestion has never been made that the use of a room that was part of the residence homestead for the temporary accommodation of guests, or its use for a time by the recently married members of the family, affected in any way its residence homestead character. These are proper uses of a home.

The liberality of the law with reference to what constitutes a homestead is indicated by *Anderson v. Sessions*, 93 Tex. 279, 51 S. W. 874, 55 S. W. 1133, 77 Am. St. Rep. 873, in which the authorities are reviewed, and it is held that the use of detached lots for a garden would make them a part of the residence homestead. The court quotes from *Arto v. Maydole*, 54 Tex. 247:

"The question is not whether any portion of this adjoining block may have been a necessity or a mere convenience to the enjoyment of the homestead, but whether, in fact, it was a part of the homestead. If it was, the fact that it may have been used as an approach to the mansion, or for purposes of ornamentation of pleasure grounds only, would not defeat it of the homestead protection"

—and says :

"If playgrounds and shady parks, with graveled walks used only for pleasure or ornamentation, are protected, because used for the purposes of a home, we think that a little garden spot, although in a distant suburb of the town, would not be an improper or an unreasonable addition to the homestead, where it is used for the purpose of supplying the home table with the necessaries and comforts of life."

Even if some of the uses to which this part of the homestead had been put were not homestead uses, such uses would not constitute abandonment of the part so used, in the absence of an intention not to use them again for homestead purposes.

The status of the law is definitely determined by a large number of cases, a few of which are reviewed.

Whitley v. Alexander (Tex. Civ. App.) 198 S. W. 173 :

A small house, which had been used as the family residence, was removed to a part of the lot segregated by a fence, and rented whenever any one could be found to rent it. The test was :

"Was there such a segregation of this portion of the homestead, coupled with the intention to abandon it as a part thereof, as to constitute abandonment?"

Held not abandoned.

Drought v. Stallworth, 45 Tex. Civ. App. 159, 100 S. W. 189 :

Two houses were erected on a lot of the block upon which the homestead had been located. The owner testified that he built the houses to rent, but that he had never surrendered their full control to any one, and that he had never abandoned the idea of using any part of this lot upon which the rent houses were situated as a home, and that he refused to sell the lot, because the sale and separation from his other lot would ruin his place as a home. During a portion of the time the houses were occupied by families who did the family washing and other services, presumably in payment for their use. The court sustained the claim of homestead.

Rollins v. O'Farrel, 77 Tex. 91, 13 S. W. 1021 :

O'Farrel owned as a homestead 100 feet on a street, running back 315 feet to another. The residence was on the east end of the lot; and, at the time of the dedication as a homestead, there were on the west end a barn, bathhouse, and a cistern house, all inclosed in one fence, and used in connection with the residence. Shortly after, he converted the barn into a residence and moved it so as to front on the street. He also moved the bathhouse and cistern house, attaching two rooms to them, so that they could be used as a dwelling. One fence inclosed all of the property; a high board fence separating the tenant houses from the residence proper. The houses were rented when tenants could be found. There was evidence that the barn and other houses changed into dwellings was with the intention to make them

more valuable, and to sell them, and have them moved off the place, if a purchaser could be found; also that they were offered for sale to be removed, and that the foundation was of a character so that they could be easily moved. The claim of homestead was sustained.

Harle v. Richards, 78 Tex. 82, 14 S. W. 257:

Harle built a house on the east half of the block, which he and his family occupied as a residence, and also carried on a hotel business therein. Soon after he built a storehouse on a lot in the same block, and opened a grocery business. The buildings were so occupied and used for several years, the residence being used as a hotel under the management of Mrs. Harle while her husband conducted the grocery business in the storehouse, when the family moved from the residence into the back end of the storehouse, and the residence was rented as a hotel. The grocery business was closed, and Mrs. Harle opened a millinery business in the storehouse. This was the status at the death of Harle. Thereafter the widow went to live with her son, closed out her millinery business, and rented the storehouse. The court holds that—

“At the time E. Harle occupied the residence or hotel property with his family as their home, and carried on a business in the storehouse, both pieces of property were homestead. * * * We think it would be unreasonable to hold that the facts of the removal of the family from the residence to the back end of the storehouse and the temporary renting of the residence for hotel purposes constituted an abandonment of the residence as a homestead. * * * The property having acquired the character of homestead property, * * * the burden is on him who seeks to subject it to the liabilities of property not homestead to show that it has been abandoned by those to whom it was protected as a homestead.”

Storrie v. Woessner (Tex. Civ. App.) 47 S. W. 838:

The homestead consisted of a residence, a barn, and two small tenements erected while the owner occupied the property under lease before purchase. In one of these he had some goods at the time of the trial, and the other was rented. He testified that they were not intended as permanent improvements, and that he intended, as soon as he could, to remove them and extend his business over the site. It was held that the use to which these smaller houses were put did not evidence a dedication of portions of the lot to other than homestead purposes.

There would appear to be no question that the rear room of the second story was, at all times, used for a homestead purpose, and that there was, at least as to that part of the building, no abandonment.

Was the Business Homestead Abandoned?—The business, as developed, included a cotton buying and private banking business. When the “bank building” was erected these parts of the business were conducted on the lower floor. The bank was subsequently nationalized, but was under control of the bankrupt, and was conducted by him and his sons as before, and the cotton business was conducted as before. Further facts with reference to the use of the property as a business homestead are indicated by the following testimony:

C. L. Eckhardt testified:

"I worked any and everywhere; later on in the cotton department. It required the keeping of books. Before the bank was built we kept them in the store, and after the bank was built we kept them in the back of the bank. It was the same way after the bank was converted into a national bank. The vault was still used for C. Eckhardt & Sons in the cotton business. The money and valuables of C. Eckhardt & Sons were kept in that bank. * * * That makes a common wall between the bank building and the warehouse. There are no openings in the wall. I think my father conducted a bank in that building 4 or 6 years before he nationalized. C. Eckhardt & Sons conducted a banking business since 1868; then they moved from the store to the bank building when it was built. When the bank was nationalized, my father rented the building to them; that is, only the lower floor. I had my cotton things in there just as before. I continued this until C. Eckhardt & Sons quit business. There was only a small office in the back of the big rock building. * * * Green and Welhausen got controlling interest in the bank about 5 years ago; then it was only a couple of years and they moved. * * * The national bank rented and paid rent for the whole lower floor, but I stayed in there until they moved out, just the same as I did before. * * * My desk was there until the bank moved out. I continued to do the cotton business there until we didn't handle any more cotton. * * * I think the building was leased to the bank always for a year, and went from year to year. * * * I think the bank moved out of the building about 12 or 15 months before my father quit business. There were some plows in the lower floor of that building, and some sewing machines and a whole lot of stuff that I helped put there myself. We used it as a storeroom after they moved out."

Gus Eckhardt testified:

"My father conducted a banking business, and he conducted the cotton business in the lower floor. * * * Before and after the bank was nationalized we conducted the cotton business in the back part of the bank. That was the understanding; that is, from the vault back. * * * The general business of my father was kept open up to the time of the filing of the petition in bankruptcy. * * * After the bank moved, my father used the back part of the bank building for a storeroom and as his private office. Plows, fruit jars, sewing machines were stored there. * * * Since the building of the bank building there has not been a time when my father did not have charge of the back end of that building. * * * The private bank was conducted in that building up to 1902, if I remember right. Then it became a national bank. Then the national bank rented a part of the lower floor. The understanding was that my father was to use the back part of the bank building. * * * At the time (of the levy) there was merchandise stored in the back part of the bank building. I guess the clerks who worked for my father put them there. I put things in there myself. The shoes were upstairs when the levy was made."

Testimony of Richard Eckhardt:

"After the new building was finished, we had a private bank and cotton office downstairs. * * * The warehouses in the back of the main building were in bad shape. It was not a fit place to store such things as sewing machines and soap and such stuff as was stored in the bank building. The value of the business done by C. Eckhardt & Sons during 1915, to the best of my judgment, was \$40,000 or \$50,000. * * * We exhibited some of the goods in the bank building for sale. We had ties, hats, shoes, shirts, etc. These were upstairs and in the back end of the lower floor."

W. H. Dunn testified:

"I am the trustee in bankruptcy. * * * In taking the inventory I found some goods in the bank building, back of the vault."

Dr. G. H. Hudson testified:

"I let the Eckhardts have some money, and agreed to let them pay it in rents. * * * That was about September 4, 1914. Since then I have been occupying the room and taking out the money in rent. * * * When I first rented the building, I paid rent from month to month. I had no lease."

[7] *The Law as to Abandonment of Business Homesteads.*—The Texas constitutional provision defining and exempting the homestead (article 16, § 51), specifically provides that no temporary renting of the homestead shall constitute an abandonment. The liberal construction given to this provision, and the limited use which will affix or retain the business homestead character, are indicated by cases of which the following are typical:

Billings v. Matlage, 36 Tex. Civ. App. 619, 82 S. W. 805:

Matlage was head of a family, and had a residence home. He also owned the lot in question, upon which he had erected a one-story frame building, 30 feet by 60. He was in the mercantile business and used the building as a store, until, by reason of reverses, he was compelled to suspend, and turned the stock over to creditors. Shortly after he began, in the same building, the business of a retail grocer and commission merchant, and continued until stress of circumstances again forced him to suspend. He then executed a written lease, whereby the building was let for one year, the lessees to use it in conducting a banking business. Under the lease the shelving was to be stored in the rear part of the building, and the lessees were, upon the expiration of the lease, to restore it to its former position. By oral agreement, Matlage reserved, in the rear of the building, space for his safe and books, and thereafter occupied it in an effort to conduct a business of real estate, loans, and collections. At the expiration of the lease, he leased to the banking firm the western half of the building, reserving the eastern half, in which he continued his collection, real estate, etc., business, reserving the right to terminate the lease upon 60 days' notice. He intended to resume his mercantile business when conditions again became normal. On several occasions, when business was very dull, he left his place and engaged in manual labor for his livelihood. The court said:

"We are of the opinion the facts show the rentals were only temporary, and failed to establish abandonment."

The appellant complains of the failure of the court to submit the issue of the abandonment of the western half of the building. The court says:

"The building was an entirety, and homestead occupancy sufficient to exempt any part of it exempted the whole. The case is distinguishable from such as *Hargadine's Case*, in 71 Tex. 482, 9 S. W. 475, in which the owner of a homestead build a business building on a lot which was a part of his homestead, and which adjoined the building occupied by himself. The new building was constructed for renting purposes, and it was properly held to have the effect to sever from the exemption the lot upon which it rested. The case of *Hinze v. Moody* [13 Tex. Civ. App. 193] 35 S. W. 832, is in point."

Hinzie v. Moody, 13 Tex. Civ. App. 193, 35 S. W. 833:

The appellant was engaged in business as a grocer in a brick store-house, situated on a lot separated from his residence. He failed, and conveyed his property to a trustee for creditors. Before the failure the upper and lower floors were connected by an elevator, and both were used for carrying on his business. After his failure, he commenced business as a commission merchant, etc., and he kept his office on the first floor, which was also for a while occupied by his trustee in selling out the goods. Soon after the failure in 1889, he closed the elevator, and cut up the second story into rooms for bedrooms and offices, which he rented out. In January, 1892, a temporary partition was run across the lower floor, 60 feet back from the front, and the room was rented out for a saloon. Later, another concern occupied the entire lower floor, except 12 by 15 feet, holding under a lease for three years. They took out the partition, making the whole lower story one room. Appellant reserved and kept as his office 12 by 15 feet of the northeast corner. It was separated by a railing 3 feet high, upon which was a wire netting, 18 inches high. He kept his safe, desk, books, etc., in this office, and it was necessary to his business. There were no windows nor doors in the wall included in the office, and his only access was through the room occupied by his tenant.

"It is also contended," says the court, "that the extent of appellant's claim would be only so much of the lot and the building above it as would be marked off by the interior lines of the railings, and the lines of the lot on the outside. But the facts do not show such a separation and abandonment of the remainder of the building as to indicate certainly what portion of it had been abandoned. Appellant had the right of ingress and egress to and from the space marked for his office, through any of the doors, and over any part of the room, for himself and his customers. It will not do to say that he could cut into the walls a window on the alley, or a door to the street, for the answer would be that he has not done so. He has an open office in the rented building, with egress from and access to it for himself and all such persons as may have business with him."

In the instant case the renting was of no more permanent character than in the cases reviewed, and the retained use was quite as important.

[8] *Effect of Inconsistent Use of Part of Building.*—The effect of use of part of a building for purposes inconsistent with the homestead, when the balance is used for homestead purposes, has been indicated by the foregoing cases of *Billings v. Matlage*, 36 Tex. Civ. App. 619, 82 S. W. 805, and *Hinzie v. Moody*, 13 Tex. Civ. App. 193, 35 S. W. 832. The leading case is *Forsgard v. Ford*, 87 Tex. 185, 27 S. W. 57, 25 L. R. A. 155. The Supreme Court details the finding of the Court of Civil Appeals as follows:

"The facts as found * * * with reference to the half of lot 4 are * * * that the lot 4 fronted on Bridge street 25 feet, with a two-story house upon it, covering the entire front and running back 85 feet. Under the entire house * * * was a cellar. The first floor above the cellar was divided into three rooms, by running a partition across the house 25 feet from the front, and another partition dividing the front into two rooms fronting on the street. The Court of Civil Appeals finds that the entire lot under the house is exempted as homestead by reason of its use; that the rear room on the first floor and the second story are likewise exempted, but that the two front rooms on the first floor are not exempted—they having been abandoned

as a homestead and rented out for other uses. The question presented is: Can a part of a house, standing on a lot that is homestead, be subjected to forced sale under our Constitution and laws? The house upon lot 5 was a fixture within the meaning of the law, and as such was a part of the land itself. A sale of the land would carry the house and every part of it. * * * The house being attached to and a part of the realty, could not be seized and sold separately from the land. * * * The Constitution * * * (article 16, § 51) defines an urban homestead in this language: "The homestead in a city, town, or village, shall consist of lot or lots not to exceed in value \$5,000 at the time of their designation as a homestead, without reference to the value of any improvements thereon: Provided that the same shall be used for the purposes of a home, or as a place of business to exercise the calling or business of the head of the family: Provided, also, that any temporary renting of the homestead shall not change the character of the same when no other homestead has been acquired." By this provision of the Constitution exemption is placed upon the lots and not upon the improvements. This was emphasized by the further provision that the value of the improvements shall not be included in determining the right. The use of the lot or lots impresses upon the land the homestead character. Whatever is so attached to the land as to become a part of it must partake of the character of the land; and if the land is subject to sale, the improvements upon it will be subject. If, however, the land cannot be sold, neither can the structures built upon it as permanent buildings, adapted to its use and intended by the owner for such purposes. It would not be contended, if this lot were not exempt from forced sale, that the sheriff could seize and sell the two rooms under these executions, nor would it be asserted that a sale of the lot would not carry the whole house. If the house, as a whole, be a part of the realty, as it evidently is, how can it be said that a portion of the house is not a part of the land; and if it be a part of the lot, under what rule of procedure can it be separated from the lot for the purposes of seizure and sale under execution?"

Bente v. Sullivan, 52 Tex. Civ. App. 454, 115 S. W. 350:

It was claimed that a part of the hotel building, 20 by 30 feet, had been abandoned as a part of the business or residence homestead. The court held that this portion of the building could not be separated or partitioned or divided from the main building, it being a part of the same structure.

The conclusions reached are:

1. The property was homestead before the construction of the bank building.
2. The construction of the bank building was not, in itself, an abandonment of the homestead.
3. The upper rear room was never used for a purpose inconsistent with the residence homestead use.
4. The first use of the lower floor of the bank building was for the conduct of a part of the established business, and constituted, with the adjoining houses, the place of the business.
5. The rentings of the lower floor are not to be differentiated in principle from those considered in the cases reviewed, in which the homestead claim was sustained.
6. The owner at all times conducted a part of his business on the lower floor; the use being of a character which, in the cases reviewed, was held to preserve the homestead character.
7. The renting of the upper front room was from month to month, and cannot, under the decisions, be held to have divested the homestead character.

8. If the renting of the upper front room had been of a character which would, if it had been of an entire house, have divested the homestead character, that effect will not follow; it being an inseparable part of the house.

Under the Texas decisions, the property in controversy was properly held exempt as part of the homestead of the bankrupt.

The judgment is affirmed.

SCRUGHAM et al. v. SHOUP et al.

In re THOMPSON.

(Circuit Court of Appeals, Third Circuit. February 13, 1919.)

No. 2321.

APPEAL AND ERROR ⇨329—INTERVENTION IN APPELLATE COURT.

An appellate court will not permit an intervention in an appeal before it, which raises new issues not presented to or passed on by the court below.

Petitions on Behalf of Respondents for Decision in the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

In the matter of Josiah V. Thompson, bankrupt. From an order obtained by George E. Shoup and others, George E. Scrugham and others, trustees, appeal. On petitions of Hugh G. Bourie, executor, and others, and James H. McGraw and others. Order for report by trustees.

Weil & Thorp, of Pittsburgh, Pa. (A. Leo Weil, S. Leo Ruslander, and L. Pearson Scott, all of Pittsburgh, Pa., of counsel), for petitioners.

William S. John, of Morgantown, W. Va., F. W. Downey, of Waynesburg, Pa., and Thomas H. Hudson, of Uniontown, Pa., for respondents.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The facts of this case so far as they relate to matters now under consideration are these:

In January, 1915, the Court of Common Pleas of Fayette County, Commonwealth of Pennsylvania, appointed receivers for the estate of Josiah V. Thompson, an individual. In May, 1917, the Supreme Court of Pennsylvania annulled the action of the Court of Common Pleas and vacated the receivership.

On August 20, 1917, a voluntary petition in bankruptcy was filed against Josiah V. Thompson in the District Court of the United States for the Western District of Pennsylvania, and, in due course, trustees were appointed for the administration of his estate. On the day following the filing of the petition and before the appointment of receivers or trustees, Thompson filed in the bankruptcy court a petition, showing that five of his mortgage creditors had previously reduced their mort-

gages to judgment in courts of the Commonwealth of Pennsylvania and that the coal lands secured thereby, situate in Green and Washington Counties in the said Commonwealth, were then advertised for sale under outstanding writs of execution, and praying that the said mortgage creditors be restrained from proceeding further on their executions. The mortgage creditors named in the petition showed by their several answers that suits had been brought on their mortgages, judgments recovered, and executions issued prior to the proceeding in bankruptcy, and claimed accordingly, that the state courts having acquired jurisdiction of the subject matter could not be ousted of their jurisdiction by the Federal courts under bankruptcy proceedings subsequently instituted.

The bankruptcy court granted a temporary restraining order extending to November, 1917, with leave to proper parties to move for its continuance. Later, the trustees of the bankrupt, having in the meantime been appointed, prayed that the order be continued to enable them to make an investigation of the loss which the estate would sustain if the order were annulled, and further to enable them to consummate a sale of all or a greater part of the coal lands of the estate at a price that would not only discharge the debts of all secured creditors but would enure appreciably to the discharge of debts of unsecured creditors. To this petition the several mortgage creditors demurred, and, on hearing, the petition for a continuance of the restraining order was denied. From this last order the trustees appealed, raising here as below a question of conflict of jurisdiction between State and Federal courts, which briefly stated is: Whether a court of bankruptcy has power to enjoin a state court from proceeding to sale of property secured by a mortgage given by the bankrupt more than four months prior to filing a petition in bankruptcy and reduced to judgment and execution within four months prior to the filing of the petition.

While this appeal was pending and before a decision on the one question involved had been rendered, Hugh G. Bourie, Executor, et al. and James H. McGraw et al. sought to intervene, and by their petitions showed that they are creditors of Josiah V. Thompson, the bankrupt, holding liens against coal lands of the bankrupt situate in the States of Pennsylvania and West Virginia, on which they had instituted actions in courts of those states; that in addition to the restraining order issued by the District Court of the United States for the Western District of Pennsylvania, brought under review by this appeal, the District Court of the United States for the Northern District of West Virginia, an ancillary court of bankruptcy, had entered an order in comity with the order of the District Court of the United States for the Western District of Pennsylvania restraining further proceedings in the state courts of West Virginia against the lands of the bankrupt estate; and—complaining grievously of undue delay on the part of this court in rendering a decision in the case to which they even then were not parties—the petitioners prayed, first, that a prompt decision be made on the question raised on demurrer by the several Pennsylvania creditors holding mortgages against certain of the bank-

rupt's lands in Pennsylvania, and second, that the decision be in accordance with the contention of the Pennsylvania mortgage creditors, the appellees in this appeal.

An examination of these petitions shows that the questions of law they raise—while related perhaps to the questions in this case—are not predicated on a like state of facts and are not the same questions of law. Being different questions newly raised, we are not required to entertain them on this appeal when they have not been presented to nor passed on by the court below, nor are we disposed further to involve this complicated case by injecting new questions on the eve of its decision. But we desire, of course, to secure to these petitioners, if we can, the right to proceed in their cases in their own way, if it can be done in a manner not inconsistent with the rights of the bankrupt estate. Therefore, we are inclined to limit the scope of the restraining order of the District Court of the United States for the Western District of Pennsylvania, still in force and involved in this appeal, so that the District Court of the United States for the Northern District of West Virginia shall no longer feel bound in comity to follow that restraining order with one of its own, but may, if it choose, exclude from the operation of its order so much of the lands of the bankrupt situate in West Virginia as are *not* presently and actively in process of sale or disposition by the trustees in the administration of the bankrupt estate, thereby permitting creditors holding liens upon such lands to proceed thereon in such courts and in such manner as may in law be right. Such action on our part would of course involve no intimation of our opinion for or against the jurisdiction of the bankruptcy court, either original or ancillary, to hold and administer the entire bankrupt estate by the officers and through the courts provided by the bankruptcy law.

With this in view, we recently directed counsel for the trustees to report to this court the tracts of coal land of the bankrupt estate situate in West Virginia, with reference to which the trustees were doing nothing toward their sale or disposition. Instead of making such a report, counsel for the trustees have filed an argument against any action by this court tending to allow lien creditors in West Virginia, acting under authority of the District Court of the United States for the Northern District of West Virginia, to enforce their liens against lands for the sale of which the trustees have no present plans or prospects.

As we shall not obstruct or delay secured creditors in the enforcement of their rights when there is involved in opposition no question of rights of unsecured creditors, it becomes necessary to transform our request for the requisite information into an order. Therefore, as it is quite impossible to discover from the record now before us what lands of the bankrupt estate situate in West Virginia are not embraced in transactions of sale, we request the trustees of the bankrupt and the petitioning creditors of West Virginia to designate by stipulation, if they can, the West Virginia lands thus intended to be released from the original and ancillary restraining orders, and failing such stipulation, we order the trustees of the bankrupt to make to this court on the first

day of the March term next ensuing a report of such coal lands of the bankrupt estate, by appropriate description, as will enable this court to dispose of them according to the premises.

COVINGTON COUNTY, ALA., v. STEVENS.

STEVENS v. COVINGTON COUNTY, ALA.

(Circuit Court of Appeals, Fifth Circuit. March 5, 1919.)

No. 3156.

1. COURTS \Leftrightarrow 363—FOLLOWING STATE LAW—ACTIONS AGAINST COUNTY—PRIOR PRESENTATION OF CLAIM.

A state law requiring claims against a county to be presented to the county board before suit may be maintained thereon is reasonable and valid, and will be recognized and enforced by a federal court unless the county board has taken action which was equivalent to rejection of the claim, and rendered its presentation unnecessary and futile.

2. COUNTIES \Leftrightarrow 197—ACTIONS AGAINST—PRESENTATION OF CLAIM TO COUNTY BOARD.

A claim for attorney's fees, based on an injunction bond given by a county in a suit in which it was defeated, need not be presented to the county board; such fees, if recoverable, being an incident to litigation begun by the county.

3. COUNTIES \Leftrightarrow 201—CLAIMS AGAINST—PRESENTATION.

Presentation to a county board of a claim for a stated sum as "actual and exemplary damages" for an alleged libelous suit does not meet the requirement of a statute requiring an itemized statement.

4. COUNTIES \Leftrightarrow 206(1)—CLAIMS AGAINST—CONCLUSIVENESS OF ALLOWANCE.

Under the law of Alabama a county may maintain a suit to have a claim against it allowed by the county board, which claim has not been substituted by a new character of county obligation, declared invalid, and a decision against it in such suit is an adjudication of the validity of the claim.

5. INJUNCTION \Leftrightarrow 252(6)—LIABILITY ON BOND—ENFORCEMENT IN INJUNCTION SUIT.

Judgment may be given on an injunction bond for damages proved, arising from the issuance in the case of a preliminary injunction, which is dissolved, but attorney's fees and other expenses incident to the suit are not allowable in a federal court.

6. SET-OFF AND COUNTERCLAIM \Leftrightarrow 34(2)—COUNTERCLAIM—LIBEL BASED ON PLAINTIFF'S PLEADINGS.

Damages for libel based upon the allegations of the pleadings in a suit in equity in a federal court cannot be set up by way of counterclaim.

7. COUNTIES \Leftrightarrow 141—LIABILITY FOR TORTS—LIBEL.

A county cannot be held for damages for libel.

Appeal and Cross-Appeal from the District Court of the United States for the Middle District of Alabama; Henry D. Clayton, Judge.

Suit in equity by Covington County, Ala., against W. L. Stevens. From the decree, both parties appeal. Affirmed in part, and reversed in part.

November 10, 1914, W. L. Stevens made a contract with the board of revenue of Covington county, Ala., by which he was to be employed as architect

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

for a new courthouse. He agreed to prepare all general and detail drawings and specifications and do all things necessary and usual in the planning and supervision of construction. His services were to begin at once, and he was to complete drawings and specifications so that the contract might be awarded not later than November 30, 1914. He was to attend to all advertising, to assist in opening bids and awarding the contract, to supervise construction, and to keep, at his expense, on the building a competent superintendent at all important stages of construction. The contract provided: "For the faithful and proper performance of this contract, the party of the second part shall pay to the party of the first part a commission of 5 per cent. of the contract price of the work, three-fifths of which shall be paid at the time of letting the contract, by warrants on the county treasurer of Covington county, Ala., bearing interest at the rate of 6 per cent. per annum, and the balance of two-fifths of which amount as the work progresses."

On November 30th, the board met to receive bids, but did not award the contract. On the 1st day of December the time was extended until the 5th. On the 5th, E. R. Merrill filed a bill of complaint in the chancery court against the board and Stevens, praying that they be restrained from accepting any bids on December 5th. A temporary injunction was granted. After service of the writ, the board, on the 24th of December, entered into a contract with the Falls City Construction Company.

On the 1st of January, Merrill amended his bill, setting up the facts with reference to the violation of the injunction, making the Falls City Construction Company a party, and praying that it be restrained from further proceeding under its contract. The injunction, granted in accordance with the prayer, having been disobeyed, proceedings in contempt were begun, and, the matter reaching the Supreme Court of Alabama, the court issuing the injunction was held to have been without jurisdiction.

On the 1st of January, 1915, the terms of office of the members of the board of revenue expired, and a new board was inducted into office. Prior to the expiration of the term of the old board, a treasurer's warrant was issued to Stevens for an amount equal to 3 per cent. of \$139,500, this being the amount of the maximum bid of the Little-Cleckler Construction Company. This warrant had a marginal note to the effect that it was payable in February, 1916. The warrant drew interest at 6 per cent. The chairman of the board of revenue refusing to sign the warrant, it was signed by the other members of the board. The new board passed resolutions declaring the contract with Stevens and the contract with the Falls City Construction Company void, and took steps to let a new contract.

On June 21, 1915, the county instituted in the equity court of the Southeastern chancery division of Alabama a suit against the Falls City Construction Company, W. L. Stevens, W. H. Johnson, and M. C. Gantt. Gantt was alleged to be a resident of the county of Covington, Ala. The bill recited facts heretofore set out, and made further allegations to the effect that Stevens was, at the time he became employed by the county and afterwards, working to secure the contract for the Falls City Construction Company. Allegations were also made to the effect that the plans and specifications were not completed in time; that there were conflicting provisions in the specifications; that the terms of the specifications were indefinite; that no person could safely bid, except by adding amounts which might be required from one construction of the plans and specifications as distinguished from another, the interpretation being in Stevens; that the plans were inadequately advertised; that there was an intentional suppression of the fact that the building was to be constructed; that no sufficient time was given for contractors to figure upon the building; that Stevens sent out to prospective bidders what purported to be bids by contractors upon certain parts of the work, the amounts being excessive; that he furnished to certain bidders sheets, showing that the building was to be of a steel frame, the bid of the Falls City Construction Company being based upon concrete frame; and making other allegations questioning the good faith and proper performance of his duty by Stevens. There are also allegations to the effect that the contract was not let to the lowest bidder:

that the plans were defective and insufficient; that the Falls City Construction Company had taken forcible possession of the lots upon which the building was to be constructed, and refused to deliver them to the board. There were prayers that the defendants be required to restore the lots, and that they be restrained from interfering with the possession and control of them by complainants; that they be restrained from proceeding to build the courthouse, or in any manner enforcing or attempting to enforce the contract; as against W. L. Stevens, that he be restrained from proceeding with his application for mandamus in the circuit court to compel the president of the board to sign the warrant, and praying for the cancellation of the contract between Stevens and the board. Upon execution of a bond for \$10,000, injunctions as prayed for were issued. The injunction as to the Falls City Construction Company was so modified as not to require surrender of the lots.

Upon petition of Falls City Company, Johnson, and Stevens, the case was removed to the United States District Court. Motions to dismiss the suit were filed by the Falls City Company and by Stevens on July 19, 1915.

On August 15, 1915, an agreement of settlement was made, signed by attorneys for all the parties. For Stevens, the agreement was "executed by his attorneys of record, Parks & Prestwood." The agreement saved all claims and rights of Stevens, except "Stevens waives damages on injunction bonds." On September 1st, Stevens, by other attorneys, filed a "motion and objection," objecting to the dismissal of the suit pursuant to the agreement, and denying that he had executed or authorized the execution of the agreement.

On October 23, 1915, Stevens filed an answer and counterclaim. The counterclaim alleged that on the 1st of September, 1915, he filed with the board of revenue of Covington county a petition, and claimed that he had earned under this contract 5 per cent. commission on \$144,500, three-fourths of which was to be paid at the time of the letting of the contract by warrants on the county treasurer, bearing interest at 6 per cent., and the remainder during the period of the erection of the courthouse, the total sum amounting to \$7,225; also a claim for damages sustained as the result of the county's having filed a bill in the chancery court against him and others, which was removed to the United States District Court, and wherein he was charged with bad faith and fraudulent conduct under his employment, the amount of this actual and exemplary damages being \$22,775, the total amount of his claim being \$30,000; that he alleged that he had been allowed the sum of \$4,198.14 for part of the services rendered, and that the board had delivered to him a 6 per cent. interest-bearing warrant, maturing February 1, 1916, signed by four members of the board, but not by W. S. Simmons, the president; and that, on this account, the warrant had been of no value to him, and that he presents the same to the president again, with the request that it be signed. The counterclaim alleges that the allegations and prayers of this petition to the board were true; that it had been regularly forwarded to the board of revenue by registered mail; that it had been sworn to by him, and that all the formalities of the law had been complied with; and that the board, although having had ample time to determine what action should be taken, failed and refused to take any action whatever. He alleged in his counterclaim the truth of the statements of this petition to the board, and prayed for judgment for the amounts claimed, \$7,225 and \$22,750. He further alleged that, since the filing of the suit, Covington county had compromised with the Falls City Construction Company by paying them a sum of money to be relieved from the contract; that the company had surrendered possession of the lot upon which the courthouse was to be constructed; that a new contract had been let for the construction of the courthouse at \$75,000, and that the county would issue warrants evidencing indebtedness for this amount, payable in 15 years; that the county was creating other indebtedness, the result of which would be to postpone the payment of the debt due him—and prayed that an injunction issue, restraining the board from entering into any contract, or issuing warrants, for the construction of a courthouse, and prayed for a temporary restraining order pending trial. In the alternative to a judgment for the \$7,225, he prays that, if the \$4,198.14 be held not due, plaintiff county, through the

president of its board of revenue, be required to recognize and sign said warrant, and that the treasurer be required to register the same.

On November 9th, Stevens filed a petition, which was allowed, that he be permitted to withdraw his plea to the jurisdiction and motion to dismiss filed July 9th. On November 12th, plaintiff filed a motion to dismiss its suit in accordance with the agreement of August 13, 1915. The court denied defendant Stevens' motion for injunction pendente lite, and dissolved a temporary restraining order theretofore granted. Plaintiff's motion to dismiss its suit was denied.

The trial judge, upon hearing of the case, acquitted the board of revenue and Stevens of any collusion, corruption, or fraud. Judgment was entered for Stevens for the amount of his warrant, with interest at 6 per cent. from December 5, 1914, and for \$3,026.86, balance due on contract on the bid of \$144,500. The claim for damages for libel and upon the injunction bond was disallowed. Appeal by county, and cross-appeal by Stevens.

D. M. Powell, of Greenville, Ala. (Powell, Albritton & Albritton, of Andalusia, Ala., on the brief), for appellant and cross-appellee.

G. W. L. Smith, of Brewton, Ala., and R. E. Milling, of New Orleans, La. (Foster, Milling, Saal & Milling, of New Orleans, La., on the brief), for appellee and cross-appellant.

Before WALKER and BATT'S, Circuit Judges, and EVANS, District Judge.

BATT'S, Circuit judge (after stating the facts as above). *Dismissal.*—The bill in this cause was filed June 21, 1915; the petition to remove was filed July 5th, and on July 19th, the defendant Stevens filed a motion to dismiss the bill for several grounds there indicated. On August 13th, an agreement was entered into, signed by all the parties, the name of Stevens being signed by Parks & Prestwood, as attorneys of record, by which it was agreed that the Falls City Construction Company should receive from the county \$10,500 in compromise and settlement of its claim and cancellation of its contract for the construction of the courthouse and surrender the lots. It was agreed that the bills should be dismissed by the county, and it was stipulated that the rights of Stevens with reference to his suit to compel the chairman to sign his warrant, and any claims which he might have against the county, would not be affected. It was, however, agreed that "Stevens waives damages on injunction bonds." Shortly after the execution of this agreement, Stevens undertook to repudiate it, stating that Park & Prestwood had no authority to agree to the dismissal of the suit. At the time of the making of this agreement, the motion above referred to, filed by Stevens on July 19, 1915, asking the court to dismiss the case, was pending. This motion had been signed by Parks and by G. W. L. Smith, who has throughout been the attorney for Stevens. Parks & Prestwood had also represented Stevens in the Merrill suit, and in the mandamus proceeding pending in the state court. The evidence indicates that they were representing Stevens in this case. Parks & Prestwood, as attorneys in the case, had a right to secure the dismissal for which Stevens was at the time praying by a motion on file. It may be, however, they were without authority to bind Stevens to a waiver of damages on injunction bonds, and the ruling of the trial judge is sustained.

[1] *Necessity for Filing Account with the Board of Revenue.*—Complainant contends, with reference to the several items entering into the counterclaim of Stevens, that they cannot be entertained by the court, because not filed with the board of revenue in the manner and under the conditions required by the statute. The contention of the defendant is that these provisions of the Alabama law which require the filing of claims with the county board may regulate the jurisdiction of the state courts, but cannot affect the right of a person having a claim against the county to maintain an action in the federal court. A number of authorities are adduced which are assumed to sustain this proposition. It is, of course, not within the power of the Legislature of any state to deprive the courts of the United States of the powers and jurisdiction which the Constitution and the laws have given them. On the other hand, a state may determine the conditions and circumstances under which its counties may incur liabilities. The counties are administrative units of the state, receive all of their powers from the state, and can incur no liabilities except under the terms and conditions imposed by the laws of the state. County boards are created to administer the financial affairs of the counties; and law have been passed in Alabama, as in most of the states, requiring that claims against the county be presented to such boards, and those bodies given an opportunity of considering and determining the validity of and providing for the payment of them, before suit. Any law which undertakes to limit subsequent action upon claims of this character to a state court would, of course, be in conflict with the rights and powers of the federal courts, and would not be sustained. But the usual, reasonable, and altogether proper regulations, requiring that a claimant against the county should give the county an opportunity of discharging an indebtedness before subjecting the county to the trouble and expense of litigation, will be sustained by the federal courts, as they should be by all courts. Cases which appear to be in conflict with this proposition are those in which, by the issuance of bonds, or other evidences of indebtedness, the county boards have already definitely determined the liability of the county.

The proper application of these principles will not, however, require that futile, foolish things be done. The county is in no position to contend that anything more than the purposes of the law should be accomplished. If any action shall have been taken by the county board which will be equivalent to rejection of the claim, or which make clear that the filing of the claim would be futile, the claimant will be excused from following the forms of the law.

The claims asserted in the counterclaim are as follows:

(1) A claim for 5 per cent. on the amount of the accepted bid for the construction of the courthouse, amounting to \$7,225. It is alleged, with reference to this claim, that a warrant for \$4,198.14 had already been issued, and that, if its legality be established, the \$7,225 is to be correspondingly reduced.

(2) A claim for \$1,998 for attorney's fees, based upon the injunction bond given herein.

(3) A claim for \$22,775 for damages for libel, based upon allegations in the pleadings in this case.

With reference to the first of these claims, the warrant for \$4,198.14 was based upon the action of the board of revenue. No further action by that board, or any other board, was necessary before taking such action as might be required to enforce the claim. The complaint sought to declare illegal the contract on which the warrant was based, and sought to restrain the prosecution by Stevens of a suit to compel the chairman of the board to sign the warrant. This suit of the county was necessarily the result of action by the county board, and would have rendered unnecessary any presentation of the claim, even if it had not already been passed upon.

As to the counterclaim for the balance, there was also a lack of necessity for filing a claim with the county board. It had, prior to that time, passed a resolution to the effect that the contract of Stevens, under which this claim was made, was void. It would not consist with ordinary common sense to require that, under such circumstances, a person should formally present a claim based upon the contract. The contract provided for the payment of this balance as the work progressed; but the contract under which he made the claim, and the contract with the construction company, by which the amount of the claim and the time of payment were to be determined, have both been repudiated by the county. The county by this action rendered itself liable to suit for breach of the contract, subject to such defenses as may be legally made.

[2] With reference to the claim for attorney's fees, the claim is based upon an injunction bond filed in this case. It is an incident to litigation which has been voluntarily entered into by the county. When it chooses to litigate, it must carry all the necessary burdens and risks of litigation. If damages be established against the principal on an injunction bond in an injunction suit, the judgment will as naturally follow as judgment for costs against a losing litigant. There was no necessity for filing the claim with the board.

[3] The claim for damages for libel, based upon the allegations in the bill of complaint in this case was not filed until September, 1916. It was not acted upon by the board of revenue, and 90 days had not elapsed after the mailing of the claim when the counterclaim was filed in October. An amendment to the counterclaim, filed after the expiration of 90 days from the date of the receipt of the claim by the clerk of the county, and alleging that fact, would appear to have the same effect as if the claim had been then for the first time filed as a counterclaim. The claim, however, as presented to the board of revenue, consisting of a single amount for "actual and exemplary damages," can hardly be said to meet the requirement of the statute for an itemized statement.

[4] *The Claim and Warrant for \$4,198.14.*—One of the items referred to in defendant's counterclaim is \$4,198.14, allowed by the board of revenue December 5, 1914, as 3 per cent. on the gross amount of the Little-Cleckler bid. A warrant was prepared, which was signed by all of the members of the board except the president, who refused to sign.

The resolution under which this warrant was issued provided for payment in February, 1916, and a notation on the warrant showed it payable at that time. The defendant set up that, by reason of the refusal of the president to sign the warrant, he had been unable to register the warrant or use it. He prayed for judgment on the warrant, that the county, through the president of its board of revenue, be compelled to sign the warrant, and that the treasurer of the county be required to register it. He prayed, in the alternative, that he have judgment for the \$7,225, which was 5 per cent. on the bid of the Falls City Company as finally accepted. To the demand for judgment on the warrant for \$4,198.14, the plaintiff pleaded that there was no allegation that it was due, and the fact that it was shown not to be due at the time the counterclaim was filed. The obligation, if it be one, matured before the trial, and the amendment filed by defendant May 15, 1917, in a statement of the claim included the item:

"Due by county warrants bearing 6 per cent. interest from December 5, 1914, \$4,198.14."

This statement would doubtless be a sufficient allegation that the warrant was due. But the warrant is not executed as required by law, and cannot itself be the basis of a suit. Local Acts of Ala. 1911, pp. 231, 232.

The order of the board of revenue approving the claim is open in the state court to the objection that an allowed claim cannot be sued upon. Suit to require the president to sign the warrant, or to compel the treasurer to register it, might be maintained; but the allowance itself has the force of a judgment, so long as it remains without attack in the proper way.

In the present case, the judgment asked for against the president or the treasurer cannot be given, because neither is a party. It seems however, that in a suit of this character, in the federal court, judgment can be given for the amount of the claim, notwithstanding it has already been allowed; judgment being an essential prerequisite to mandamus or other executory process. *County of Greene v. Daniel*, 102 U. S. 187, 26 L. Ed. 99. Again, the answer of defendant to plaintiff's action, wherein it undertakes to nullify the effect of the allowance and the warrant, presents an issue, the determination of which will have substantially the same effect as a suit upon the warrant. If the county fails to nullify the order and warrant by a failure to sustain its charges of fraud and nonperformance of contract, the judgment will necessarily carry the inference of the validity of the claim. If defendant should undertake, by mandamus in the state courts, to enforce his rights, the validity of his claim would be held a thing adjudicated.

That the county may institute suit to cancel an allowed claim, even where a warrant has been issued, is thoroughly established; and if, in this case, the allegations of its bill are sustained by the evidence, either with reference to fraud or to failure of consideration, judgment canceling the warrant and nullifying the claim would have to be given.

The case of *Board of Revenue of Covington County v. Merrill*, 193 Ala. 521, 68 South. 971, arising out of the facts involved in this case

was disposed of by a most able and instructive opinion. It calls attention to the fact that it has been declared by the Alabama courts that the board of revenue is the repository of the authority and jurisdiction, whether legislative, judicial, or executive, committed to the county, and that this body is entitled "a court of record." Authorities are cited, and the conclusion reached that, in the several matters committed to them, the county board exercises a discretion that cannot be exercised for them, and that, in the performance of such duties, they exercise a function that is quasi legislative, and that their acts in this behalf, when free from fraud, corruption, or unfair dealing, cannot be controlled or reviewed by any other court. From these general principles, and from the authorities in the case cited and universally applied, it must be concluded that, in determining whether or not the courthouse should be built, and upon what lot it should be built, and what the price should be (within the limit of the taxing power to discharge the debt), and in the employment of an architect, and in fixing his compensation, and in the manner of letting the bid, and in determining to whom the contract should be let, the board of revenue exercises a discretion which can in no manner be controlled, and that their action with reference to these matters is subject to judicial correction only when it is charged and established that there was fraud and collusion, participated in by the governing majority of the board, in the exercise of the functions committed to them. No court, then, could set aside the contract entered into between the board of revenue and Stevens, except upon the ground of fraud.

The case before us, however, presents not only this question, but the additional question as to whether, under his contract, Stevens had so performed his contract as to be entitled to have paid to him the sum allowed. A determination requires consideration of the character of the duties discharged by the county commissioners' court when claims are presented for payment. It is entirely clear that, if claims are refused, suit may be instituted upon them in the courts; and the proposition has never been made that, in addition to establishing the validity of the claims, it must also be established that the county commissioners' court, in rejecting them, have been guilty of fraudulent conduct. If it should be insisted that, in passing upon these claims, the county commissioners are really exercising judicial functions, and if the judgment which they reach is a judgment reviewable only for fraud, this additional allegation would have to be made and proved before any claim which one had against the county could be established in the ordinary courts. The conclusion is not one that could be accepted. If the court is not exercising judicial functions when it rejects a claim, can it be said that it is exercising judicial functions when it approves a claim? The character of its act must be held the same in either event. When the action of the county commissioners in the approval of the claim has further ripened into some character of evidence of indebtedness, a somewhat different status may be attained; and when such evidences of indebtedness shall have acquired the status of negotiable instruments, doubtless different rules would be applicable. But, so long as the claims are still unpaid and not substituted by a new character

of county obligation, there would appear to be no reason why the county could not have the same access to a court to establish the invalidity of the alleged claim as a claimant whose claim had been disallowed, to establish its validity. The only difference would doubtless be that allowance by the county board would be prima facie evidence of the validity of the claim.

Making direct application of these principles to the instant claim: If fraud in making the contract be shown, no question could arise about the right of the county to attack the board's allowance of the claim, and have the warrant declared illegal. The county may also establish, even if the contract was valid, that it was not performed, and that the resolution adopted by the board of revenue was improvidently and improperly passed on account of that fact. The views which are here expressed are amply sustained by the Alabama authorities.

Commissioners' Court v. Moore, 53 Ala. 27:

"In the exercise of this authority, the act of the court is not judicial, but executive. If it audits and allows a claim not properly and legally chargeable on the county, or which it has not authority to allow, it exceeds the power with which it is intrusted, and as the act of a corporation which is ultra vires is void, so is the action of the court. Or if, upon false evidence, it should be lured into the allowance of an unjust claim, or should allow a claim which was wanting in consideration, or the consideration of which failed, the county would not be estopped from defending against it. The audit and allowance has no more force and effect than a settlement between individuals. It is a simple admission by the court of county commissioners that there is a valid subsisting debt due and owing by the county. The admission prima facie fixes a liability on the county. So, if a settlement is had between individuals, and the one makes his note or bond payable to another for an ascertained balance, a prima facie debt is established. In each case the burden of impeachment rests on him who questions the prima facie evidence. If, after the audit and allowance, a warrant is, pursuant to the statute, drawn on the county treasurer, it is a mere authority to him to pay. It is nothing more really than an order on the county itself, the debtor. Dillon, Munic. Cor. §§ 406-412. When such warrants have been illegally issued—issued without authority, or when any just defense exists against the claim which they evidence—the county may maintain a bill in equity for their cancellation. Id. § 412. And this we incline to regard as the most appropriate remedy. When the claim has been audited and allowed by the commissioners' court, it ceases to be the subject of a suit in the ordinary modes against the county. If the commissioners' court fail to levy and collect a tax for the payment of such claim, they fail to exercise a ministerial or executive power, with which they are clothed, and in the exercise of which an individual has a right and interest, and mandamus lies to compel its exercise. Marshall County v. Jackson County, 36 Ala. 613. The answer to the application for such writ could set up the invalidity of the claim audited and allowed. If the funds are in the treasury of the county to pay the same, and the county treasurer should be proceeded against for a failure to pay on demand, it would be his duty to set up in defense the invalidity of the claim."

The Claim for \$7,225.—The contract of Stevens with the county provided for payment to him for the services therein set forth of 5 per cent. of the cost of the building. Under the terms of the contract, a part of this was payable at the time the contract for the construction of the building was let; and the \$4,198.14, already discussed, was the three-fifths of the total amount held payable at that time. The balance of the compensation of the architect was to have been paid as the work

progressed. While the \$4,198.14 was based upon the bid of the Little-Cleckler Company, the total is based upon the bid of the Falls City Construction Company finally accepted. The work of the Falls City Company has been abandoned, but this fact cannot affect the claim of Stevens, if it be otherwise meritorious; and the circumstance that the abandonment was the result of the action of the county, and also the fact that the contract with Stevens was repudiated by the county, gives Stevens a right of action for a breach of his contract. If, however, Stevens can recover at all, it is manifest that, under no circumstances, can the total amount claimed be recovered by him, and that the judgment of the trial court for the total is erroneous. Provision is made in the contract for certain expenses to be met by Stevens, and a recovery of damages for a breach of the contract would necessarily take these expenses into account in a determination of the amount of damages. The observations already made with reference to the \$4,198.14 apply to the balance of the claim of \$7,225, except that this balance, not having at any time been approved by the board of revenue, must be established by a preponderance of the evidence in favor of the defendant. While the county must show that the \$4,198.14 arose out of the contract that was fraudulently made, or that the contract was not carried out by Stevens, the ordinary burdens of a plaintiff as to the balance of the amount must be upon the defendant.

[5] *The Claim on the Injunction Bond.*—Claim for damages on the injunction bond cannot be set up as a counterclaim. It does not arise out of the transaction which is the subject-matter of the suit, but arises out of the suit itself. Nor is it an independent cause of action, upon which an equity suit could be based. But the injunction bond was given in this case, and is an incident of the case, and in this case judgment may be given upon it, if it be shown that damages have accrued. There are obligees of the bond other than defendant the Falls City Construction Company, W. H. Stevens, and W. H. Johnson. There could be no recovery on the bond without these being parties, except for the fact that, having been parties, any claim either of them might have had has been settled by the agreement as the result of which they were dismissed from the suit. As to the surety, the principles of *Pease v. Rathbun, Jones Eng. Co.*, 243 U. S. 273, 37 Sup. Ct. 283, 61 L. Ed. 715, Ann. Cas. 1918C, 1147, would seem to apply. The defendant asserts that the allegations with reference to the claim on the injunction bond are not denied. Issue is formally joined. But in any event, the items of damages, consisting of attorney's fees and other items of expenses incident to the litigation of this case, are not such as are allowable in a federal court. The judgment of the court as to this claim should be affirmed.

[6] *Claim for Damages for Libel.*—Defendant's counterclaim for damages for libel is based upon the allegations of the pleadings in this case. It is not a counterclaim arising out of the transaction which is the subject-matter of the suit. The suit is a matter distinct from the cause of action upon which it is based.

Suit for damages for libel may be predicated upon pleadings. In order, however, to sustain such a case, it would have to appear from the

pleadings of the plaintiff that the allegations complained of were maliciously made, were without foundation in fact, and that the pleader had knowledge of the fact that the allegations were lacking in truth. The evidence in this case is entirely insufficient to maintain the counterclaim. The statements of fact in the pleadings complained of are apparently, as to most matters, true. Where the evidence does not make it appear that they are true, there is nothing to indicate that the pleader had knowledge of the lack of truth. The conclusions of fact, which constitute a large part of the pleadings, are not without warrant; and, if they were, there is nothing to indicate that the conclusions were not the bona fide conclusions of the pleader. The evidence in this case would not have warranted a judgment for damages.

[7] This claim has been discussed upon the assumption that a good cause of action could be stated against a county for libel. A county is a governmental subdivision of the state, with very limited and strictly defined powers. No county has been given the authority to commit a libel, nor given the power to authorize any one to commit a libel for it. It is a character of tort for which a county cannot be held.

The judgment of the trial judge with reference to the claim for damages for libel may be sustained upon either of these grounds: (1) There was no proper presentation of the claim to the board of revenue. (2) It was not a matter upon which a counterclaim could be predicated. (3) The evidence would not, in any event, have sustained a judgment. (4) A county cannot be held for damages for libel.

Provisions of the Decree as to Payment, etc.—The decree gives directions to the county board of revenue and other officers of the county as to the auditing, allowance, registration, and payment of the claim (paragraphs 4, 5, and 6). Where judgment has been given against a county, the court may, in the case in which it is rendered, make such executory orders and decrees as may be necessary to make the judgment effective; but, if the execution of the judgment requires orders to or against officers of the county, the individuals who are these officers must be brought into court. None of the officers of Covington county has been made a party to this suit, and the judgment as to each of them is ineffective and erroneous.

The judgment is affirmed as to the claim for damages for libel and upon the injunction bond. The judgment is in other respects reversed, and the cause is remanded for another trial upon the issues presented by the pleadings with reference to the contract of the county with Stevens, and his claims arising out of the contract.

In part affirmed, and reversed in part.

AGENCY OF CANADIAN CAR & FOUNDRY CO., Limited, v.
PENNSYLVANIA IRON WORKS CO. (two cases.)

(Circuit Court of Appeals, Third Circuit. February 25, 1919.)

Nos. 2361, 2362.

1. REPLEVIN ⇨70—ISSUES—BURDEN OF PROOF.

A plea of property by both parties in replevin puts in issue plaintiff's interest, and imposes upon it the burden of proving its right to the immediate and exclusive possession of all the property.

2. BAILMENT ⇨7—CONTRACT TO MANUFACTURE GOODS—CONSTRUCTION—RIGHT OF POSSESSION.

A contract under which plaintiff delivered certain parts of steel shells to defendant, which was to furnish the necessary work and materials for their completion, construed, and *held* to give defendant a special property in the shells, upon which it had expended work and materials, and the right to their possession until inspected and accepted by plaintiff.

3. REPLEVIN ⇨96—SUFFICIENCY OF VERDICT

A verdict for defendant in replevin for a sum of money only, where the goods were taken by plaintiff on the writ, must be construed as for the value of the goods, where there was no evidence of damages for caption and detention, and is equally good at common law and under Act Pa. April 19, 1901 (P. L. 90) § 7.

4. REPLEVIN ⇨71(1)—EVIDENCE—VALUE OF DEFENDANT'S SPECIAL PROPERTY INTEREST.

In replevin for unfinished artillery shells, delivered by plaintiff to defendant under contract for completion, upon which defendant had expended labor and material, but which were unfinished and without market value when plaintiff broke the contract and replevied them, defendant may show the value of its interest by proving the cost of its labor and material, and in addition what would be a reasonable and ordinary profit thereon.

5. ESTOPPEL ⇨63—CLAIM OF PROPERTY BY DEFENDANT—LIEN.

A manufacturer, working on material furnished by plaintiff when such material was replevied, *held* not estopped to assert a property right therein by the fact that it had previously claimed a lien.

6. REPLEVIN ⇨72—LIEN OF DEFENDANT.

Evidence *held* not to sustain the claim of a defendant in replevin to a lien on the property replevied.

7. WORDS AND PHRASES—"VALUE."

"Value" of goods is not what they cost their owner; it is what they are worth to him or to others.

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

In Error to the District Court of the United States for the Eastern District of Pennsylvania; W. H. Seward Thompson, Judge.

Two actions at law by the Agency of Canadian Car & Foundry Company, Limited, against the Pennsylvania Iron Works Company. From the judgments, plaintiff brings error. First judgment affirmed, and second reversed.

Ralph B. Evans, Robert J. Doads, and Edwin W. Smith, all of Pittsburgh, Pa. (Reed, Smith, Shaw & Beal, of Pittsburgh, Pa., and

Prichard, Saul, Bayard & Evans, of Philadelphia, Pa., of counsel), for plaintiff in error.

George Wharton Pepper, of Philadelphia, Pa. (Henry, Pepper, Bodine & Pepper, of Philadelphia, Pa., of counsel), for defendant in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and THOMSON, District Judge.

WOOLLEY, Circuit Judge. This controversy arose out of war contracts. Canadian Car & Foundry Company, Limited, a corporation of Canada, had a contract with the Imperial Russian government for the manufacture of 2,500,000 shrapnel shells for three-inch quick-firing field guns. Finding it impracticable to turn out shells in this number from its works in Canada, this corporation came to the United States and entered into many subcontracts for finishing shells with concerns having manufacturing plants of diverse kinds. One of these was the Pennsylvania Iron Works Company, a corporation of Pennsylvania, the defendant in error.

This contract between these parties bore date April 20, 1915, and for convenience described Canadian Car & Foundry Company, Limited, as "the Purchaser" and the Pennsylvania Iron Works Company as "the Manufacturer." Pursuant to its terms, stated very generally, the Purchaser undertook to supply the Manufacturer 100,000 shrapnel shell forgings in the rough, together with certain shell parts, and the Manufacturer undertook to supply the remaining parts, such as resin, red lead, asphaltum and lacquer, and to assemble, machine and finish the whole according to patterns and designs having an especial regard to precision in work and accuracy of measurements prescribed by rigid specifications. The work was to be done from templates and be measured by master gauges to be supplied by the Purchaser, conforming with patterns and gauges furnished the Purchaser by the Russian Government; and the work was to be accepted and paid for only after it had passed inspection by both the Purchaser and the Russian Government. The Manufacturer undertook to make deliveries monthly and the Purchaser on acceptance to make payment at the rate of \$1.80 a shell.

After entering into the contract, the Manufacturer, which had been previously engaged in the manufacture of steam and gasoline engines and hydraulic machinery, put its plant in suitable condition for the manufacture of shells, and the Purchaser delivered to the Manufacturer large quantities of shell parts.

The work was new to both parties. Disputes arose almost at once, with consequent delays on the part of both in the performance of their respective undertakings, resulting, after the delivery of a small number of completed shells, in a breach of the contract, which each party charged to the other.

As a last phase of these disputes, the Manufacturer in July, 1916, regarded the contract as terminated, stopped work, advertised the shells for sale, and notified the Purchaser of its action.

Subsequently to the making of the contract and pending its perform-

ance, the Purchaser disposed of the shells by bill of sale and assigned the contract to one of its subsidiaries doing business in the United States, known as "Agency of Canadian Car & Foundry Company, Limited," a corporation of New York. This concern, on being informed of the proposed sale and claiming title to the shells under the bill of sale and assignment from the Canadian corporation, brought these two actions of replevin, the first being for shells on which the Manufacturer had done some work or had supplied some material, and the second being for shells on which it had done no work and toward whose completion it had supplied no material. The value of the shells replevied was set at \$77,015.81. Agency of Canadian Car & Foundry Company, Limited, the plaintiff in the two actions (to which for convenience we shall also refer as the Purchaser), gave the requisite replevin bonds. The Manufacturer, in order to hold the shells, arranged to give counter bonds, when, owing to exigencies growing out of the war, it was dissuaded from this action by the Purchaser, resulting in a stipulation to which we shall refer presently. The marshal then delivered the shells to the Purchaser and the Purchaser turned them over to another manufacturing concern for completion, after which they disappeared from the case.

The two cases of replevin were tried together, being similar in most aspects though radically different in one. We shall therefore review them together in this opinion, but shall dispose of them separately.

Number 2361.

[1] The pleadings in this case are elaborate, but as many of the issues have been decided by the verdict, it will be sufficient for the purpose of this review to state, that the Purchaser, the plaintiff, pleaded general property in the shells and a right of possession because of the termination of the contract on a breach which it charged to the Manufacturer. The Manufacturer, the defendant, traversed this allegation, made a counter charge of breach by the Purchaser, and pleaded special property in itself. Property thus pleaded by both parties in replevin put in issue the Purchaser's interest in the shells and imposed on it as plaintiff the burden of proving its right to the immediate and exclusive possession of the whole of them. *McIlvaine's Adm'r v. Holland*, 5 Har. (Del.) 226, 227; *Pritchard's Adm'r v. Culver*, 2 Har. (Del.) 129; *Hazzard v. Burton*, 4 Har. (Del.) 62.

[2] At the trial, the Purchaser proved in support of its claim of title and right of possession that the shells in the rough and certain of their parts were originally its property, that they were delivered to the Manufacturer only to be machined, assembled, and finished, and that, without regard to any special property which the Manufacturer may at one time have acquired in them under the contract, that property had become wholly lost and had passed from the manufacturer to the Purchaser upon the termination of the contract, by force of clause 27, which provided:

"27. Upon the completion or termination of this agreement, by cancellation or otherwise, as the case may be, the Manufacturer shall forthwith deliver, to the order of the Purchaser, all steel shell forgings, component parts or oth-

er material, the property of the Purchaser, which may then remain in the possession of the Manufacturer."

This clause the Purchaser contends is the only clause in the contract which related to the title or the right of possession of the shells on the termination of the agreement by whatever cause, and, as the contract has been terminated by the breach of one party or the other, the Purchaser contends further that its right of possession of the shells, in which admittedly it had a general property, was established. Obviously, this position would be sound were clause 27 the only clause in the contract governing the right of possession. But the contract contained other clauses which under certain conditions gave a special property in the shells to the Manufacturer and awarded it temporarily an absolute right of possession. With reference to the Manufacturer's property the contract provided as follows:

"1. That in this agreement that word 'work' shall, except where by the context another meaning is clearly indicated, mean the whole of the material, labor and other things required to be supplied, done, finished and performed by the Manufacturer under this agreement."

On all shells replevied by this writ, the defendant had done some "work" by performing some labor and supplying some material. In addition to its absolute property in the material which it had itself supplied, as resin, red lead, etc., the contract gave the Manufacturer a special property in the shells (notwithstanding the Purchaser's general property) the instant it began "work" on them. The *character* of this special property was determined by the "work" done on the shells, as defined by clause 1, and its *duration* was determined by two other clauses of the contract. The first is:

"5. That all work performed by the Manufacturer hereunder, and accepted by or on behalf of the Purchaser, shall be deemed to be the property of, and shall be delivered to the order of, the Purchaser."

As the shells in dispute had not been accepted by or on behalf of the Purchaser, this clause is not pertinent to the controversy except for its implication that the "work" performed by the Manufacturer on the shells, that is, its special property in them, was intended to continue until they had been accepted.

The other clause reads as follows:

"17. When the inspectors find the work completed in accordance with the specifications, they shall issue certificates in writing accepting the same; and it is agreed that the *property in the work shall not pass from the Manufacturer to the Purchaser until after the same shall have been inspected and accepted by the inspectors*, notwithstanding that there may be any delay in making the inspections, or that any part or the whole of the purchase price of the work shall have been already paid to the Manufacturer."

From these several clauses of the contract it appears that each party had a property in the shells, one a general and the other a special property. They were not joint properties, where each drew to itself the same right of possession, thereby precluding an action of replevin by one joint owner against the other. *Pritchard's Adm'r v. Culver*, 2 Har. (Del.) 129, 130; *Fell v. Taylor*, 2 Pennewill (Del.) 372, 45 Atl. 716. They were several properties of different kinds, running for dif-

ferent periods, which drew to the holder of one or the other the right of possession only according to the terms of the contract by which the properties were established and defined. There being two properties in the shells, not inconsistent one with the other because the two owners never had a right of possession at the same time, we think the learned trial judge committed no error in construing the contract to mean that the parties, fully recognizing that the shells had been and were again to come into the possession of the Purchaser by reason of its general property in them, intended, nevertheless, that the Manufacturer by reason of its special "property" should hold the shells exclusively in its possession as security for its investment of labor and material until they were inspected and accepted. Nor do we think the trial judge erred in holding that clause 17 of the contract, which preserved to the manufacturer a special property in the shells on which it had done work until inspection and acceptance, is not inconsistent with clause 27, which provided for the delivery by the Manufacturer of "the property of the Purchaser" on the termination of the contract. Manifestly, "the property of the Purchaser" as expressed in the latter clause meant those shells on which the Manufacturer had done no work, and therefore shells in which the Purchaser had a property and the Manufacturer had none. No shells of this kind are involved in this action of replevin. Only shells in which the Manufacturer had done some work are here in suit.

[3] Under this interpretation of the contract, we are of opinion that the learned trial judge properly instructed the jury that the Manufacturer had a property in the work it had done on the shells and that it could not be deprived of this property except by the Purchaser's acceptance or by the Manufacturer's own default. He therefore submitted the main issue as to whether the contract had been terminated, and if so, whether by the breach of the Purchaser or the Manufacturer. Finding that the contract had been terminated by the breach of the Purchaser, the jury returned the following verdict:

"As to case No. 4256, the jury rendered a verdict in favor of the defendant for \$52,922.86; the special machinery and appliances to remain the property of the defendant."

The Purchaser, the plaintiff below, sued out this writ of error. It does not, of course, assign as error the finding by the jury that the contract had been terminated by its breach, but conceding this, as it must, it specifies error in the admission of testimony and in the form of the judgment. We shall address our discussion first to the form of the judgment, for if infirmity be found here, other errors, if committed in the trial, cease to be of importance.

The Purchaser contends very correctly that the verdict must be rendered and judgment be entered under the Act of April 19, 1901, Statutes of Pennsylvania, P. L. 88, entitled "An Act relating to replevin, and regulating the practice in cases where the writ of replevin is issued." The applicable provision of this statute reads as follows:

"7. If the title to said goods and chattels be found finally to be in a party who has not been given possession of the same, in said proceeding, the jury shall determine the value thereof to the successful party, and he may, at his option, issue a writ in the nature of a writ of *retorno habendo*, requiring the

delivery thereof to him, with an added clause of fieri facias as to the damages awarded and costs; and upon failure so to recover them, or in the first instance, he may issue execution for the value thereof, and the damages awarded and cost; or he may sue, in the first instance, upon the bond given, and recover thereon the value of the goods and chattels, *damages and costs*, in the same manner that recovery is had upon other official bonds."

Acquitting ourselves of any intention of construing this state statute beyond its application to the case in hand, we may say that what the quoted provision seems to do is to enlarge the common law process of execution in replevin by awarding a writ of retorno habendo, not alone in a case where goods have been replevied and judgment is for the defendant, as at common law, but in any case to the successful party—whether defendant or plaintiff—who is not in possession of the goods, against the unsuccessful party—whether plaintiff or defendant—who is in possession of the same. But it is not necessary for us to construe the statute thus far, because the goods having been replevied by the plaintiff and the judgment being for the defendant, it is just such a judgment as could be rendered at common law, to enforce which the common law writ of retorno habendo or fieri facias is, according to the character of the verdict, appropriate.

[7] The verdict being in part for a sum of money without words indicating for what it was awarded, whether "damages" or the "value" of the chattels replevied, the Purchaser attacks the judgment entered on the verdict as invalid, because, if for damages, the only "damages" contemplated by the Pennsylvania statute, as it contends, are damages for the caption and detention, and if for the "value" of the property taken, as allowed by the Pennsylvania statute, the verdict fails to disclose a finding of that kind.

If section 7 of the Pennsylvania statute provides in a case like this a procedure in any way different from that at common law, there might be merit in this contention; but the quoted section of the Pennsylvania statute, so far as it is applicable to a case where goods have been replevied and verdict is for the defendant, is but declaratory of the common law. At common law, judgments of several kinds may be entered for the defendant according to which party has possession of the goods at the time of trial and whether they can be reached and returned by a writ of retorno habendo. These different judgments at common law are very clearly defined in the case of *Clark v. Adair*, 3 Har. (Del.) 113, an early decision by the courts of Delaware, a jurisdiction that adheres more closely to common law practice and procedure as they were before the Hilary Rules and Procedure Acts than any other jurisdiction. In this case the court said:

"The judgment for the *defendant* depends on the pleadings and verdict. * * * Under the plea of property, the defendant, if it be found for him, is entitled to judgment for the return of the property (pro retorno habendo) and damages for the taking upon the writ. 1 Salk. 93, *Butcher v. Porter*, s. c., Vin. 249; 5 Mass. Rep. 343, *Powell v. Hinsdale*; 5 Serg. & Rawle, 135, *Easton v. Worthington*. But that is not the only common-law judgment, for it is expressly laid down by Lord Chief Justice Hale in his commentary on Fitzherbert's *Natura Brevium*, that 'if defendant claims property, or says that he did not take, etc., if in the meantime the beasts die or are sold, so that he cannot have a return, he may recover all in damages if it be found for him;' and cites Year Book 7, h. 4, 18; Fitz. N. B. 159, note c.

"The property for which the writ was brought in this case is ninety-eight and a half bushels of corn, which is a perishable article, and which ipso usu consumitur; and, upon proof made at the trial that the corn had perished or been consumed, the jury might well give a verdict for *damages, embracing the value of the corn*, of which in such case *the defendant could have no return*, for that is the principle of the rule as laid down by Lord Hale. As, therefore, the verdict in this case was given for the value of the corn, it must be intended that proof was made at the trial, that the corn had perished or been consumed, and then the verdict is well enough; and the judgment must follow the nature of the verdict, and cannot be pro retorno habendo."

Followed later by the case of *Davis v. White, Sheriff, 1 Houst. (Del.) 228.*

In providing in the alternative several processes for redress by the successful party, section 7 of the Pennsylvania Act provides at least what the common law provided, when the verdict was for the defendant, namely: a process for the return of the goods when they can be reached and their return be enforced, together with a fieri facias clause for damages if any have been awarded for the caption and detention of the goods (one form of damages at common law): and also, for damages for their caption and detention, if any be awarded; and finally, suit on the bond for the value of the goods (a form of damages at common law), damages for the caption and costs.

Admittedly, the verdict in this case is somewhat unusual in form, being made up of two distinct parts dealing with two subject matters. One part, which is for money, means something. Evidently this money part is for some loss the defendant had sustained by the replevy of its chattels. The award cannot be said to be for damages for caption and detention for there is no evidence of such damage except as is always implied in such a verdict. The verdict awarding a sum of money must be presumed to be based on evidence, and it is valid if evidence can be found to sustain it. There is in the case such evidence, and this evidence is for damages which the defendant suffered in having its chattels replevied, not those incident to the caption and detention such as deterioration, but damages which were sustained by the defendant in having its chattels taken from it and so dispersed that they could not be restored to it. This is one species of damages recoverable at common law, and this is the same species recoverable under section 7 of the Pennsylvania statute on a finding of "value" of the property taken and not returned. It is unimportant that the finding be shown in words to be the value of the chattels if the evidence shows that fact. As the evidence amply sustains such a finding, the verdict is valid equally at common law and under section 7 of the Pennsylvania Act.

So far, the form of the judgment is without fault. In the other part of the verdict, there is the expression "special machinery and appliances to remain the property of the defendant." These chattels belonged to the defendant and title to them never was in dispute. They came into the case only as a claimed ingredient of damage. As we regard this concluding expression of the verdict, it was nothing more than redundancy. All that it did was to show the very practical way in which the jury disposed of the element of damage which the defendant had claimed for money expended in the equipment of its plant for the finishing of shells under the contract. We find no error here.

[4] The next question is, whether the theory of the court on which it admitted evidence in proof of the value of the shells was proper.

The jury having determined by their verdict that the title to, or property in the "work," was in the Manufacturer, that is (in the language of the Pennsylvania statute), "in the party who has not been given possession of the same," they were permitted by the court to find the "value" of the property on evidence which the Purchaser now asserts was improper. This evidence showed the items by which the defendant computed value. Speaking in round numbers these items embraced labor and material, \$53,000.00; special machinery and appliances (which as appears by the verdict, the jury did not assess against the Purchaser as damages but left with the Manufacturer as its own property), \$7,000.00; proportion of overhead charges, \$35,000.00; total cost expenditures, \$96,000.00; and finally a *reasonable manufacturer's profit* in addition to cost; less a credit on the whole of \$18,000.00.

No exception to the court's action admitting cost items is very seriously urged. The principal exception goes to the admission of evidence of the manufacturer's profit on the shells in their unfinished condition when taken from the Manufacturer on the Purchaser's writs of replevin. At the trial, the Manufacturer made an offer to prove "what were the disbursements necessarily made by the defendant in the course of the performance of the contract, and what under the circumstances was a *reasonable profit margin on the manufacturer's work*, this for the *purpose of establishing the value* to the defendant *at the time of the taking* of the defendant's property in the goods seized." On this offer the court ruled that the Manufacturer was entitled to a profit and permitted it to prove that such work normally is done on a basis of cost plus a profit and that the ordinary profit for such work is a given percentage on the proven cost. On this tender there seems both here and below to have been some confusion with reference to the precise object of the court's ruling, the suggestion being that the Manufacturer was allowed to recover in this action of replevin damages in the nature of profits which it would have made on the contract had the contract not been terminated by the breach of the Purchaser, profits of this character being of course recoverable only in an action of assumpsit. We do not find this to be either the purpose or the effect of the court's ruling. On the contrary, the court admitted testimony to prove what was a manufacturer's profit on the shells in their unfinished condition *at the time they were replevied*, not the profit which would have been made on the contract, if completed, raising squarely the question, whether the "value" of the shells to the Manufacturer at that time included a profit item in addition to items of cost.

We are of opinion that the court made no mistake in this ruling. The Purchaser admits the Manufacturer is entitled to a profit on the work it had done at the time it was stopped, if the work showed a profit instead of a loss. But the Purchaser maintains further that cost alone is the measure of the value of the goods replevied and that the manufacturer's profit on the work done to which it concedes the owner

of the goods is entitled cannot be recovered in replevin but only in assumpsit. This is correct if profit is not an element of "value."

Value of goods is not what they cost their owner; it is what they are worth to him or to others. This is as true of shells as it is of corn. *Clark v. Adair*, supra. If the property replevied had been corn instead of shells, we do not think the owner would have been compelled to separate profit from cost and show the value of his corn by proving what it had cost him to raise it; nor do we think the court would have limited his recovery to the cost of planting, tilling and harvesting. The value of corn is its market value, and this may include profit as well as cost.

Being entitled to a profit and being entitled also to have that profit included as an element in the value of the shells, the only question with which we have had difficulty is, whether profit on the shells, considered with reference to their peculiar character, must be withheld from the Manufacturer because of the impossibility of proving it or whether it is capable of proof by some proper evidence. Ordinarily the measure of damages in replevin for the value of the property replevied is its market value, if it has a market value. This, as we have said, is as true of shells as it is of corn. Considering the varying requirements of different belligerent nations with reference to types and dimensions of shells, it is doubtful whether there was a market even for finished shells. Certainly there was no market for unfinished shells; and such shells consequently had no market value. But "the fact that property has no market value does not restrict the recovery to nominal damages only, but its value or the (defendant's) damages must be ascertained in some other rational way and from such elements as are attainable." 8 R. C. L. 488. Another rational way was contained in the Manufacturer's offer of proof and was based upon elements attainable in other shops, where war products were manufactured. In these shops, profits were measured, not by market values which did not exist, but by values which arose from the novelty and difficulty of the work and the unusual conditions under which it was done. Profits may reasonably be supposed to have been within the contemplation of the parties when they made the contract, and a profit on the manufacturer's work at the stage at which the work was stopped, as distinguished from the contract profit, we regard as a proper element of its "value," provable in a case like this on a cost plus basis.

[5] When in July, 1916, the Manufacturer stopped work under the contract because of conduct on the part of the Purchaser which the Manufacturer then thought and the jury have since found made performance on its part impossible, it advertised the shells for sale and notified the Purchaser of its purpose to sell them (using its own language) "to enforce a lien which we have on your material at our plant." On receiving this notice the Purchaser instituted these actions of replevin. At the trial, the Manufacturer did not assert a lien, but stood on its plea of property alone. The Purchaser, maintaining that the Manufacturer's previous claim of a lien was an admission by it that property in the shells was in the Purchaser, presented the following point to the court:

"Third. That under the evidence in the case, particularly the letters from the defendant to the plaintiff, dated July 26 and 27, 1915, the advertisement in the Chester Times, the notice of sale, the defendant is estopped from asserting any claim of property, right or interest in the material described by the writ, and has waived its right to make any such claim, and the verdict must be for the plaintiff."

The court's refusal of the point is assigned as error.

We find in the Manufacturer's claim of lien before trial nothing that estopped it asserting its property right at trial. While it was a claim of a legal right which the Manufacturer did not have, it does not appear to have been made for the purpose or with the effect of inducing the Purchaser, in reliance upon it, to part with any advantage or causing it to suffer any prejudice. Both parties later stood, just where they stood before. The statement was nothing more than a misconception by the Manufacturer of its legal remedy and involved none of the elements of estoppel.

The only other assignment of error which we shall discuss is the court's refusal to allow the Purchaser to prove counter damages because of the Manufacturer's alleged defective workmanship on the shells. This assignment arose on a stipulation between the parties entered into after the shells had been replevied and while the Manufacturer was arranging to hold them by giving counter bond. On abandoning this course, the Manufacturer obtained an admission by the Purchaser in a stipulation in the words following:

"And now, August 11, 1916, it is stipulated that the time for filing a claim property bond be extended for two weeks but that plaintiff shall be at liberty to remove within one week such of the material replevied as it admits for *all the purposes of this case to be not defective* under the terms of the contract between the Canadian Car & Foundry Company, Limited, and The Pennsylvania Iron Works Company."

Having obtained a release of the shells from the Manufacturer's proposed counter bond only by admitting that they were not defective, it cannot seriously be urged that the court erred in refusing to allow the Purchaser to avoid the effect of its admission and to profit by denying it.

Another position taken by the Purchaser with respect to this stipulation is, that when the defendant agreed that the plaintiff should take away the shells, it waived its right to plead property in this action and permitted itself to be relegated to an action on the contract against the Purchaser wherever it might be found. We discover no substance in either of these positions.

Finding no error in the trial of this case, we direct that the judgment below be affirmed.

Number 2362.

[6] This action of replevin was for shells on which the Manufacturer had done no work. Property in the shells admittedly was in the Purchaser and no property was pleaded by the Manufacturer. It had done no work on the shells, and therefore, by the definition of clause 1 of the contract, it had acquired no property in them. The Manufacturer, however, claimed the right to the immediate and exclusive

possession of the shells, not because of a property interest but under a lien against them, which, if such existed, could be enforced in an action of replevin by virtue of section 6 of the Pennsylvania statute (Act of April 19, 1901, P. L. 88), in which it is provided, that if, on the trial of title and right of possession of goods and chattels "any party be found to have only a lien upon said goods and chattels, a conditional verdict may be entered, which the court shall enforce in accordance with equitable principles."

The facts on which the Manufacturer based its claimed lien are these: When the breach in the contract occurred, the Manufacturer notified the Purchaser that unless it promptly removed the shells, it would charge for the expense of retaining them on its premises, involving costs of storage, watchman, insurance, etc. The shells remained with the Manufacturer until they were replevied. At the trial the Manufacturer claimed and was allowed to prove a lien for storage, etc., and the jury found a verdict for the *plaintiff* "upon the condition of paying the defendant the sum of \$375.00."

The right of the Manufacturer to enforce its lien as a condition to recovery by the Purchaser, depended, of course, upon the Manufacturer having such a lien. The trial judge very properly ruled that such a lien could exist only by reason of a contract either express or implied. Concededly, it did not arise from the written contract between the parties. We find in the case no evidence of any other express contract. If it arose from contract at all, it must have arisen from an implied contract. While the law might perhaps imply a contract between the parties, making the Purchaser liable to the Manufacturer for moneys expended in and about its business, we know of no such implied contract that raises an implied lien. The lien claimed in this case admittedly was not given by any statute of Pennsylvania, nor by any rule of the common law with which we are familiar. In fact, no case has been cited and no principle has been invoked in support of the lien which the Manufacturer asserted and the jury found.

In this we think there was error, and direct that the judgment below be reversed.

SNOWDEN v. MARINE NAT. BANK OF PITTSBURGH. PA.

(Circuit Court of Appeals, Third Circuit. February 26, 1919.)

No. 2380.

BANKS AND BANKING —100—SALE OF STOCK FOR CUSTOMER—LIABILITY FOR FRAUD OF CUSTOMER.

A bank *held* not liable in tort for the sale, for account of a customer, of shares of stock owned by plaintiff, where plaintiff had indorsed the certificates in blank and forwarded them to the customer as a broker for sale, and there was no evidence that the bank had knowledge or notice of his ownership.

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action at law by James H. Snowden against the Marine National Bank of Pittsburgh, Pa. Judgment for defendant, and plaintiff brings error. Affirmed.

Samuel S. Mehard, Mehard, Scully & Mehard, and Wm. E. Schoyer, all of Pittsburgh, Pa., for plaintiff in error.

Hill Burgwin and H. & G. C. Burgwin, all of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and THOMSON, District Judge.

BUFFINGTON, Circuit Judge. In the court below, James H. Snowden, a citizen of Connecticut, brought suit against the Marine National Bank of Pittsburgh. On the trial the court, at the conclusion of the plaintiff's proofs, granted defendant's motion for a compulsory nonsuit. On its subsequent refusal to take off such nonsuit, plaintiff sued out this writ, and the question before us is whether the proofs were such as justified submission of the case to the jury.

The action was trespass, and the statement charged a tort on the bank's part. The tort consisted in the following facts, which are alleged in the statement:

That John L. Moore was engaged in business in Pittsburgh, Pa., as "a mere promoter engaged in exploiting enterprises of doubtful value, notably a company known as the Amber Oil Company, and that such transactions as the sale of stock as said John L. Moore, individually, or as John L. Moore & Co., may have been engaged in, were merely incidental to his said business as promoter." That the business name of John L. Moore was John L. Moore & Co., and "was assumed by said John L. Moore to mislead the public, in the belief that another person or persons were engaged in said business beside the said John L. Moore, and to thus unwarrantedly gain business faith and credit, and in the course of such business said John L. Moore falsely and fraudulently held himself out as a stockbroker, and so advertised both in the public press and by means of so-called "market letters," which he sent through the mails, in large quantities, to many persons, in different parts of the country." That certain correspondence and telegrams passed between Snowden and Moore in reference to the sale of 200 shares of stock of the Union Mutual Gas Company, which Snowden had placed in Moore's hands. That "these facts were well known to the Marine National Bank, its officers and agents, in which and through which said John L. Moore, as John L. Moore & Co., transacted his banking business, as was also the fact that the wording used in the so-called

'confirmation of purchase' blanks used by John L. Moore & Co. was used with intent to evade legal responsibility for wrongful acts."

The statement further averred:

That the bank, with knowledge or notice that the stock in question was Snowden's, and not Moore's, had it transferred to the name of Moore, and new certificates issued in Moore's name, and that such new certificates "were held by said bank until the same were sold and disposed of by said bank in co-operation with John L. Moore, trading as John L. Moore & Co., October 19, 20, and 21, 1915, and the money received therefor was paid to the Marine National Bank, representing John L. Moore, trading as John L. Moore & Co., as aforesaid."

The statement further averred:

The bank "well knew that John L. Moore, doing business in the name and style of John L. Moore & Co., was falsely and habitually holding himself out as a legitimate stockbroker."

And it then charged:

"Specifically, plaintiff is informed, believes, and expects to be able to prove, and therefore avers, that the Marine National Bank, with full knowledge of the fact that the stock in suit was the property of James H. Snowden, and was in the possession of John L. Moore, or John L. Moore & Co., as broker or agent only, received same from John L. Moore and John L. Moore & Co. as the agent thereof, for the purpose of selling and disposing of same through the Stock Exchange of the City of Pittsburgh, for the account of James H. Snowden, the plaintiff herein, and to that end acted in collusion and co-operation with the said John L. Moore, trading as John L. Moore & Co., to the great loss and damage of the plaintiff herein."

The statement further averred:

That "at the time of the transaction herein complained of * * * John L. Moore as an individual, or as John L. Moore & Co., was indebted to the Marine National Bank; * * * that for some time prior thereto the officers, agents, and employes of said bank were, as above stated, well aware of the material facts and circumstances herein set forth," and notwithstanding such was the fact, "unlawfully appropriated to itself the money received from the sale of the 50 shares of stock," for which Moore had given his check to plaintiff, which was not paid, and also "the proceeds of the remaining 50 shares of the stock of James H. Snowden, for which no check was ever sent, in payment of the debt owing to said bank by the said John L. Moore, trading as John L. Moore & Co., and that in truth and in fact the defendant herein, the Marine National Bank, caused the last 100 shares, represented by certificates Nos. 13,990 and 13,991, to be sold October 21, 1915, and wrongfully appropriated the entire proceeds thereof to its own use."

It was further averred:

"That by reason of its wrongful and unlawful conversion of the proceeds of one lot of 50 shares of said stock and its unlawful sale, appropriation, and conversion of the other 50 shares of stock in co-operation and collusion with John L. Moore," the bank was indebted to the plaintiff in the sum claimed, and that "since his discovery of the facts and circumstances above set forth he has made demand, through his attorneys, upon the defendant for reimbursement in the premises, which demand has been by said defendant refused."

Based on this statement, the plaintiff brought this action of trespass. The Pennsylvania Procedure Act (P. L. 1887, p. 271), which is followed by the court below, provides for two forms of action, viz. assumpsit and trespass. Assumpsit is the proper form of action where there is

a contract, express or implied; trespass, the form to redress a tort or wrong. In the present case, the action is trespass, and the cause of action charged in the statement is the tort or illegal act of the bank. Such being the case, the test question is: Did the plaintiff's proofs show the bank guilty of a tort or tortious wrong done to John H. Snowden, the plaintiff?

The evidence shows that Snowden, on September 23, 1915, telegraphed John L. Moore & Co., stating his wish to sell 200 shares of Union Natural Gas stock at \$132 per share, and inquiring whether they "can dispose of this for me at once." Having received, on September 27th, a favorable reply, Snowden wired Moore & Co. to sell the stock at once at \$132, and sent by registered letter, certificates which were in his name, and signed his name to the transfer in blank printed on the back of the certificates.

Acknowledging receipt of the certificates, Moore & Co., on September 28th, wrote Snowden:

"We are taking the matter up with some of our clients whom we know to be interested in this company, and we believe we can get you a little better price in this way than in the open market."

While there was an interchange of messages meanwhile, the next important step was on October 11th, when Moore & Co., wrote Snowden, informing him they had themselves bought 50 shares of his stock at private sale at \$133, and returned all the certificates, with the request that Snowden have his signature to the transfer guaranteed by his bank. This was done by Snowden, who returned the certificates. On October 14th, Moore & Co. remitted their check to Snowden "to cover the 50 shares of Union Natural Gas stock purchased from you on the 11th inst.," and further wrote:

"It is probable that we will be in position to take the balance of this stock within the next day or so, and as we do I will remit to you."

The correspondence shows the money for the first 50 shares was forwarded and paid to Snowden. It also shows the second 50 was taken by Moore & Co. in the same way on the 15th of October, and a check for same forwarded to Snowden, dated October 25th, received and "placed to the credit of Mr. Snowden's account in his passbook." The proofs further showed the admission by the bank in its affidavit of defense:

"Defendant admits that John L. Moore & Co. delivered to it several certificates of stock in the Union Natural Gas Corporation, and requested the defendant to have the same transferred to the name of John L. Moore & Co."

Further oral proofs show that Snowden's certificates were brought by an officer of the bank to the Union Natural Gas Company, and new certificates were issued therefor to John L. Moore & Co. The stock represented by these certificates was subsequently sold by a broker at the request of the Marine National Bank, and certificates therefor issued to the purchasers, and the proceeds paid to the bank. All of these transactions happened on or prior to October 21st. There was proof, also, that the gas company, before it made stock transfers, required that signature of the owners whose signatures were not known

to be guaranteed by a bank John L. Moore, who was called by plaintiff, testified as follows:

"Q. When you say that you sometimes sold stock through the Marine National Bank, will you state just exactly what would occur at that time? A. First, I would request some one in authority there at the bank to dispose of certain shares of stock at certain prices, or at the market price, whatever the requirements might be in the case.

"Q. And when such sales were made, the proceeds were deposited, or what was done with the proceeds of the sales? A. Credited to our account."

The proof further showed the bank made no charge for such sales other than reimbursement for the commission paid to the broker who made the sale. The proofs further show Snowden was paid by Moore for the two lots of 50 shares first sold, a check on the Marine National Bank was sent him by Moore for the third 50, but the check went to protest, and for such third 50 and the fourth 50 he was never paid. Thereafter Snowden visited the bank and demanded a return of his stock and payment of the check, which was declined; the bank saying it did not have the stock and had no funds of Moore's to pay the check. Such were the proofs the plaintiff made to establish the tort.

But it is quite evident that the plaintiff, when his proofs were completed, wholly failed to sustain any element of the serious charges made in his statement. If Moore was guilty of any fraud in the general conduct of his business, no knowledge of the bank or collusion with him was shown. The bank had no dealings with Snowden, or no knowledge of any facts which raised any implied duty to him on its part. Moore was its customer; the bank at his request had sold stock to his account. In his customary way, he brought these certificates to the bank. They were indorsed in blank by the owner, and his signature was guaranteed by a bank. The bank had new certificates issued in the name of Moore & Co., and thereafter caused them to be sold. In thus selling the stock, the bank did exactly what Snowden had placed it in Moore's hands to do. In pursuance of Snowden's authorization, the bank sold the first 100, and Snowden was, in due course, paid the proceeds of such sale. Such being the case, wherein was the bank guilty of a tort in selling the second lot?

The proofs fail to show any tort of the bank in making the sale of the second 100, and the plaintiff simply did not, by his proofs, make good the allegations of tort on the bank's part, which constitutes a right of action in trespass. The testimony showing that the second 100 shares of the stock had been sold by the bank in the customary way, and the plaintiff having himself proved the bank's assertion that no proceeds of the sale were in its hands when his ownership of the certificates was for the first time brought to its notice, it is clear that no tort on the bank's part was proved, and to visit upon it the loss Snowden has sustained through Moore would be unjust, for it must not be overlooked that whatever wrong was effected was caused by Snowden placing in Moore's hands his certificates, with a certified signature, which put in Moore's power to do what he did. It follows, therefore, that the outcome of this case is in line with that just principle of jurisprudence that, where one of two innocent parties must suffer for

a wrong, the law places the damage on him who enabled a third party to do such wrong.

The judgment below is affirmed.

STENNICK et al. v. JONES et al.

(Circuit Court of Appeals, Ninth Circuit. March 10, 1919.)

No. 3139.

COSTS ⇐230—REVERSAL ON APPEAL—COSTS IN APPELLATE COURT.

Where a complainant is compelled to go to an appellate court to obtain any substantial relief, and is there given a decree, he is entitled to recover his costs in that court.

On motions to modify decree of reversal. Addendum, to be considered in connection with original opinion.

For former opinion, see 252 Fed. 345, —C. C. A. —.

PER CURIAM. Upon motions and counter motions for modifications.

As to costs: The formal order of this court was for a reversal and an accounting for any liability of defendants under the terms of the contract discussed in the opinion of the court. Inasmuch as appellant had to come to this court for any substantial relief, and has been awarded a decree, the usual rule should prevail, and he should recover his costs in this court.

With respect to personal liability of Jones and Kribs, our opinion holds that they, being parties to the suit and being sued as joint tortfeasors, are liable individually for any property which they or either of them may have taken in their individual capacities, and that the accounting should be had against them as individuals, as well as against the J. K. Company.

Appellant's counter motion is for a modification of the opinion, so that \$155,000, for 1,520 acres of Dodge timber land, be included in the accounting, or "at least that an accounting be had for that part of the aforesaid timber land which belonged to the Yale Logging Company." At the time of the trial a stipulation was entered into to the effect that, if findings should be made for the trustee, it should be "considered" that the Hamilton Creek Timber Company and the Rainier Lumber & Shingle Company are the sole owners of "all the property involved in the suit." The trustee also asks that, if this court cannot make an accounting on the record submitted, then that an account be taken of "all the property," and contends that the funds used by the bankrupts in connection with the project of building the railroad and other works "came from the funds of all the creditors alike, and that it is impossible or extremely difficult to trace any particular fund, or determine what particular property was acquired out of the \$215,000 received from the sale of bonds."

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

Counsel say that the stipulation referred to was made in order that in this suit all property rights of the Dodge corporations should be finally determined, and that the Yale Logging Company, although not a party to the contract was the owner of part of the machinery and chattels converted, and also owned a large part of the 1,520 acres of timber land sold by Dodge for the unpaid purchase price of \$155,000 to the J. K. Company.

Defendants' counsel, however, take sharp issue with this argument, and point to the fact, not to be ignored by us, that on its face the stipulation does not purport to affect the property of the Yale Company. That company was not even a party to this suit or to the contract involved herein. It is true that Dodge turned in, as part of the equipment he was to provide under the provisions of the contract, some property owned by the Yale Logging Company, one of the so-called Dodge corporations, and that the J. K. Company furnished the money out of the \$215,000 to pay Dodge for this property.

But, now that a controversy as to the effect of the stipulation has arisen, in the absence of any assertion of rights by the Yale Company, this court can make no decree which can bind the Yale Logging Company. It is to be noted that Dodge himself, although a party to the contract involved, was not made a party to this suit; nor was his trustee in bankruptcy impleaded in any way. The reason for not joining such persons as parties is not given, but as the stipulation only authorizes the court to regard the trustee of the two corporations named therein as interested in the contract our jurisdiction is confined accordingly.

Next, as to \$155,000 to be paid Dodge: Dodge, as we have held, had an equity, because he had delivered to the J. K. Company the equivalent of \$155,000 in money. Dodge's equity was in the railroad and equipment. The money was to be paid to Dodge and used for development. For the purpose of passing legal title to Dodge in the property, the \$155,000 was to be regarded and treated as paid at the time that the last installment of the \$60,000 was paid. But Dodge having broken his contract, and his creditors having refused to proceed to fulfill its terms, equity will not now come to his relief, for so to do would be to hold that Dodge could break his contract, and yet be relieved of forfeiture under the forfeiture clause. The contract provided for forfeiture of the railroad if there was substantial breach of the contract, and under the authorities cited in the opinion Dodge by reason of his breaches is not in a position to recover anything done under the contract.

The appellees could introduce evidence, as they did, that they were heavily damaged. Such evidence, while not proper for the purpose of recovering a money judgment, was admissible to show that the enforcement of the forfeiture clause was not inequitable. *Edmonds v. Spanish R. P. & P. Co.* (D. C.) 206 Fed. 92.

The appellees argue that the decree of this court should be in effect a dismissal of the bill, because there are but few possible classes of property not directly affected by the terms of the contract, namely, commissary supplies, railroad material, ties, and such property. They

say these things were upon the land of the J. K. Company, and paid for out of the \$215,000, and were put upon the property by Dodge for the purpose of proceeding with the construction of the railroad. But, as the contract did not cover these matters, we hold they are outside of its terms, and ought not to be included.

It is also argued that, even under this construction of the contract, the results will not be changed by an accounting, provided the equities of the case are given due consideration. These equities are said to be the losses sustained by the J. K. Company, said to be \$480,000, and also \$50,000, representing a loss sustained by Jones and Kribs as individuals, because they gave their credit to Dodge in the loan referred to in the principal opinion. Jones and Kribs, being the sole stockholders of the J. K. Company, ask that their position be regarded as though the J. K. Company had loaned its credit to Dodge and had sustained this loss of \$50,000. Appellee is right in the position that this item is fairly to be considered. But it is not for us to say on this record that the value of items which appellant may properly include in the accounting is less than the amount of \$50,000 or any other sum. We think appellant should have an opportunity to introduce evidence upon the issue as it is now defined.

Let this addendum be considered in connection with the original opinion.

FRANKLIN STATE BANK v. MARYLAND CASUALTY CO.

SAME v. UNITED STATES FIDELITY & GUARANTY CO.

(Circuit Court of Appeals, Fifth Circuit. April 2, 1919.)

Nos. 3327, 3328.

1. INSURANCE Ⓒ425—BURGLARY INSURANCE—RISKS INSURED.

A bank's burglary insurance policy, covering loss (a) by abstraction from its locked safe by force; (b) by damage to money, securities, safe, and furniture caused by forcible entry or attempted entry into the safe or premises; and (c) loss by robbery (1) from within the banking inclosure; (2) from an officer or employé transferring money between the inclosure and safe; and (3) from within the safe, by compelling an officer or employé to unlock the safe, held to cover losses from safe only when the safe is closed and locked and entrance is effected by either "cracking" the safe or forcibly compelling an officer or employé to open it, and not to cover loss where money was taken from an open safe.

2. INSURANCE Ⓒ332½, New, vol. 13 Key-No. Series—BURGLARY INSURANCE—BREACH OF WARRANTY—ERROR IN DESCRIPTION OF EQUIPMENT.

Although false statement in schedule of bank's burglary insurance policy that insured's safe was locked by both combination and time lock might be deemed merely an "error in description of equipment," which would reduce the indemnity, in case of loss, yet the statement, "All combination and time locks will be continued to be regularly used during the currency of the policy," was a promissory warranty, breach of which avoided the policy.

3. INSURANCE Ⓒ309—BREACH OF WARRANTY—EFFECT—CONTRIBUTING TO LOSS.

Breach of insured's warranty will avoid his policy, though such breach does not contribute to the loss.

In Error to the District Court of the United States for the Western District of Louisiana; George W. Jack, Judge.

Actions by the Franklin State Bank against the Maryland Casualty Company and against the United States Fidelity & Guaranty Company. From judgments for defendant in each case, plaintiff brings error. Judgment in each case affirmed.

Henry Bernstein and Allan Sholars, both of Monroe, La., for plaintiff in error.

P. M. Milner, of New Orleans, La., and J. S. Atkinson, of Shreveport, La., for defendants in error.

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

GRUBB, District Judge. These cases arise, so far as the alleged loss is concerned, upon identical facts. They differ only as to the terms of the policies, which are the bases of the suits. They are both actions on policies, providing banks with indemnity protection against losses of money or securities, through burglary and robbery. The facts being identical, the cases may be best treated in one opinion.

The plaintiff in error was plaintiff in each case in the court below, and upon the trial in the District Court a verdict was directed against it in each case, though upon different grounds. From the judgments entered, the writs of error were taken.

The plaintiff was a state bank, engaged in business at Winnsboro, La. Evidence was introduced by plaintiff tending to show that on the night of February 12, 1917, about 9 o'clock, while the vice president of the bank, Heatherwick, and a citizen, Judge Holstein, were in the bank for the purpose, as claimed, of agreeing on and settling the amount of an overdraft in Judge Holstein's account, a man with a flash light in one hand and a pistol in the other appeared and ordered Heatherwick to give him the bank's money, and then forced them both into the bank vault, which had been opened to get the ledger showing Holstein's account with the bank. The man himself, standing outside at the door of the vault, threw Heatherwick a flour sack, and, continuing to point the gun at him, forced him to open the inner safe, which was not locked and which was supposed to contain the money, and to put the money in the sack. Heatherwick testified that he filled the sack with currency and asked the robber if he wanted the silver. The robber shook his head in reply, and Heatherwick then threw the sack to the robber, who grabbed it and quickly slammed the outside door of the vault, and, by turning the combination, locked Heatherwick and Holstein on the inside of the vault, and disappeared with the sack, containing about \$44,000 in currency. Heatherwick and Holstein got out of the vault by the use of a screwdriver and iron bar, left in it, as claimed, to meet such an emergency.

The inner safe had a combination and a time lock, but both had been habitually disused, at least during the years 1916 and 1917, and for a period up to within a few days of when the safe was installed. Heatherwick testified that the combination of the safe had been for-

gotten by the officers of the bank. Presumably the ledger, which the witnesses Heatherwick and Holstein say was needed in making their settlement, and the need for which, according to their evidence, accounted for the opening of the vault, was in the vault, but not in the safe. It was not claimed that the inner safe was unlocked by Heatherwick. The vault was built in a corner of the banking inclosure, its walls forming a part of the walls of the building, within the railed-off portion used for the transaction of the bank's business by its employés.

There are many other facts in evidence which reflect on whether or not there was an actual robbery, or whether the supposed robbery was merely a ruse to cover a shortage, existing in the accounts of Heatherwick and Womble, its vice president and cashier, at the time of the occurrence; but, as they are not material to the disposition of the appeals, they are not recited.

The District Judge directed a verdict in the case in which the Maryland Casualty Company was defendant, upon the ground that the policy did not cover the loss; the undisputed evidence showing that the money was taken from an open safe. In the case in which the United States Fidelity & Guaranty Company was defendant, the verdict was directed because the policy issued by it was held to include losses from daylight robberies only. If the verdicts were properly directed, for a reason different from that assigned by the District Judge, the result would be an affirmance of the judgments entered on them.

[1] In the Maryland Casualty Company's case, its policies agreed to indemnify the Franklin State Bank:

"A. For all loss of money and securities in consequence of the felonious abstraction of the same during the day or night from the safe or safes (or from the vault, if contents of same are specifically insured) after said safe or safes or vault have been duly closed and locked, described in said schedule, while located in said banking room, also described in said schedule, hereinafter called the premises, by any person or persons, after forcible entry into such safe or safes or vault, or by any accomplice of such person or persons. In the event that the said safe or safes or vault are not locked by time lock, the company shall not be liable for loss of said money and securities feloniously abstracted therefrom, unless said forcible entry is made therein by the use of tools, explosives, chemicals, or electricity directly thereupon.

"B. For all loss by damage to said money and securities, and to said safe or safes or vault, described in said schedule or to the premises, or to the office furniture and fixtures therein, caused by such person or persons while making or attempting to make such entry into said premises, vault, safe, or safes.

"C. For all loss by robbery (commonly known as hold-up) of money and securities: (1) From within the banking inclosure reserved for the use of the officers or office employés of the assured while at least one officer or office employé of the assured is present and regularly at work in the premises; (2) from an officer or an office employé of the assured while transferring the same during the assured's regular office hours, either way between the said banking inclosures and any safe or vault described in the schedule as located in the premises outside of the said inclosures; (3) from within that part of the safe or safes or vault insured hereunder, caused by robbers during the day or night, by compelling under the threat of personal violence an officer or office employé of the assured to unlock and open the safe or safes or vault."

The construction of the policies, as to what risks were insured, is to be ascertained from these clauses. The contention of the plaintiff is that subdivision (1) of clause C, which indemnifies the bank for all loss by robbery (commonly known as hold-up) of money and securities within the banking inclosure reserved for the use of the officers or office employés of the bank, while at least one officer or office employé of the bank was present and regularly at work in the premises, covers a robbery of the safe, while it was unlocked, if it was within the inclosure. The plaintiff's contention was that the vault and safe from which the money was taken is a part of this reserved inclosure; that it was taken while Heatherwick, an officer of the bank, was regularly at work within the inclosure, and hence that the robbery fulfills every requisition of this subdivision. The defendant's contention is that the safe was no part of the reserved inclosure, though the door of the vault opened into it, and hence that robbery from the safe in the vault did not come within the terms of subdivision 1 of clause C, which is the only one that could cover it.

Construing the policy as an entirety, and looking at clauses A, B, and C, as including the subject-matter insured, we have reached the conclusion that it was not the intention of the policies to insure loss from an unlocked safe under any contingencies, and regardless of the particular location of the safe with reference to the banking inclosure.

Clause A covers losses caused by abstraction from a locked safe by force. Clause B covers losses to the safe and to the furniture of the banking room caused by forcible entry or attempted entry into the safe or into the premises which contained it. The first subdivision of clause C covers money and securities which have been removed from the safe for current business purposes, and are within the railed-off inclosure, used exclusively by the employés of the bank, and while at least one of them is regularly at work there. The purpose of this subdivision of clause C is to insure such money and securities as, in ordinary course of business, are daily required to be kept out of the safe, in the cash drawers of tellers, until the close of business. Subdivision 2 of clause C covers only such money or securities as are in process of transfer either (a) from a safe outside the banking inclosure to the inclosure, or (b) from the inclosure back to the safe outside of it. This subdivision does not insure the entire contents of the safe, but only such part of them as is being transferred. This part is insured, whether it is being removed from the safe, when stolen, or whether it is being returned to the safe, after having been in the banking inclosure. The robbery of the contents of the safe outside the inclosure, other than such as are being transferred, is not within the risks insured by the second subdivision of clause C. Its purpose, like that of subdivision 1, was to protect money and securities necessarily required to give up the protection of the safe in order that business might be done.

Neither subdivision 1 nor subdivision 2 of clause C, as we read them, cover losses of money or securities from a safe, whatever its location. They are concerned only with money or securities after their removal from the safe for the conduct of the bank's business. Subdivision 2

of clause C is limited to transfers from safes outside the inclosure, because, if the safe were inside the inclosure, there would be no intermediate risk in the transfer. The money or securities being transferred would either be in the safe or in the inclosure, and could not at any time be between the two. On the other hand, if subdivision 1 is held to cover money or securities in an unlocked safe inside the banking inclosure, then the failure of the policies to provide insurance for the contents of an unlocked safe, outside the inclosure, would seem to be an unaccountable case of omission. It seems clear that subdivisions 1 and 2 are directed at moneys and securities when removed from the safe, and that neither covers insurance of the contents of safes before removal. The insurer was willing to cover the risk of loss to the comparatively small amount of money and securities which necessarily must daily forego the protection of a locked safe for the bank to do business. It was willing to cover the risk of the large amount of money and securities, the removal of which from the safe was not necessary, so long as they retained the protection of the safe, which implied that it be kept locked. It was unwilling to assume the risk of loss to the entire contents of an unlocked safe, under any conditions.

It is not difficult for the banker to bring himself within the risks covered by the policy, so construed, provided he keeps his safe locked only when keeping it locked is practicable, and that is necessarily at all times except when it was opened to remove or replace its contents. The working books are kept in the vault, and not in the safe; the former may be kept open, while the latter is kept closed. The infinitesimal time required to open and close the safe for the removal or replacement of money or securities is that not covered by the policy. If the banker extends it by leaving the safe unlocked longer, it is his voluntary lack of care. If liability is imposed upon the insurer for all money and securities taken from an unlocked safe in the day or night, provided only that one subordinate office employé is at work in the banking inclosure at the time, the risk covered is greatly and unnecessarily increased. The employé present may not have the combination; but this fact makes no difference, if the safe is unlocked. The time lock, if in use, protects, even if the employé present knows the combination. If not in use, the protection is withdrawn. These protections are within the power of the banker to avail of, and there seems no policy or necessity that would require the providing indemnity against losses due to a failure of the banker to observe such simple precautions.

Subdivision 3 of clause C insures losses by robbery of money and securities from insured safes or vaults, caused by robbers, in the day or night, by compelling under threat of personal violence an officer or office employé of the bank to unlock and open the safes or vaults. If subdivision 1 of clause C, as contended, includes robberies from vaults or safes in the banking inclosure, there would be such a limited scope for subdivision 3 in cases, as in this one, where the only safe insured is within the inclosure, as would not justify its existence. If the safe or vault be considered a part of the inclosure, then subdivision 1 pro-

fects all robberies from it, including those specifically covered by clause 3; the only difference between the situations described in the two being that the officer or office employé, under subdivision 1, must be present and regularly at work, while under subdivision 3 he must be present, but is not expressly required to be at work. The difference is so slight that it does not impair the argument that, if subdivision 1 includes robberies of safes in the banking inclosure, there is no substantial field of operation for subdivision 3.

Our conclusion is that the policies of the defendant in error, Maryland Casualty Company, properly construed, cover losses from safes only when the safe is closed and locked, and entrance is effected either by "cracking" the safe or by forcibly compelling an officer or office employé to unlock and open it. Access to the safe was not obtained by either method in this case, and the District Judge rightly directed a verdict, on this ground, for the defendant the Maryland Casualty Company.

[2] In the case of the United States Fidelity & Guaranty Company, defendant, the District Judge directed a verdict for the defendant, holding that its policy covered daylight robberies only; the robbery, in this case, having occurred at night. We find it unnecessary to pass either upon this question, or upon the question of the scope of the policy, as to the inclusion in it of losses from unlocked safes. The language of the policy is different from those of the Maryland Casualty Company in the latter respect. We think the direction of the verdict was proper upon another ground. The policy contained the statement, in its schedule, that the insured's safe contained an outer burglar-proof door, which was locked by both a combination and time lock. It also contained this promissory warranty:

"All combination and time locks will be continued to be regularly used during the currency of the policy."

It also recited that the consideration for the policy was the premium paid, and—

"the statements in the schedule hereinafter contained, which statements the assured makes on the acceptance of this policy, and warrants to be true."

It also contained a provision that, "in case of error of description of equipment or failure to maintain watchman's service," the policy should not be avoided, but the indemnity, in case of loss, reduced to correspond to what the premium paid would purchase, in view of the increased hazard.

The District Judge found that the stipulation with reference to the character of locks was a matter of description of equipment only, and not a warranty, and a breach of it would not totally avoid the policy. The first extract from the policy might bear that interpretation. We do not think the statement that "combination and time locks will be continued to be regularly used during the currency of the policy" admits of being construed as a description of equipment. It was a warranty of an existing fact as to the use when the policy was issued, and promissory as to what was to be done during the currency of the policy. The last renewal before the loss in February, 1917, was

on March 25, 1916, and for a year from that date. The evidence, without conflict, shows that the safe from which the money and securities were taken was not locked with either a combination or a time lock at the time of the robbery, and that it had not been so locked at any time during the years 1916 and 1917, and that the combination had passed out of the memory of the officers of the bank. When the policy was last renewed in March, 1916, the implied statement that a combination and time lock was then being used was false, and the statement that it would continue to be used regularly during the currency of the policy was one the bank officers had no intention of keeping, and did not, in fact, keep.

That the warranty was breached, both as a representation of a present existing condition and also as a future promise, is shown without dispute. It also appears that, if the warranty had been observed and the safe locked with either the time or combination lock, or both, access to the safe could not have been had by the method it is testified it was had. If the time lock had been used at the close of business hours, the vice president, Heatherwick, could not have opened the safe, even though he had the combination. If the safe had been locked with the combination lock only, it would have been equally out of the power of Heatherwick to have opened it, if his testimony is to be credited, since it was to the effect that he had forgotten the combination, and he was the only bank officer present, *ex officio*, at least, when the alleged robbery occurred.

[3] If the agreement to regularly use the combination and time lock was a warranty, then a breach of it would avoid the policy, though it did not contribute to the loss. *Royal Exchange Assurance Co. v. Thrower*, 246 Fed. 768, 770, 159 C. C. A. 70; *Imperial Fire Insurance Co. v. Coos County*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231. We think the decisions of the federal courts require us to hold that it was a warranty. It was partly promissory and partly an assurance of an existing condition when the policy was last renewed. It was material to the risk insured. Covenants against overinsurance, change of occupancy or title, and for the keeping of proper books of account in an iron safe, in fire insurance policies, have all been recognized as warranties, though pertaining to the future conduct of the insured, the breach of which would work a forfeiture of the policy, as have covenants against deviation in marine insurance, and covenants against the engaging in certain hazardous occupations in life and accident insurance policies. *Home Insurance Co. of New York v. Williams*, 237 Fed. 171, 150 C. C. A. 317; *Royal Exchange Assurance Co. v. Thrower*, 246 Fed. 768, 159 C. C. A. 70; *Imperial Fire Insurance Co. v. Coos County*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231; *Kentucky Vermillion M. & C. Co. v. Norwich U. F. Ins. Soc.*, 146 Fed. 695, 77 C. C. A. 121; *Lumber Underwriters v. Rife*, 237 U. S. 605, 35 Sup. Ct. 717, 59 L. Ed. 1140.

The District Court did not err in directing verdicts for the defendants in both cases, and the judgment in each case is affirmed, with costs.

Affirmed.

MALCOLM v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. December 5, 1918.)

No. 1653.

1. INTOXICATING LIQUORS \Leftrightarrow 210—TRANSPORTATION INTO PROHIBITION STATE
—INDICTMENT.

An indictment under Reed Amendment, Act March 3, 1917, for transporting liquor into a prohibition state, is not fatally defective because it incorrectly states the point from which the transportation started.

2. CRIMINAL LAW \Leftrightarrow 371(10, 12), 372(2)—OTHER OFFENSES—EVIDENCE.

In a prosecution for unlawfully transporting liquor into a prohibition state by automobile, evidence of a prior trip made by the same persons between the same places a few days before, and connected with the one charged, *held* admissible, being a part of the same scheme, and as showing motive and intent.

In Error to the District Court of the United States for the Southern District of West Virginia, at Huntington; Benjamin F. Keller, Judge.

Prosecution by the United States against Gerald Malcolm. Judgment of conviction, and defendant brings error. Affirmed.

William G. Barnhart, Thomas C. Townsend, A. M. Belcher, and S. B. Avis, all of Charleston, W. Va., for plaintiff in error.

Lon H. Kelly; U. S. Atty., of Gassaway, W. Va.

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

KNAPP, Circuit Judge. Plaintiff in error, hereinafter called defendant, was convicted of transporting intoxicating liquors in interstate commerce, in violation of the act of Congress approved March 3, 1917 (39 Stat. 1069, c. 162), commonly known as the Reed Amendment. The government's evidence was to the effect that defendant, in January, 1918, hired two colored men to bring whisky by automobile from Catlettsburg, Ky., to Charleston, W. Va.; that they made two trips in that month, one a few days after the other; and that each time they brought in a considerable quantity of whisky. Three questions are raised by the assignments of error.

[1] 1. The indictment charges that the transportation was from Ashland, Ky., to Charleston, W. Va., whereas the proof shows that it was from Catlettsburg, Ky., which is a few miles from Ashland, and this variance is alleged to be fatal. We are quite unconvinced, notwithstanding the able argument of defendant's counsel, that this contention should be sustained. The gravamen of the offense charged is the transportation of liquor into a prohibition state, and the place from which it is brought is wholly immaterial. In our judgment it would have been sufficient merely to charge, in the language of the statute, the transportation of the whisky in question into the state of West Virginia, without naming the particular place, or even the state, from

which it was transported. Omission of the point of origin might have entitled defendant to a bill of particulars, but it would not have served to render the indictment demurrable. It follows that the averment of the locality from which the whisky was brought must be regarded as surplusage, since the indictment would be valid without that averment. As the Supreme Court said in *Hall v. United States*, 168 U. S. 632, 639, 18 Sup. Ct. 237, 239 (42 L. Ed. 607):

"Without this averment the third count contains every fact necessary to be proved in order to constitute an offense under the second clause of the statute, and the evidence in the case is sufficient to authorize the defendant's conviction upon that count. * * * Because the pleader unnecessarily made an averment of a totally immaterial fact, the government was not therefore bound to prove it in order to sustain a conviction. For this reason there was no fatal variance between the offense set forth in the indictment and the proof."

Moreover, in the case at bar there could be no claim that defendant was surprised, as it is evident from the record that he was never in doubt as to what transactions were referred to in the indictment. The defense of variance is purely technical and cannot be allowed to prevail.

[2] 2. As above stated, the men who brought in the whisky made two trips, a week or so apart, and the incidents of both trips were described by the government's witnesses. Claiming that their testimony related to two separate and distinct offenses, although but one was charged in the indictment, defendant moved that the government be required to elect the particular offense for which it would ask a conviction. This motion was granted, and thereupon the government elected to stand on the second trip; but the court ruled that the evidence relating to the first trip might also go in "upon the questions of mental attitude, motive, and intent." The refusal to exclude this evidence from consideration by the jury is assigned as error.

We are of opinion that the ruling is sustainable upon two grounds. In the first place, it seems clear that the two trips in question were not independent and unrelated. On the contrary, they are shown to have been quite closely connected in time and circumstances. According to the government's proofs, the same men were employed for both trips, the same assurance given that they would be protected in case of discovery, the same means of transportation used, and the whisky procured at the same saloon in Catlettsburg and brought to the same place in Charleston. But while the arrangements for the first trip were definite and complete, as to what the men were to do and what they were to be paid, the second trip appears to have been undertaken by them, in part at least, upon the understanding that it was to be of the same character and for the same compensation as the first. In short, the two trips were so associated in the planning and execution of a fraudulent scheme that the full truth respecting the second could not be shown without more or less reference to what had happened a few days before; that is to say, the circumstances under which the first trip was made gave point and significance to the subsequent occurrence. The trial court was therefore right in refusing to strike

out the entire testimony relating to the first trip, since much, if not all, of it was clearly competent. *State v. Calhoun*, 67 W. Va. 666, 69 S. E. 1098.

We are also of opinion, without arguing the point, that the testimony in question was admissible for the purpose stated by the learned District Judge. The case comes within the recognized exception to the general rule that a person charged with a particular offense may not be shown to have committed another similar offense in no way connected with the one for which he is on trial. As above stated, the two trips to Catlettsburg were closely related, and the incidents of the first tended to show the motive and intent of defendant in directing the second. Indeed, in this aspect the case seems much less doubtful than *Moore v. United States*, 150 U. S. 57, 14 Sup. Ct. 26, 37 L. Ed. 996, in which the Supreme Court said:

"As intimated in the case of *Alexander v. United States*, 138 U. S. 353 [11 Sup. Ct. 350, 34 L. Ed. 954], where the question relates to the tendency of certain testimony to throw light upon a particular fact, or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it manifestly appear that the testimony has no legitimate bearing upon the question at issue, and is calculated to prejudice the accused in the minds of the jurors."

3. It is further argued that the quantity of whisky transported the second time was not proven to be in excess of the amount allowed by the West Virginia statute, but this can hardly be a serious contention. Even if it be assumed that the one quart a month for personal use permitted by that statute could be brought in without violating the Reed Amendment—and upon that question we express no opinion—it is enough to say that ample and undisputed testimony showed many times that quantity transported on the second trip to Catlettsburg. This claim of defective proof was not made at the trial and its want of merit is obvious.

The record discloses no reversible error and the judgment will accordingly be affirmed.

BIRD v. ELABORATED ROOFING CO. OF BUFFALO, Inc., et al.

(Circuit Court of Appeals, Second Circuit. January 15, 1919.)

No. 151.

1. PATENTS \Leftrightarrow 112(3)—VALIDITY—EFFECT OF INTERFERENCE PROCEEDINGS.
The effect of Patent Office proceedings in interference is to settle on the record there made the question of priority between the parties, assuming that the claimed inventions are identical; but they do not finally establish that either party has made a patentable invention.
2. PATENTS \Leftrightarrow 328—IDENTITY OF CLAIMED INVENTIONS—PREPARED ROOFING.
The Bird patent, No. 1,181,827, and the Becker patent, No. 1,024,550, for prepared roofing held identical as to the invention claimed.
3. PATENTS \Leftrightarrow 106(1)—SECOND PATENT FOR SAME INVENTION—INTERFERENCE PROCEEDINGS.
Under Rev. St. § 4904 (Comp. St. § 9449) which expressly provides for declaring interference with an existing patent, priority of invention may be adjudged in the adverse party, and a patent issued to him.
4. PATENTS \Leftrightarrow 328—VALIDITY AND INFRINGEMENT—PREPARED ROOFING.
The Bird patent, No. 1,181,827, for a prepared roofing, held valid and infringed.
5. PATENTS \Leftrightarrow 328—VALIDITY AND INFRINGEMENT—PREPARED ROOFING.
The Bird patent, No. 1,036,427, for prepared roofing, held valid, but not infringed.
6. PATENTS \Leftrightarrow 165—CONSTRUCTION—BROAD CLAIMS.
A broad claim does not extend invention, and if a patentee discloses one means, a statement that he does not confine himself thereto will not justify a claim covering all means.

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

Suit in equity by Charles S. Bird against the Elaborated Roofing Company of Buffalo, Incorporated, the Elaborated Ready Roofing Company, and Mathias B. Becker. Decree for complainant, and defendants appeal. Modified and affirmed.

The following is the opinion of Hazel, District Judge, in the court below:

"This is a suit in equity for infringement of two letters patent, No. 1,036,427, issued August 20, 1912, on application filed August 9, 1911, and No. 1,181,827, issued May 2, 1916, on application filed August 21, 1911. The two applications which were awaiting action by the Patent Office at the same time, relate generally to roofing paper—a chemically saturated waterproof paper designed to look like tiles, or slate or wood shingles, when laid on the roof of a building. Plaintiff's second patent was not issued earlier, owing to an interference with the Mathias B. Becker patent, No. 1,024,550, previously allowed, under which the defendants herein are manufacturing and selling their roofing material (Complainant's Exhibits 6 and 7 in evidence), and which is alleged to infringe both patents in suit.

"Building paper, having applied thereto an asphaltic material for making it waterproof and treated with fine mineral substances for protecting the surface, was not a new idea at the date of the invention, but was fairly well known and frequently used in the building of dwelling houses. Plaintiff's second patent deals generally with prepared roofing, known to the art, con-

sisting of a paper or felt base, with a layer of viscus material applied thereto, usually of an asphaltic nature, which the base usually absorbs, while the remainder, to which fine particles are applied, is given a waterproof coating for forming a protective covering from the weather. The patentee regarded the sameness of appearance of roofing with straight edges a detriment to its sale for use on the nicer class of dwelling houses, and therefore prepared his roofing sheets somewhat differently, securing a new product. The novelty of his improvement consisted in applying a varicolored matter to the paper base, which gave it the appearance of slate shingling, making it attractive, and relieving the monotony of appearance.

"The application for patent was at first rejected on the ground that no invention was involved in adding a layer of coloring matter to the roofing in any desired design, and the examiner called attention to the Becker patent, No. 1,024,550, which had been granted a few months previously on a later application, and suggested an interference therewith. Claim 6, which was descriptive of Becker's invention, was then inserted. It reads:

"6. Prepared roofing, comprising a sheet of fibrous material impregnated and coated with a waterproof material, said coating being varied in thickness in various fields, a coating of granular grit partially embedded in said coating in the fields of least thickness, and a similar coating completely embedded in the fields of greater thickness."

"Six claims are involved herein, but, as the one set forth is typical, the others need not be reproduced.

"Becker's application was filed six months after Bird's, though a patent to him issued first, inadvertently, it is claimed, on April 30, 1912, and in the interference proceeding, involving this patent and Bird's application, much testimony was introduced relating to priority of invention. The evidence taken in the interference proceeding and the decision thereon have been stipulated into the record herein. Priority of invention was awarded to Bird. The board of examiners in chief, on appeal from the examiner, rendered a similar decision, which was later affirmed by the Commissioner of Patents. Then an appeal was taken to the Court of Appeals for the District of Columbia, where such decisions were affirmed. *Becker v. Bird*, 44 App. D. C. 432. Later this action for infringement was brought against the same parties and their privies.

"The answer of the defendants alleges that the plaintiff was not the inventor of the product described in claim 6 in issue, that his application for patent discloses no invention, that he appropriated the invention of the defendant Becker, and, further, that his patent was anticipated and had been in prior public use. Defendants also seek to have the Bird patent in question canceled under section 4918 of the Revised Statutes.

"The patentability of plaintiff's roofing material was decided on practically the same evidence in favor of the patentee herein by the Circuit Court of Appeals for the 7th Circuit (*West Coast Roofing & Mfg. Co. et al. v. Elaborated Ready Roofing Co. and Mathias B. Becker* [recently decided] 249 Fed. 221, 161 C. C. A. 257), wherein Judge Evans, writing for the court, held that the subject-matter was patentable, and that Bird, the plaintiff herein, anticipated Becker, under whose patent the defendants market their product. It was asserted by defendants in that case, however, that since the decisions on the question of priority of invention new evidence had been discovered, showing that Bird was not the first inventor of the product. The court held, however, that since no such evidence was submitted in the West Coast Case, the contention that it would be submitted in this action, then pending in this district, was insufficient reason for not deciding the priority of invention on the record before the court. It was ruled that, as Bird's application antedated Becker's, the decisions of the Patent Office tribunals and of the Court of Appeals of the District of Columbia would be followed; that, notwithstanding the fact that Becker first received his patent on an application filed later than Bird's, the latter's patent was anticipatory. The record in the Patent Office certainly shows that the subject-matter on both sides was treated as patentable, and Becker's attitude throughout, and the tenacity with which his claim to priority of invention was insisted upon, must certainly be considered as bearing on the good faith of an assertion of invalidity of plaintiff's patent.

"The prepared roofing field was still open for improvement at the date of the invention in controversy. The adaptation of a layer of asphaltic material provided with a coating of fine mineral particles, for varying its thickness and imparting to the roofing a varicolored appearance, was an innovation, resulting in a new and useful product; a preference for such roofing being immediately manifested by builders of dwelling houses. The design imbedded in the roofing is made lasting by using the materials in combination—by uniting the applied layer, the sand or grit, and the asphalt coating underneath, and by such adaptation a result is attained that the prior structures failed to attain. There are prior patents (Lee, No. 490,668) which speak of embossing or finishing the surface of the fabric by ordinary painting to produce the effect of shingles; but the specification does not enlighten the art as to how this was to be successfully done. It failed utterly to disclose a method of coating and utilization of granular grit embedded in the coating to produce the desired design, lines or ornamentation. Such method, in my opinion, amounted to more than mere substitution or selection of suitable material for accomplishing the object of the inventor.

"The Rugen & Abraham patent, No. 775,634, relates to waterproof roofing and accompanying ornamentation; but the substances used for accomplishing the result were a union of resins, fats, and pigment. The patent does not suggest using asphaltic coating varying in thickness and merging in it granular grit, and therefore was not anticipatory. The Goldberg patent, No. 1,113,116, was held not anticipatory in the West Coast suit, and, as there pointed out, the waterproof coloring matter did not mix with the asphalt base, as in Bird's patent, and is not anticipatory.

"As to the date of invention: The evidence in its entirety, supported by the findings of the Patent Office, proves that the patentee Bird conceived the idea in the year 1909, and substantially reduced the same to practice and filed his application for a patent ahead of Becker. It is not shown that Becker conceived the idea before August 21, 1911, which is the date of Bird's application for the patent under consideration. True enough, it is claimed by defendants that his application disclosed nothing patentable until he filed an amendment thereto, which included Becker's disclosure; but there is no satisfactory evidence to substantiate such claim. Complainant's preference in 1914 for paroid or proslate roofing, so-called, the first having the design painted on it marked off with asphalt lines, and the second being 'branded' as described in Bird's first patent, does not bear heavily upon the asserted appropriation of the Becker disclosure—a disclosure that eventuated afterwards, and which prematurely ripened into a patent. Priority of invention as an issue was thoroughly considered by the trained experts of the Patent Office, and nothing is found in the record before me to warrant overthrowing their decisions. Defendants claim generally that, while their invention was conceived as early as June, 1911, it was not finally reduced to practice until Becker filed an application for another patent (No. 1,157,665) involving the same subject-matter, in May, 1913, and that such later patent runs back to the original invention and antedates it. But this contention is without substantial merit.

"The law is that, to set aside a determination of the Commissioner of Patents as to priority of invention, the evidence before the court in an action for infringement must be of such clearness and probity as to satisfy the mind beyond a reasonable doubt that the determination was wrong. *Standard Cartridge Co. v. Peters Cartridge Co.* (C. C.) 69 Fed. 408; *Gold v. Gold*, 237 Fed. 84, 150 C. C. A. 286. Importance is attached to new evidence in this case relating mainly to diligence in reduction to practice, but such evidence does not persuade me of error in the final decision that Bird was first; nor has Becker proven his conception and reduction to practice until after Bird's application was filed, namely, on August 21, 1911. *Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657.

"Reference is made in the briefs to samples of roofing manufactured by Becker and there is testimony by several witnesses not sworn in the interference proceeding; but it appears clearly enough that in 1911 there were painted roofing sheets made by Becker, which had become known to others—sheets without the grit—but the testimony as to such samples is not of a per-

suasive character, as the witnesses may have been mistaken as to the particular kind of roofing sheets they saw. The evidence does not substantiate defendant's claim that Bird's specific conception (claim 6) was induced by information obtained by the witness Bird from Becker, for at such time Bird's application had been filed, although claim 6 was included at the suggestion of the Patent Office. Nor in my opinion is the evidence sufficient to sustain estoppel or priority.

"As to infringement: The product, Plaintiff's Exhibit 6, is shown to be made of a wool felt base, saturated and coated with asphalt and then covered with a layer of colored mineral particles or crushed slate. The stripes overlying the surface are produced by rolling onto the sheet heated asphalt, which is also used in saturating it. By such treatment the stripes or lines were united with the asphaltic base; the sand or mineral particles becoming firmly embedded, which imparted to the roofing varying thickness. Plaintiff's Exhibit 7 is made similarly, save that the asphaltic material, when heated, has a creosote solvent, which dissolves when applied to the base. Defendant's roofing is then rolled, and black sand is sprinkled thereon. As in Exhibit 6, the asphalt of the design united with the asphalt coating of the base, while the particles adhere to the thickest part, forming the stripes, but not so much at other portions of the roofing, where the coating is not so thick.

"Defendants further contend that Bird's invention is limited to a roofing with a smooth finish as distinguished from one covered with grit. But the specification of the second patent states explicitly that 'the particles 7, 7 (see Fig. 2), may be grains of sand, soapstone, or any other natural or artificial particles adapted for the purposes herein described,' and that 'the greater portions of such particles 7, 7, extend outward from said layer 6, and mechanically protect said surface from the weather,' implying no limitation as to shape or size. It makes no difference that no roofing has been produced by plaintiff with grit of the kind used in defendants' product, or that plaintiff preferred to make a smoother sheeting. There is no doubt in my mind but that grains of sand or soapstone—mineral particles—are a species of grit, as that term is ordinarily understood.

"My conclusion is that Bird's second patent fairly included a roofing material containing as essential elements either a smooth or a rough grit for making the lines, and that by the inclusion of claim 6 in the specification the improvement was not appropriated from Becker.

"As to Bird's patent, No. 1,036,427, of earlier date: The single claim covers the product and reads as follows:

"Building and roofing material, comprising a sheet of paper furnished with an asphaltic coating having a continuous layer of soapstone particles, certain areas or lines of said particles being embedded in said asphaltic material thereby exposing the asphaltic material and producing areas or lines of contrasting color.'

"The patentee acknowledges in the specification that paper roofing having the base impregnated with an asphaltic material and its surface sprinkled with mineral particles was an old expedient, but, desiring to relieve sameness of appearance in the product, he made the roofing with stripes or lines, and conceived the idea of forming them on the surface of the sheets of asphaltic material. To accomplish this, he used either sand, soapstone, or other mineral particles, and caused the same to adhere to the body of the sheet to form a protective covering 7. The color of the protective sheeting was in contrast with layer 6. By applying heat with pressure to the outer coating 7, he was able to form the design or stripes by embedding the sand or grit therein. This adaptation, as has been pointed out in considering the second patent, was first reduced to practice in June, 1909. The prior art roofings were without lines or stripes. Indeed, lines or stripes made from the protective material by branding it into the surface of the sheet formed a new and useful adaptation.

"One Schmidt attempted to show prior use. He decorated his roofing by hand with a brush and coated the seams; but he was unable to specify the character of the coloring, and the testimony is wholly insufficient to establish prior use.

"Defendants further contend that the process in question, by which plaintiff's roofing was produced, was an abandoned experiment. The design or lines, it is true, were formed in the roofing material of the earlier patent, without varying the thickness of the asphalt coating, and the particles were pressed into the line areas without change in the thickness of the sheeting; but plaintiff was not restricted to one adaptation, and sues, not only for infringement of the specific adaptation embodied in claim 6 of the patent already considered, but also of the broad idea of making lines in the ready roofing by embedding the particles in the material for producing areas of contrasting color, irrespective of the manner in which it is accomplished. There is no doubt but that the patentee could have embodied several inventions in one patent, but he was not required by law to do so. He had the right to protect his inventions by different patents, notwithstanding that they originated at the same time. Thomson-Houston Electric Co. v. Elmira & H. Ry. Co., 71 Fed. 396, 18 C. C. A. 145. One patent may protect the generic invention and the other the specific. Cleveland Foundry Co. et al. v. Detroit Vapor Stove Co., 131 Fed. 853, 68 C. C. A. 233.

"In my opinion the claim in question was infringed by defendants' product, unless the patent is limited to soapstone or fine sand; but such a limitation is not contained therein. Defendants' paper base roofing is concededly coated with asphalt upon which there is sprinkled a continuous layer of mineral particles for forming the design, and the lines of the design have an asphaltic coating, which is thicker than the other portions of the roofing or sheet, owing to an additional quantity of asphalt, and there are areas of contrasting color—substantially the same product as plaintiff's.

"Decree for plaintiff, as prayed, with costs."

The facts were stated in this court as follows:

The action is upon all the claims of two patents, both issued to the plaintiff. The general subject-matter of both patents is commercially known as prepared roofing, consisting of a "felt" made of paper stock impregnated and coated with a waterproofing material, usually asphaltum, and covered on the side intended to be exposed to the weather with mineral particles of many kinds, sand being in commonest use. Such roofing is a well-known substitute for shingles and the like.

The plaintiff-patentee has long been a manufacturer of such roofing, which was well known in and long before 1911. In August of that year plaintiff filed applications for the two patents in suit. His earlier patent, No. 1,036,427, issued August 20, 1912, is for an improvement in the above-described roofing material and contains one claim, as follows:

"Building and roofing material comprising a sheet of paper furnished with an asphaltic coating having a continuous layer of soapstone particles, certain areas or lines of said particles being embedded in said asphaltic material thereby exposing the asphaltic material and producing areas or lines of contrasting color."

The object of the invention thus defined was to produce a design upon the roofing material simulating slate, and thus relieve the dull uniformity of color and surface which (it was thought) impaired the marketability of the plain product. The only means of producing "areas or lines of contrasting color" contained in the disclosure is to apply heat or pressure or both to (apparently) either said "areas" or said "lines," and thus embed the mineral covering of the asphaltum coating more deeply in said coating within the lines or areas subjected to heat and pressure. This patent will hereafter be called the "branding" patent.

The other patent in suit did not issue until May 2, 1916, by reason of a long-continued interference with the defendant Becker.

On February 1, 1912, Becker himself filed an application which, like both of the patents in suit, covers an improvement in roofing materials. Thus the applications of Becker and of Bird for the second patent in suit were copending, but no interference was declared until Becker's patent issued (it was said by inadvertence in the Office) on April 30, 1912.

No. 1,024,550: This patent to Becker contained one claim, and after its issue an interference was declared between Bird and Becker; Bird then incorporating into his application Becker's single claim, which is as follows:

"Prepared roofing comprising a sheet of fibrous material impregnated and coated with a waterproof material, said coating being varied in thickness in various fields, a coating of granular grit partially embedded in said coating in the fields of least thickness, and a similar coating completely embedded in the fields of greater thickness."

This followed the usual procedure of the Office and raised this issue, viz.: Both Bird and Becker asserted by their applications that patentable invention was disclosed. Bird at least asserted identity of invention and each of the interfering parties asserted his own priority:

This interference proceeded for some years, and Bird prevailed throughout the Patent Office and in the Court of Appeals for the District of Columbia; and thereupon, notwithstanding the existence of Becker's patent, issued as aforesaid, Bird obtained the second patent in suit (No. 1,181,827), containing six claims, including the one above quoted and appropriated from Becker. It is not though necessary to set forth any of the other claims.

The disclosure of this patent exhibits another and different method of producing a design prepared roofing, viz. by taking the old prepared roofing with asphaltic and mineralized surface and applying a pattern thereto, by laying thereon in lines the same viscous asphaltic material as had been used to surface the original "felt," and putting in this still plastic overlay mineral particles, preferably of a different color. Thus this style of roofing, as produced by both Bird and Becker, is of one thickness in one area and of greater thickness in the other and contrasting area. Bird's second patent will hereafter be called the "overlay" patent.

It thus appears that since the issue of the overlay patent both Bird and Becker (or their assignees) have owned separate grants of monopoly containing one claim in common, namely, the one last above quoted.

The relative merits of these patentees were exhaustively considered in the Seventh Circuit in *West Coast, etc., Co. v. Elaborated, etc., Co.*, 249 Fed. 221, 161 C. C. A. 257, with the result that, not only Becker's patent in interference (1,024,550), but also another patent of his relating to the same subject-matter (1,024,549), were declared void as anticipated by the overlay patent to Bird.

When this decision was filed the present action was pending in the District Court; it was brought against the Elaborated Roofing Company of Buffalo only, whereupon the other present defendants-appellants petitioned to be admitted; it appearing that the original defendant was but a subsidiary of the intervenors. The prayer was granted, and an amended answer filed, setting up all the defenses usual in patent suits and especially that Becker, and not Bird, was the first inventor of whatever the invention is disclosed in the overlay patent.

The District Judge overruled all the defenses, declared defendants to infringe all the claims in suit, and this appeal was taken; but in this court the defense of prior invention in Becker over Bird was not argued and will not be considered by us.

J. Edgar Bull, of New York City, and John M. Zane and R. W. Lotz, both of Chicago, Ill., for appellants.

W. K. Richardson and Harrison F. Lyman, both of Boston, Mass., for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] The effect of the Patent Office proceedings in interference is not doubtful; they settled, on the record there made, that, assuming identity in the assumed inventions of Bird and Becker, the former was the prior in time. *National, etc., Co. v. Wheeler, etc., Co.*, 79 Fed. 432, 24 C. C.

A. 663. They did not finally establish that either party had, in common speech, invented anything, although of course an interference would have been impossible, had not each party declared on oath his claim to a patentable invention. This rule rests fundamentally on the interest of the public in every grant of monopoly, even the most beneficial.

Whether, under the circumstances shown, defendants (who are the Becker of the interference and his creatures) are not estopped or in some way prevented from presently urging that Bird, if he first invented anything, invented something different from the result of Becker's ingenuity, is a question we shall not consider, preferring to examine the merits of this record.

Since the new evidence as to priority introduced at the trial of this case has not warranted argument to us on that question, we assume priority in Bird.

[2] As to identity, it is enough to refer to the opinion in the West Coast Roofing Co. Case, *supra*. We do not assert that the judgment therein binds us in respect of this litigation, nor overlook arguments based on the peculiar way in which the relative merits of Bird and Becker were there made an issue; but we do concur in the result there reached after very prolonged discussion of a record identical on this subject with that before us, viz. that Becker, and Bird in his "overlay" patent, made exactly the same contribution to the sum of human knowledge.

As to the patentability of both the grants before us, there is nothing to add to Judge Hazel's discussion of the prior art as revealed by older patented inventions. We note, however, that in this court new or greater stress is laid on Hebblewhite, No. 322,601, as anticipating the "branding" patent. The argument is an endeavor to import into the art of roofing an anticipation from that of floor covering. Such contentions are legitimate and oftentimes succeed. The question is of fact, and it is impossible to appraise items of evidence so that they always pass current at some standard value, as do sterling coins. In this instance, we regard the similarity as very forced, and the remoteness of the arts so obvious as to negative the thought that any one, desiring to produce a design roofing, would gather even inspiration or suggestion from a patterned floor cloth.

The real and substantial question as to patentability does not rest on a meticulous comparison of this or that old patent, but on consideration of the query whether, assuming in, especially, Mr. Bird a long and intimate knowledge of the kind of roofing first above described, there was room for a mechanical product patent covering an ornamental variant of an old article of manufacture, when no change in roofing efficiency was sought or reached, and the means of ornamentation were so simple as are disclosed in both the patents in suit.

Solution of this question (always remembering the presumption in favor of invention, slight though it be) must be reached by consideration of the ample evidence before us, showing the existence of a real demand for a design roofing, and the failure of ornamental ad-

ditions produced by any material less durable or unchanging than the waterproofing surface itself.

By means very simple, but truly mechanical, and novel in their application, Bird solved the problem in two ways, and received two patents for so doing. He did more than put a design on roofing; he showed how to do it. Therefore he was and is entitled, not only to patent protection for his method, but for the result of his method, if both result and method were new. We reach this conclusion without any reliance on the doctrine of commercial success (which might well be invoked), and without being consciously affected by the obvious, and indeed admitted, fact that Becker, after fighting for six years to get something from Bird which they both called "invention," now discovers the acidity of the grapes, and says there was no invention after all.

[3] It is also urged that under section 4904, R. S. (Comp. St. § 9449), the Patent Office had no jurisdiction to "grant a second patent for the identical invention, * * * and such second grant is void." This means that, Becker having once gotten a patent, it was beyond the Commissioner's power, by or after interference or otherwise, to grant Bird's patent containing Becker's single claim. For this contention we are referred to decisions holding "that no patent can issue for an invention actually covered by a former patent" (e. g., *Miller v. Eagle, etc., Co.*, 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121), and it seems to be thought that some constitutional rights are involved or infringed.

All patent rights are statutory; the constitutional grant is merely a power to secure for limited times to inventors the exclusive right to their discoveries; Congress may exercise the power or refrain from so doing, and, if it does exercise the same, all grants of privilege are at the peril of the law creating them. Section 4904 expressly provides for interference with an existing patent; it was law when Becker applied for his patent; therefore he took subject to the possibility of just what happened, and has no right to complain. Whether such a statute as section 4904 could affect patents issued before its passage is a question not before us.

[4, 5] We thus agree with the court below that both patents in suit are valid, and that the overlay patent has been infringed; but there is only one infringing article proved, viz. an overlay design roofing which exactly responds (as would be expected) to the claim devised by Becker's solicitor and awarded to Bird after interference. We are of opinion that infringement by that article of the "branding" patent was declared by inadvertence.

[6] It is true that the single claim of that patent is so broadly drawn as to read on any roofing showing contrasting "lines and areas"; such contrast being produced by the "embedding" of some mineral particles in the asphaltic covering more deeply than other particles. But a broad claim does not extend invention; and if an inventor discloses one means, a statement that he does not confine himself thereto will per se certainly not justify a claim covering all means. *Outlook, etc., Co. v. General, etc., Co.*, 239 Fed. at 879, 153 C. C. A. 5.

In this, as in many other instances, the proper inquiry is, what does the disclosure of the "branding" patent teach? It tells how to make "branded roofing," and gives no other information to the man skilled in the art. It states that the branding may result from heat, pressure, or the application of a solvent; beyond that there is not even the oft-referred to "pious aspiration." Therefore we do not think that Mr. Bird himself ever dreamed that his "overlay" roofing would (if made by a stranger) infringe his "branding" patent, and, if such is the case, Becker's product in evidence does not infringe.

The decree appealed from is modified, by denying infringement of valid patent No. 1,036,427, and, as modified, affirmed, without costs.

FOUNDATION CO. v. UNDERPINNING & FOUNDATION CO.

(District Court, S. D. New York. January 27, 1919.)

PATENTS \Leftrightarrow 287—SUIT FOR INFRINGEMENT—USE OF INVENTION BY OR FOR UNITED STATES—INJUNCTION.

Under Act June 25, 1910, as amended by Act July 1, 1918 (Comp. St. 1918, § 9465 Append.), providing that, whenever a patented invention shall be used by or for the United States without license, the "owner's remedy shall be by suit against the United States * * * for the recovery of his reasonable and entire compensation," a court will not grant a preliminary injunction to restrain the use of a patented invention by a contractor in the construction of a government building.

In Equity. Suit by the Foundation Company against the Underpinning & Foundation Company. On motion for preliminary injunction. Denied.

D. Anthony Usina, of New York City, for the motion.

J. Edgar Bull, of New York City, opposed.

John E. Walker, Special Asst. U. S. Atty., of New York City, amicus curiæ.

MAYER, District Judge. Plaintiff is the owner of certain patents having to do with the construction of caissons, and has brought the usual suit for infringement against defendant, inter alia, for permanent injunctive relief, and this motion is for a preliminary injunction.

Caissons said to infringe are being sunk as parts of the foundation of the new United States Assay Office, now in course of construction at 30 Wall street, New York City, for the United States government, under the direction of the Treasury Department, pursuant to contract.

Defendant is the subcontractor for the building of the foundations for this new Assay Office, and the caissons are being constructed as parts of such foundations. Two caissons have been completed and are ready to be sunk, and other caissons are in various stages of construction. When sunk to bed rock, the caissons become parts of the foundations of the building.

It is plain that an injunction, if now issued, would seriously delay the construction of the public building in question, and therefore, at

the threshold of the case, attention is called to the Act of July 1, 1918, c. 114, 40 Stat. 704 (Comp. St. 1918, § 9465, Append.), which amended the Act of June 25, 1910, c. 423, 36 Stat. 851. The point is made that the act of 1918 was intended, in any event, to prevent the issuance of an injunction in a case such as that at bar.

It may fairly be assumed that the amendatory act of July 1, 1918, was enacted to overcome the delays and difficulties which confronted the government in the use of patented articles and which were still possible under the act of 1910, as that act had been construed by the Supreme Court. *International, etc., Co. v. William Cramp, etc., Co.*, 202 Fed. 932, 121 C. C. A. 290; *William Cramp, etc., Co. v. International, etc., Co.*, 246 U. S., 28, 38 Sup. Ct. 271, 62 L. Ed. 560; *Maroni Wireless, etc., Co. v. Simon (D. C.)* 227 Fed. 906; *Id.*, 231 Fed. 1021, 145 C. C. A. 656; *Id.*, 246 U. S. 46, 38 Sup. Ct. 275, 62 L. Ed. 568.

Such parts of the two acts as are material to the question here are quoted for convenient reference:

"Whenever an invention described in and covered by a patent of the United States shall hereafter be used by the United States without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the Court of Claims. * * *"
 Act of 1910.

"Whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture. * * *"
 Act of 1918.

These important differences at once appear: (1) "Used by the United States" is enlarged to (a) used by and for and (b) manufactured by and for; (2) such owner "may recover reasonable compensation" against the United States, with no limitation upon the right to sue or recover against the infringing contractor, manufacturer, or other person, is changed to confining "such owner's remedy" to a suit against the United States for the recovery, not only of reasonable compensation, but of his "entire compensation."

In the case at bar, which is quite typical, one provision of the original proposals and specifications, "because of the urgent need for the early completion of the building," makes time an element in the consideration and determination of the award of the contract, and probably one of the reasons for the enactment of the act of July 1, 1918, was to obviate delays which injunctive relief would occasion.

The sovereign power, therefore, which cannot be sued without its consent, has decided to protect itself by treating such a situation as that at bar as a claim, in effect, against itself for full money compensation, and has thus created, not only a cause of action against itself for reasonable compensation, but for whatever may be "entire" compensation.

Whether plaintiff has a cause of action against defendant is, however, not here for decision at the moment. It is, however, clear that the act of July 1, 1918, was intended to supply the inadequacies of the

previous act, and give complete remedy against the United States, in order to prevent delays injurious to the government which necessarily follow the restraining of any person from carrying out a contract to furnish patented articles, devices, et al., manufactured for or to be used by or for the United States.

Whether these views are correct or not, it is at least certain that, under the well-settled practice of this circuit, the motion must be denied.

CLEVELAND MACARONI CO. v. STATE BOARD OF HEALTH OF CALIFORNIA et al.

(District Court, N. D. California, Second Division. March 3, 1919.)

No. 415.

1. **COMMERCE** ⇨41(3)—**GOODS SHIPPED IN INTERSTATE COMMERCE—PACKAGES.**
Goods packed in cartons, shipped in interstate commerce, and sold by importing wholesalers to retailers, by whom they are removed from the shipping cases, and the cartons placed on sale to consumers, are removed from the domain of interstate commerce.
2. **COMMERCE** ⇨60(3)—**POWER OF STATE TO REGULATE SALE—MISBRANDING.**
Food and Drugs Act June 30, 1906 (Comp. St. 1916, § 8717 et seq.), by prohibiting adulteration or misbranding, does not interfere with the power of a state, after a product has become a part of its retail commerce, to prescribe the standard of purity to entitle it to be sold under a certain brand or label.
3. **CONSTITUTIONAL LAW** ⇨62—**DELEGATION OF POWER—REGULATION OF SALE OF FOOD.**
It is competent for a state, in regulating the sale of food products, to adopt the standard of percentage of ingredients fixed by the Department of Agriculture to entitle an article to be sold under a certain label, without making act an obnoxious delegation of power.

In Equity. Suit by the Cleveland Macaroni Company against the State Board of Health of California and others. On motion by complainant for preliminary injunction. Denied.

Theodore A. Bell, of San Francisco, Cal., for plaintiff.
Kemper B. Campbell, of Los Angeles, Cal., for defendants.

VAN FLEET, District Judge. Application by plaintiff for a preliminary injunction. The bill discloses that plaintiff manufactures in Ohio the well-known article of food popularly called "noodles," and introduces its product into this state through the medium of local wholesalers and jobbers for sale to retailers, and ultimately through the latter to the consumer. The goods are doubly labeled on their packages or containers as "Golden Egg Brand Noodles" and "Golden Age Noodles," and are shipped to the jobbers who, according to the allegations of the bill, "distribute the same to retail dealers for sale to consumers in the same packages" in which they leave the factories, and that the packages "remain unbroken until they reach the hands of the individual consumers."

It is alleged that the defendant State Board of Health threatens to proceed under the provisions of the Pure Food Law of the state (Stats. Cal. 1907, c. 181, p. 208), to seize and quarantine plaintiff's goods as misbranded and thus prevent their sale, and it is alleged that such action will violate plaintiff's rights under the commerce clause of the Constitution (article 1, § 8, cl. 3) and the Food and Drugs Act of June 30, 1906 (34 Stat. 768, c. 3915 [Comp. St. § 8717 et seq.]), and cause irreparable injury to plaintiff; hence this application to restrain the threatened acts pending the final hearing.

[1] 1. Plaintiff's main contention is that its goods are a part of interstate commerce and that it is not competent for the state to interfere to regulate the manner of their sale or disposition.

The defendant in its return distinctly disclaims any purpose or intention to interfere with the goods until after they have been sold by the importing wholesaler to the retailer, removed from the cases in which shipped, and placed on the shelves of the latter for sale to the consumer. Ordinarily such disposition withdraws goods shipped into a state from the domain of interstate commerce, and makes them a part of the general body of local commerce, and subjects them to any reasonable regulations by the state. *Austin v. Tennessee*, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224; *Ex parte Maier*, 103 Cal. 484, 37 Pac. 402, 42 Am. St. Rep. 129.

Plaintiff insists, however, that under the principles of *McDermott v. Wisconsin*, 228 U. S. 115, 33 Sup. Ct. 431, 57 L. Ed. 754, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915A, 39, its goods are still a part of interstate commerce and solely subject to regulation by Congress, notwithstanding they may have been sold by the wholesaler to the retailer, so long as they remain in the original packages in which they were packed by the manufacturer, and the allegations of its bill are evidently shaped to bring the case made within that contention. But in this I think plaintiff has misapprehended the scope and effect of the principles announced in that case. The case was somewhat unusual in its circumstances. The sale of the goods was directly by the manufacturer in one state to the retailer in another, the latter thus being the original recipient from the manufacturer without any intermediate sale within the state. The state law of Wisconsin, into which the goods were shipped, moreover, undertook to forbid a sale within the state of the particular food product without a removal of the label or brand under which it had been received and the substitution of one prescribed by the local law, although the label or brand under which it had been shipped into the state was not violative of the requirements of the federal Food and Drugs Act. The court held that, as the commodity was still in the hands of the original importer, it was to be regarded as a part of interstate commerce and was not subject to state regulation, and, further, that to require the label to be removed while the article remained unsold would be an unwarranted interference with the regulations adopted by Congress for the protection of such commerce.

That is as far as that case goes. It was manifestly not intended by anything there said to work any change in the principles previously

announced, and often reaffirmed by that court, on the question when commodities carried in interstate commerce cease to be a part of such commerce and come under the control of the regulatory power of the state. This is made plain by the court's own interpretation of that decision in the recent case of *Weigle v. Curtice Bros. Co.*, 248 U. S. 285, 39 Sup. Ct. 124, 63 L. Ed. —, where it is said:

"For reasons stated in *McDermott v. Wisconsin*, 228 U. S. 115, 33 Sup. Ct. 431, 57 L. Ed. 754, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915A, 39, if the state could require the label to be removed while the bottles remained in the importer's hands unsold, it could interfere with the means reasonably adopted by Congress to make its regulations obeyed. But all this has nothing to do with the question when interstate commerce is over and the articles carried in it have come under the general power of the state. The law upon that point has undergone no change."

The present case is precisely similar in its facts, so far as their legal aspects are concerned, to the *Weigle Case*. It appears from defendant's return on the order to show cause that the plaintiff's goods are shipped into the state in large containers or boxes, each containing a certain number of small packages or paper cartons, in quantities suitable for sale to the consumer, and that it is in this latter form they are sold by retailers. The *McDermott Case* has no application to such a state of facts. Nor is there anything in either *Schollenberger v. Penn.*, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49, or *Collins v. New Hampshire*, 171 U. S. p. 30, 18 Sup. Ct. 768, 43 L. Ed. 60, to support plaintiff's contention. Both cases, so far as they bear upon the question, are quite in harmony with the views above expressed.

[2] 2. Nor is there anything of substance in plaintiff's further contention that the provisions of the state law sought to be enforced by the defendants contravene or are in conflict with the Food and Drugs Act. Plaintiff's goods, as we have seen, are labeled in a manner to convey the impression that they are within the class of what in the trade are known as "egg noodles"; that is, noodles containing a substantial quantity of egg ingredient in their composition. The claim of the defendant board that they are misbranded or mislabeled is based upon the fact, as disclosed in its affidavits, that the goods do not contain the quantity of egg ingredient to entitle them to be classed as "egg noodles"; that analysis shows that they contain but 2 per cent. of egg, whereas the state law requires that they should contain at least 5 per cent. of egg ingredient—the percentage fixed by the United States Department of Agriculture (which the state law [section 3] adopts as the standard of purity) to entitle them to be classed as "egg noodles"; that consequently they can only be properly labeled and sold under the state law as "plain noodles" or "water noodles."

Plaintiff's contention is, however, in effect that Congress has undertaken to prescribe a standard of purity for such products and as to how they are to be branded, and that it is not competent for the state to prescribe a different standard or measure of purity or manner of labeling; in other words, that, Congress having legislated on the subject, its enactment prescribes the exclusive measure of requirement for the manufacturer which the state is not at liberty to transgress, even after the goods have reached the hands of the retailer.

But this contention confounds the distinction, always to be kept in mind, between the power of Congress to regulate interstate commerce and that of the several states, under their ample police powers, to regulate without interference all that pertains to their own internal affairs, including their domestic commerce, in such manner as will in the judgment of the particular state best conserve the welfare of its inhabitants. This distinction arises out of our dual system of government and the respective powers granted to the federal government on the one hand and reserved to the states on the other, as clearly expressed in the Constitution. The federal Food and Drugs Act, in all its provisions, keeps this distinction well in view, and discloses very clearly that it is not intended to trench upon the powers of the states in any respect. It aims, as its title imports, at "preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs," etc., but only while and so long as the commodities remain a part of interstate commerce and so under the control of Congress. It does not undertake to prescribe any precise standard of purity or the manner in which goods shall be branded or labeled, contenting itself with the requirement that they shall not be adulterated, or sophisticated, or otherwise rendered deleterious to health, and, if labeled or branded as to character or quality, that such marking shall be correct and truthful. But these provisions, and any regulations made in pursuance of them, as before stated, cease to affect a commodity when it has finally come within the range of state control. These principles are thus aptly and clearly expressed in the *Weigle Case*:

"The Food and Drugs Act indicates its intent to respect the recognized line of distinction between domestic and interstate commerce too clearly to need argument or an examination of its language. It naturally would, as the distinction is constitutional. The fact that a food or drug might be condemned by Congress, if it passed from state to state, does not carry an immunity of foods or drugs, making the same passage, that it does not condemn. Neither the silence of Congress nor the decisions of officers of the United States have any authority beyond the domain established by the Constitution. *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 362, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455. When objects of commerce get within the sphere of state legislation, the state may exercise its independent judgment, and prohibit what Congress did not see fit to forbid. When they get within that sphere is determined, as we have said, by the old long-established criteria. The Food and Drugs Act does not interfere with state regulation of selling at retail. *Armour & Co. v. North Dakota*, 240 U. S. 510, 517, 36 Sup. Ct. 440, 60 L. Ed. 771, Ann. Cas. 1916D, 548; *McDermott v. Wisconsin*, 228 U. S. 115, 131, 33 Sup. Ct. 431, 57 L. Ed. 754, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915A, 39. Such regulation is not an attempt to supplement the action of Congress in interstate commerce, but the exercise of an authority outside of that commerce that always has remained in the states."

3. There is nothing in the state law, so far as the provisions here involved are concerned, which would seem to transcend the power of the state in the reasonable exercise of its regulatory power. The provisions are evidently aimed at the protection of its inhabitants against deceit and misrepresentation as to the real character of the food presented for their consumption; and it matters not in this respect if plaintiff's goods be, as claimed, healthful and nutritious food and free

from deleterious matter. It is a question of requiring them to be labeled and sold for what they really are, and not as something else; one of fair dealing with the public. *The Hebe Co. v. Shaw*, 248 U. S. 297, 39 Sup. Ct. 125, 63 L. Ed. —.

[3] 4. It was perfectly competent for the state act to adopt as a standard of purity for the enforcement of its regulations the determinations of the Department of Agriculture, and such enactment involves no obnoxious delegation of legislative power. *Ex parte Gerino*, 143 Cal. 412, 77 Pac. 166, 66 L. R. A. 249; *Arwine v. Board Medical Examiners*, 151 Cal. 499, 91 Pac. 319; *St. Louis, I. M. & S. Ry. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061.

In view of these considerations, the application for an injunction must be denied.

LUMBER MUT. FIRE INS. CO. v. MALLEY, Internal Revenue Collector.

(District Court, D. Massachusetts. December 29, 1916.)

No. 653.

1. INTERNAL REVENUE ↔9—CORPORATION EXCISE TAX—MUTUAL INSURANCE COMPANIES—"INCOME RECEIVED WITHIN THE YEAR."

Only premiums actually received in cash during the year, and not premiums accruing or becoming due, but not paid, within the year, nor money previously received in payment of a premium, but applied within the year to pay a different premium, on a renewal policy, instead of the policy holder, on expiration of his policy, taking his expiration return premium, or dividend, in cash as he had a right to do, are "income received within the year" by a mutual insurance company within Excise Tax Act, § 38, cl. 2; an estimation on a "cash," as opposed to a "revenue," basis being contemplated by the act.

2. TRIAL ↔145—ABANDONMENT OF PART OF CLAIM.

Plaintiff, in action to recover back part of excise tax assessed against it and paid under protest, abandoning at the hearing its claim as to a certain item, the court will rule that as to such item there was no illegal exaction.

3. INTERNAL REVENUE ↔38—ILLEGAL EXACTION—RECOVERY OF SUCCESSOR IN OFFICE.

Part of excise tax illegally exacted and paid under protest to collector of internal revenue may be recovered of his successor in office.

At Law. Action by the Lumber Mutual Fire Insurance Company against John F. Malley, Collector of Internal Revenue. Judgment for plaintiff.

Choate, Hall & Stewart, of Boston, Mass., and Frederick H. Nash, of Boston, Mass., for plaintiff.

George W. Anderson, U. S. Atty., and James S. Allen, Asst. U. S. Atty., both of Boston, Mass., for defendant.

DODGE, Circuit Judge. In this suit against the collector of internal revenue, the plaintiff, a mutual insurance company incorporated under Massachusetts laws and doing business in Boston, seeks to recover back part of the franchise tax for the year 1909, assessed against it by the Commissioner of Internal Revenue and paid by it under protest to the defendant's predecessor in the office of collector. The questions pre-

sented involve the construction of provisions contained in section 38 of the act of Congress passed August 5, 1909 (36 Stat. 112-117), known as the federal excise tax statute.

The parties have waived trial by jury, and have submitted the case on an agreed statement of facts filed March 21, 1916, which is adopted as my finding of the facts involved.

[1] 1. The first question in dispute is as follows: In its return for 1909, as amended by it February 26, 1910, the plaintiff stated its total income from premiums received during the year at \$232,575.08, being the total amount of such premiums only as were actually received by it during 1909 in cash. This included premiums on policies written before the year began, but not paid to it until after the beginning of the year. It does not include premiums on policies written during 1909, but not actually received in cash until after that year had ended, nor premiums on policies written during 1909, the premiums whereon were never received, because the policies were never taken by the insured. In the cases of premiums received, but in part returned during the year upon cancellation or modification of the policy, only the part retained is included. This item, with one other, representing the income from sources other than premiums, made up the total gross income returned.

The Commissioner of Internal Revenue, amending the return under the provisions of the fourth clause of section 38, added \$106,056.18 to this item, thereby making it amount to \$338,631.26, and making it include all premiums written in policies or renewals issued during 1909, whether collected during that year or not. The total of all such premiums was \$385,802.05, but the Commissioner permitted the omission of all premiums written as above whose return was allowed during 1909, whether actually repaid during that year or not, until after its expiration; their total amount being \$47,170.79.

In the \$106,056 added by the Commissioner as above is included \$104,787.72, the total amount of payments by credit of premiums written during 1909 in policies issued in renewal of policies expiring within 1909, but written before that year began. This was a mutual insurance company, and out of the premiums paid when such policies were issued each of the policy holders was entitled upon the expiration of his policy to an "expiration return premium" or "dividend." Instead of taking this in cash, as he might, if he renewed his policy, he took credit for it as part of the premium charged him on the renewal policy, and completed payment thereof by paying or promising the balance remaining due after such credit. The question here is whether or not the amounts of such credits, in the company's hands before 1909 began, are, because applied during that year in payment of premiums for policies written within the year, "income received within the year," in the sense intended by the second clause of section 38. Whether or not, irrespective of the year in which the amounts credited were received by the company, such "expiration return premiums" or "dividends," whether credited in renewal or paid in cash to the policy holder, are "sums other than dividends" deductible from net income under the fur-

ther provisions of said second clause, is a different question, further referred to below.

The Commissioner's ruling was, in effect, that said second clause required the inclusion in gross income of all premiums accrued or credited within 1909, whether actually paid the plaintiff company in cash within that year or not. In other words, he required a "revenue," instead of a "cash," basis for the accounting.

I regard the plaintiff's claim that only premiums actually received in cash during the year can properly be regarded as income for the purposes of said second clause as well founded. As to premiums accrued or becoming due, but not paid, within the year, and as to money previously received in payment of a premium, but applied within the year to pay a different premium, I rule that their inclusion as "income received within the year" is not required by said second clause.

The same question, in substance, was decided in the same way by the District Court in New Jersey in *Herold v. Mutual, etc., Co.*, 198 Fed. 199, 214, 216, a decision affirmed on appeal 201 Fed. 918, 120 C. C. A. 256 (though the particular question was not discussed by the appellate court), and also by the District Court in Connecticut, *Connecticut General, etc., Co. v. Eaton*, 218 Fed. 188, 205, 206, and *Connecticut Mutual, etc., Co. v. Eaton*, 218 Fed. 206, 222, 223, decisions affirmed on appeal 223 Fed. 1022, 138 C. C. A. 663 (through again without discussion of the particular question by the appellate court). The reasoning of the District Court in each of the decisions referred to seems to me applicable here and to require a similar decision in the present case. A "cash" and not a "revenue" basis, for estimation of the income whereby the tax imposed is to be admeasured, seems to me the basis contemplated by the statute. It may be noticed that in providing by the act of October 3, 1913 (38 Stat. 114, 166, c. 16), for the taxation of the incomes of individuals and corporations, Congress expressly subjected to taxation "the entire net income arising or accruing from all sources in the preceding calendar year" (38 Stat. 166, 172), which is language better adapted to bear such a construction as is here contended for by the internal revenue authorities than is the language of the statute governing this case.

I rule that to the amount of \$1,060.56, being 1 per cent. upon the sum added to gross income by the Commissioner as above, the tax paid by the plaintiff was illegally exacted, and that it is entitled to recover said amount from the defendant.

2. A further question presented by the pleadings is whether or not the Commissioner's action in further amending the plaintiff's return by disallowance of a claimed deduction amounting to \$10,083.09 was justifiable under the act. The increase of tax resulting therefrom was \$100.83.

The amount of the deduction claimed and disallowed as above consisted of payments made by the plaintiff during 1909, to holders of its expired policies who, instead of renewing them upon the terms above explained, took from it the amounts of "expiration return premium" or "dividend" in cash. The Commissioner held that such payments by

the company were not of "sums other than dividends" within the meaning of the second clause of section 38.

[2] The plaintiff abandoned at the hearing the claim as to this item asserted in its declaration, and conceded that the above amount of \$10,083.09 should not be deducted, although authority for its deduction is to be found in the decisions I have referred to above. I therefore rule, in this case, that there was no illegal exaction of the \$100.83 involved in said deduction.

[3] There is no dispute that the plaintiff has put itself into the position required by the act to permit its recovery of whatever the court may adjudge to be due it. I rule that the defendant is liable for the above illegally exacted tax, though it was not paid to him, but to his predecessor in the same office, in this respect following the expressed opinion of both counsel.

I find, therefore, in the plaintiff's favor for the sum of \$1,060.56, with interest from March 14, 1913, the date of its payment, and judgment, when entered, will be entered accordingly.

LUMBER MUT. FIRE INS. CO. v. MALLEY, Internal Revenue Collector.

(District Court, D. Massachusetts. December 29, 1916.)

No. 650.

INTERNAL REVENUE \Leftrightarrow 9—CORPORATION EXCISE TAX—MUTUAL INSURANCE COMPANIES—"INCOME RECEIVED WITHIN THE YEAR."

Increase or decrease in book value of bonds held by a mutual insurance company as investment does not affect "income received within the year," within Excise Tax Act, § 38, cl. 2.

At Law. Action by the Lumber Mutual Fire Insurance Company against John F. Malley, Collector of Internal Revenue. Judgment for plaintiff.

Choate, Hall & Stewart, of Boston, Mass., and Frederick H. Nash, of Boston, Mass., for plaintiff.

Geo. W. Anderson, U. S. Atty., and James S. Allen, Asst. U. S. Atty., both of Boston, Mass., for defendant.

DODGE, Circuit Judge. 3. A further item of addition made by the Commissioner to the plaintiff's gross income as returned by it is in dispute in this case, and presents a question not raised in No. 653, 256 Fed. 380, relating to its income for 1909, nor in No. 652, relating to its income for 1910.

The plaintiff claims \$142.95, being the tax paid by it on \$14,294.61, added by the Commissioner to the amount of income from all sources other than premiums included by it in returning its gross income.

On the plaintiff's books this appeared as the net increase in value of bonds held by it as investments of its funds; the gross increase appearing as \$14,884.83, offset by a gross decrease in value of \$590.22.

Said increase and decrease were calculated by the plaintiff according

to an "amortization" plan, adopted by it for the first time in 1911. On bonds which had cost it less than par the book value was to be proportionally increased in each year, so as to amount to par at maturity; and on bonds for which a premium had been paid there was to be a proportionate decrease in book value, so that they should stand at par at maturity. Said increase or decrease were in no case based upon any sale or disposal of any of the bonds involved.

I am unable to believe, either that such increases in book values can be income received within the year, or that their excess over such decreases can be income received within the year, in the sense of the second clause of section 38 of the act here in question. Act Aug. 5, 1909, c. 6, 36 Stat. 113. Nor can I believe that such decreases in value are either expenses paid in maintenance and operation, or losses sustained within the year, including depreciation of property, in the sense of said clause. As I have held in No. 653, the act contemplates an estimation of income and of deductions therefrom upon a "cash," as opposed to a "revenue," basis, except where the language used distinctly indicates otherwise. In my opinion, appreciation in value of securities thus held does not become income until it is received by realization. If such appreciation cannot increase income for the purposes of the act, there is no ground for allowing such depreciation to decrease the remaining income. The depreciation here in question is not claimed to be a "reasonable allowance for depreciation of property," and therefore a deduction to which the plaintiff is entitled.

I therefore rule that to said amount of \$142.95 the tax for 1911 paid by the plaintiff was illegally exacted, and that it is entitled to recover the same from the defendant.

Ex parte MASON.¹

(Circuit Court, N. D. New York. October 2, 1882.)

1. COURTS ⇨96(1)—BINDING EFFECT OF SUPREME COURT DECISION.

The Circuit Court is concluded by the decision of the Supreme Court that petitioner's offense was against military discipline and properly cognizable by court-martial.

2. WAR ⇨32—COURT-MARTIAL—VALIDITY—JUDGE ADVOCATE GENERAL'S OPINION.

Advisory report of Judge Advocate General to Secretary of War, giving opinion on the merits of a trial and sentence by court-martial, to the effect that court-martial was without jurisdiction, and that there was no evidence of guilt, *held* not a reversal, nor to purport to be such.

3. WAR ⇨32—COURT-MARTIAL—REVERSAL BY JUDGE ADVOCATE GENERAL—"REVISE."

Rev. St. § 1199, making it the duty of the Judge Advocate General to "receive, revise and cause to be recorded" the proceedings of all courts-martial, implies no authority to reverse; the word "revise," under the rule of *noscitur a sociis*, imposing a duty analogous to that of receiving and recording the proceedings.

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

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

¹ Published by request.

Petition by John Anderson Mason for writ of habeas corpus. Rule discharged and application denied.

This proceeding came on for hearing under a rule to show cause why an application for a writ of habeas corpus should not be granted on behalf of John Anderson Mason, the petitioner, late sergeant, Battery B, Second Artillery, confined in the Albany Penitentiary, under sentence of a general court-martial, for a violation of the Sixty-Second Article of War.

The petitioner, as appeared from his sworn petition, was a sergeant in Battery B, Second Regiment, United States Artillery, and stationed on the 11th day of September, 1881, at Washington Barracks, District of Columbia, from whence he was sent with his battery, under the orders of the Secretary of War, to the United States jail in the District of Columbia, for guard duty.

Having arrived there for said duty, on said day, it was thereafter alleged that he then and there violated the Sixty-Second Article of War (section 1342, Rev. Stat.), in that he did thereupon, with intent to kill Charles J. Guiteau, a prisoner then confined under the authority of the United States, in said jail willfully and feloniously discharge his musket, loaded with ball cartridge, at said Guiteau, through the window of said jail, into the cell then occupied by the said Guiteau.

For this alleged crime the petitioner was duly tried, convicted, and sentenced by a general court-martial, appointed under the seventy-second Article of War by Maj. Gen. Winfield S. Hancock, commanding the military geographical Department of the East, who subsequently approved the proceedings, findings, and sentence of said court (Articles of War 106, 109) and, subject to the approval of the Secretary of War, designated the Albany Penitentiary as the place of confinement, which place, thus designated, was duly approved by the Secretary of War, and the sentence ordered to be carried into execution.

The principal and only material points which the petitioner urged in his petition against the validity of his conviction and sentence, and service in execution thereof, were as follows:

First. That the order of the Secretary of War, directing said guard duty at a jail "belonging to the civil department of the government," was null and void, because it was issued without an application therefor from the "executive authority of the District of Columbia," and that there were no "army stores, nor was there any army property of any class, character, or description at the jail or in its vicinity to be guarded."

Second. That such employment of Battery B, Second Artillery, and of the petitioner, was prohibited by section 15 of the act of Congress of June 18, 1878 (20 Stat. 152, c. 263), commonly known as the Posse Comitatus Act.

Third. That the crime charged against the petitioner involved merely a breach of the civil peace, and in no way affected the discipline of the army, and, if committed at all, was not committed by the petitioner in the discharge of his military functions, or of any military duty, nor was it committed by him at any military camp, post, or garrison, nor against the person of a soldier in the army, but against a civilian in a place exclusively under civil jurisdiction, and over which and whom no military authority could be rightfully or lawfully exercised.

That consequently the alleged crime was not triable in time of peace under the sixty-second Article of War, and that it has been so ruled in this country from the foundation of the government, and in England for more than 150 years, and that the general court-martial was without jurisdiction and the petitioner's imprisonment is unlawful.

Fourth. That only those offenses which are to the prejudice of good order and military discipline, and not mentioned or provided for in the other Articles of War, are triable under the sixty-second Article, and that the crime of an assault with intent to kill a citizen is provided for in the fifty-ninth Article of War, and, on this account, conviction under the sixty-second Article is unlawful.

Fifth. That the Judge Advocate General of the army recently reviewed the evidence adduced on the trial before the said general court-martial, and on or about August 28, 1882, transmitted to the Secretary of War his report on the

said proceedings, in which he renders an opinion reversing the findings and sentence of said court on the grounds:

"(1) That the court-martial had no jurisdiction to try the petitioner, because the alleged offense was not committed by him while in the discharge of his military duty, nor at any military camp, garrison, barracks, or post, nor against the person of a party under military authority or control, but at a place exclusively under the civil authorities of the government, and was therefore merely a breach of the civil peace.

"(2) That the employment of Battery B, Second Artillery, to guard the said jail, was prohibited by the act of Congress of June 18, 1878 (Posse Comitatus Act).

"(3) That there was no evidence adduced at the trial showing the petitioner guilty of the charge and specification, but that the record of the testimony clearly establishes his innocence."

Sixth. That under section 1199, Revised Statutes, it is the duty of the Judge Advocate General to "receive, revise and cause to be recorded the proceedings of all courts-martial," and that it was the intention of Congress thereby to invest in the Judge Advocate General an appellate judicial authority over courts-martial, and that the Judge Advocate General has the judicial power, under the law, to review, revise, reverse, or affirm the findings and sentences of all courts-martial, and that his decision is the ultimate judicial judgment in all such cases.

That by the judgment and decision of the Judge Advocate General, rendered as aforesaid, reversing the findings and sentence of the said court-martial, the further imprisonment of the petitioner is unlawful and wrongful.

Further, that his conviction and sentence, and the orders carrying the same into execution, are each and all annulled and made to stand for naught by the said judicial judgment and decision of the Judge Advocate General, reversing the findings and sentence of the said court-martial.

Two depositions were introduced by respondents—one made by First Lieut. Edward T. Brown, Fifth Artillery, late Judge Advocate of the general court-martial, to show that evidence has been taken as to the petitioner's guilt; the other by John Tweedale, Esq., chief clerk of the War Department, as to reports received from the Bureau of Military Justice.

The opinion of the Supreme Court of the United States, filed May 8, 1882, on a previous application of petitioner to that court, for writs of habeas corpus and certiorari, was also introduced. *Ex parte Mason*, 105 U. S. 696, 26 L. Ed. 1213.

Incidentally during the hearing the court decided:

First. That the Judge Advocate General's report on the general court-martial proceedings was a "privileged" communication, and, although petitioner's counsel had given the respondents due notice to produce it, they were not bound to do so.

A certified copy was, however, subsequently voluntarily introduced by the respondents.

Second. That the duly certified copy of the original record of the general court-martial proceedings in petitioner's case, offered in evidence by the petitioner's counsel, was inadmissible, under objection, and therefore excluded, as the court could not enter into a review of the case.

General J. G. Bigelow, of Washington, D. C., for petitioner.

Asa Bird Gardner, Judge Advocate, U. S. Army, for Superintendent Albany Penitentiary, and, by designation of the United States Attorney General, for the United States.

Martin I. Townsend, Dist. Atty., for the United States.

Before WALLACE, Circuit Judge, and COXE, District Judge.

WALLACE, Circuit Judge. The petition for the writ proceeds upon two grounds: First, that the general court-martial was without jurisdiction to try the petitioner, Mason, for the offense of which he

was convicted, such offense being a breach of the civil peace, and not a military offense, and the sentence of the court being therefore void; and, second, that the Judge Advocate General has reversed that sentence, thereby nullifying the conviction of the court-martial.

[1] As to the first branch of the application we are concluded by the decision of the Supreme Court of the United States, which, by the unanimous opinion of the court, adjudged Mason's offense to be one against military discipline, and properly cognizable by court-martial.

That decision is of controlling authority, and disposes of the first ground of the application adversely to the petitioner.

[2, 3] The second ground of the application is not tenable, because the alleged reversal by the Judge Advocate General of the findings of the court-martial is not a reversal at all, and does not purport to be. It is merely an advisory report to the Secretary of War, giving the opinion of the Judge Advocate General upon the merits of the trial and sentence. We might rest our decision here, but, as it has been strenuously contended by the counsel for the petitioner that Congress has conferred authority upon the Judge Advocate General to reverse the proceedings of courts-martial, it is proper that we should express our dissent from such a conclusion. It is urged that, because the statute makes it the duty of that officer to "receive, revise and cause to be recorded the proceedings of all courts-martial," the power to reverse is to be implied. It is not reasonable to suppose that the exercise of such an important power would be conferred in vague and doubtful terms, or that it lurks behind the word "revise." Applying the rule "*noscitur a sociis*," the word "revise" is to be read in connection with the words that precede and follow it, and, thus read, the duty it imposes is analogous to the duty of receiving and recording the proceedings. Had it been intended by the statute to introduce such a marked innovation into the pre-existing functions of that officer, and to convert a staff officer or the head of a bureau into a judicial officer having the ultimate decision in all cases of military offenses the power to affirm, reverse, or modify the proceedings of courts-martial would have been lodged in plain and explicit language. The language employed is more appropriate to indicate the discharge of clerical duties.

It is not intended to intimate that it is not the province and the duty of the Judge Advocate General to revise the proceedings of courts-martial so far as may be necessary to rectify errors of form, and to point out errors of substance which, in his judgment, should be corrected by the proper authorities, nor is it doubted that, as to all such topics as are within the purview of his official scrutiny, his opinion is entitled to that respectful consideration which is due to the dignity and importance of the position which he holds.

The rule is discharged, and the application for a writ of habeas corpus is denied.

UNITED STATES v. FERGER et al. (two cases).*

(District Court, S. D. Ohio, W. D. October 14, 1918.)

Nos. 1198, 1199.

COMMERCE ⚡16—FORGING BILLS OF LADING—INTERSTATE COMMERCE.

Act Aug. 29, 1916, c. 415, § 41 (Comp. St. § 8604u), penalizing the forgery of interstate and foreign bills of lading, etc., unconstitutionally exceeds Congress' power under the commerce clause, when applied to an entirely fictitious bill of lading having no connection with any actual or contemplated interstate commerce.

August Ferger, Thomas M. Dugan, and Robert H. Rasch were indicted for forging interstate bills of lading. On motions to quash and on demurrers. Indictments dismissed.

Stuart R. Bolin, U. S. Atty., of Columbus, Ohio, and Edward K. Bruce, Asst. U. S. Atty., of Cincinnati, Ohio, for the United States.

Sherman T. McPherson and John C. Hermann, both of Cincinnati, Ohio, for defendants.

HOLLISTER, District Judge. To the respective indictments in the above cases the defendants therein filed motions to quash and demurrers. Among others, the question is raised whether or not, as applicable to the facts stated in the indictments, the Congress had power to enact section 41 of the act relating to bills of lading in interstate and foreign commerce approved August 29, 1916 (39 Stat. 538, c. 415 [Comp. St. § 8604u]). If that question is decided in the negative, then all of the other questions become unimportant.

Section 41 reads:

"That any person who, knowingly or with intent to defraud, falsely makes, alters, forges, counterfeits, prints or photographs any bill of lading purporting to represent goods received for shipment among the several states or with foreign nations, or with like intent utters or publishes as true and genuine any such falsely altered, forged, counterfeited, falsely printed or photographed bill of lading, knowing it to be falsely altered, forged, counterfeited, falsely printed or photographed or aids in making, altering, forging, counterfeiting, printing or photographing or uttering or publishing the same, or issues or aids in issuing or procuring the issue of, or negotiates or transfers for value a bill which contains a false statement as to the receipt of the goods, or as to any other matter, or who, with intent to defraud, violates, or fails to comply with, or aids in any violation of, or failure to comply with any provision of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding \$5,000, or both."

Case No. 1198 contains 24 counts, the odd counts charging defendants with falsely making, forging, and counterfeiting the certain bill of lading in each count set forth at length, with intent to defraud, and in the same counts the defendants are charged with uttering and publishing, and aiding and assisting in uttering and publishing, the falsely forged and counterfeited bill of lading in each count set forth.

The even-numbered counts charge the defendants with having uttered and published as true and genuine the falsely forged and counterfeited

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

*Reversed 249 U. S. —, —, 39 Sup. Ct. 445, 447, 63 L. Ed. —, —.

bill of lading, a copy of which is set forth in each count, knowing it to be falsely forged and counterfeited, with intent to defraud, and that they did negotiate and transfer for value, and aided and assisted in negotiating and transferring for value, the falsely forged and counterfeited bills of lading, with the Second National Bank of Cincinnati, and charges that the falsely forged and counterfeited bills of lading then and there contained a false statement as to the receipt of the goods described therein, to wit, 80,000 pounds of corn.

Case No. 1199 contains one count charging the defendants named with conspiring to commit an offense against the United States, in that they agreed, with intent to defraud, to falsely make, forge and counterfeit, and aid in falsely making, forging and counterfeiting, bills of lading purporting to represent goods received at Fountaintown, in the state of Indiana, for shipment to Cincinnati, in the state of Ohio, and to utter and publish, and aid and assist in uttering and publishing, the falsely made, forged and counterfeited bills of lading, knowing them to be falsely made, forged and counterfeited, and to negotiate and transfer for value the falsely made, forged and counterfeited bills of lading, which falsely made, forged and counterfeited bills of lading were to contain false representations as to the receipt of goods for shipment, and that they, in furtherance of and to effect the object of their conspiracy, negotiated for and secured from the Second National Bank of Cincinnati a loan of \$22,000 for the benefit of the Ferger Grain Company, of Cincinnati, and of the defendants, being interested as officers, stockholders and employes, and that the defendants gave as evidence of that indebtedness a demand note, copy of which is incorporated in the indictment.

The indictment further charges that, to further effect the purpose of the conspiracy, the defendants negotiated, transferred for value and delivered, and caused to be negotiated, transferred for value, and delivered to the Second National Bank of Cincinnati, as collateral security for such loan, 12 bills of lading, falsely made, forged and counterfeited, containing false representations as to receipt of goods, which bills of lading were of the standard form of order bill of lading approved by the Interstate Commerce Commission by Order No. 877 of June 27, 1908, all purporting to be issued by the Cincinnati, Hamilton & Dayton Railway Company, and which contained the following false statements and information: Dated at Fountaintown, Indiana, on the various dates set forth in the indictment. Received from W. D. Springer; consigned to order of W. D. Springer; destination, Cincinnati, Ohio; notify Ferger Grain Company at Cincinnati, Ohio. Route C., H. & D. "Description of contents and special marks: Corn. Weight 80,000 pounds"—the name of the agent being stated as W. E. Sheldon, and bearing the indorsements of W. D. Springer and the Ferger Grain Company, Thomas M. Dugan, Secretary.

It was agreed at the argument and assumed in the briefs of counsel that the so-called bills of lading were fictitious, in that there was no actual consignor or consignee, and that they did not relate to any shipment or contemplated shipment of corn whatsoever. This fact so agreed upon in open court is to be read into the indictments.

Such power as Congress had to enact section 41 is derived from the commerce clause of the Constitution (article 1, § 8). Counsel for defendants contend that there must be some commerce actually existing, or at least in contemplation, to be regulated, so as to bring into exercise the power delegated to the Congress by the Constitution.

The government claims that since, under the commerce clause, Congress has power over the instrumentalities through which interstate commerce is carried on and may prescribe a uniform bill of lading, that it necessarily has power to prevent the imposition on the public of papers purporting to be genuine bills of lading, although they in fact represent no shipper or consignee or goods to be shipped in interstate commerce, and are wholly fictitious.

Although the exercise of power of the Congress under the commerce clause has been held to include acts whose purpose involved immorality, and thus contrary to good morals and the public welfare, such as the Lottery Case, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492, and the White Slave Cases, 227 U. S. 308 et seq., 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913C, 905, yet in these illustrations the foundation of the exercise of the power was the existence in the one case of interstate shipments of lottery tickets, and in the others the interstate transportation of persons. In these the exercise of police power was incidental only.

A bill of lading is nothing more than a contract and a receipt. *Pollard v. Vinton*, 105 U. S. 7, 8 (26 L. Ed. 998). In that case Mr. Justice Miller said:

“The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver.”

These bogus bills of lading were nothing but pieces of paper, fraudulently inscribed to represent a real contract between real people and the actual receipt of goods for interstate shipment. They were not receipts for goods to be shipped; they did not affect interstate commerce, directly or indirectly; they did not obstruct it or interfere with it in any manner, and had nothing whatsoever to do with it, or with any existing instrumentality of it. That they were inscribed so as to purport to relate to interstate shipments was nothing else than a fraud upon such persons as innocently took them, as collateral or otherwise. The execution of them and their use for obtaining money under false pretenses was nothing other than a crime of the kind cognizable by the criminal legislation of the states, and a matter with which the Congress, in the exercise of its power to regulate commerce, is not concerned.

The principle that our federal government is one of enumerated powers is universally admitted. Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. *316, *405, 4 L. Ed. 579. The powers possessed by the national government are only such as have been delegated to it. The states have all powers but such as they have surrendered (*Gilman v. Philadelphia*, 3 Wall. 713, 725, 18 L. Ed. 96), which is but stating what the Constitution declares in article 9:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

And in article 10:

"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."

The states have not surrendered, and therefore retain, their power to enact laws to prevent and punish such acts as these defendants are charged with, and have not delegated to the Congress the power to pass laws to prevent and punish acts, however immoral, which have no relation whatever to the subjects-matter included within any of the powers delegated. "In the American constitutional system, the power to establish the ordinary regulations of police has been left with the individual states, and cannot be assumed by the national government," says Judge Cooley, in *Const. Lim.* 574. See *Patterson v. Kentucky*, 97 U. S. 501, 503, 24 L. Ed. 1115; *Keller v. U. S.*, 213 U. S. 138, 144, 29 Sup. Ct. 470, 53 L. Ed. 737, 16 Ann. Cas. 1066.

It was said in *U. S. v. Knight*, 156 U. S. 1, 13, 15 Sup. Ct. 254, 39 L. Ed. 325:

"The regulation of commerce applies to the subjects of commerce and not to matters of internal police."

We are not discussing the forging or counterfeiting of an existing, genuine bill of lading, having to do with an actual shipment made, or about to be made, or even in contemplation, and have nothing to say about the validity of section 41 with respect thereto.

In all of the definitions the Supreme Court has given to "interstate commerce," beginning with *Gibbons v. Ogden*, 9 Wheat. 1, *197, 6 L. Ed. 23, and up to the *Child Labor Case*, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101 (opinion delivered June 3, 1918), that which was described was something tangible, or, if not tangible, as in the *Telegraph Cases* (*Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 24 L. Ed. 708; *Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067; *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187; *Western Union Telegraph Co. v. James*, 162 U. S. 650, 654, 16 Sup. Ct. 934, 40 L. Ed. 1105), was something, even if only "ideas, wishes, orders, and intelligence" (*Lottery Case*, 188 U. S. 321, 351, 352, 23 Sup. Ct. 321, 325 [47 L. Ed. 492]), carried from one state to another by wire, that was actually transmitted across state borders, or had definite relation to one or the other of these. It would be useless to refer at length to all or any considerable number of the many cases.

While in the nature of things the Supreme Court could not make, or, at any rate, would not attempt to make, in any case, a definition so comprehensive as to cover all situations, yet from what the court has said, and on principle, the inevitable deduction must be made that acts such as are described in the indictments, which constitute in themselves a mere fraud, acts which do not involve any real transaction whatever, either as to parties or subject-matter, although purporting to include both, would not be regarded by the Supreme Court, from any stand-

point whatever, as interstate commerce, or as having any relation there-to under the commerce clause. Such legislation is not a regulation of commerce between the States.

Counsel for the government say that the laws providing for the punishment of counterfeiting and uttering and publishing counterfeit coin and currency of the United States present a complete analogy. There is no analogy. Under clause 5 of section 8, art. 1, of the Constitution, power is delegated to the Congress to coin money, and by clause 6 of section 8 to provide for punishment for counterfeiting the securities and current coin of the United States.

The question made at the beginning of this discussion must be decided in favor of the defendants, and the holding made that the Congress has not the power, under the commerce clause, to prescribe a punishment under the circumstances of this case, and if the Congress has sought to do so, the attempt is futile, because without authority.

An order may be taken dismissing these indictments.

MOBILE & GULF NAV. CO. v. SUGAR PRODUCTS CO.

(District Court, S. D. Alabama. April 29, 1919.)

No. 1717.

1. SHIPPING Ⓒ39—CONSTRUCTION OF CHARTER—DESIGNATION OF LOADING PORT.

A charter for a voyage from one of two named ports, providing that one port shall be declared on signing bill of lading, requires the charterer, who was to furnish the cargo, to designate the port of loading.

2. PRINCIPAL AND AGENT Ⓒ17S(1)—AUTHORITY OF AGENT—NOTICE.

Where agents for the shipper, who negotiated the charter, signed the shipper's name, but quoted its name as authority, and there was no proof that they had authority to bind the shipper, notice to the agents to designate the port of loading is not sufficient to charge the shipper with demurrage.

3. SHIPPING Ⓒ173—DEMURRAGE—DELAY IN CLEARANCE.

Where the clearance papers were taken out by the shipper and brought to the master by them, the shipper is liable for any unjustifiable delay in securing the clearance.

In Admiralty. Libel by the Mobile & Gulf Navigation Company against the Sugar Products Company. Decree entered for libellant.

Harry T. Smith & Caffey, of Mobile, Ala., for libellant.

Palmer Pillans and Alexis T. Gresham, both of Mobile, Ala., for respondent.

ERVIN, District Judge. This was a libel in personam, claiming damages in the nature of demurrage for delays caused by the failure of the Sugar Products Company to name a port at which the schooners G. J. Boyce and W. D. Hossack should load a cargo of molasses in barrels, for Mobile, Ala.

It appears that the Sugar Products Company chartered from libellant the two schooners at the same date, through J. W. Somers-

ville & Co., of Gulfport, Miss. The charter is dated March 27, 1918, and, after stating the name of the schooner, recites:

"Now bound to Cienfuegos, Cuba, of the first part and Sugar Products Company, of 69 Wall street, New York, of the second part, * * * for a voyage from the port of Mariel or Bahia Honda, Cuba, to Gulfport, Miss., or Mobile, Ala. (owner's option), one port only to be declared on signing of bills of lading."

The cargo to be transported was molasses in barrels and the charter party agreed on a specific sum to be paid on each barrel of molasses transported. The charter party was signed:

"For Sugar Products Company, per their wire of March 27, 1918. J. W. Somerville & Co."

Each of the charter parties contained the identical stipulations and were signed in the same way.

It appears from the evidence that libelant, after the vessels arrived at Cienfuegos, wrote to Somerville & Co., calling attention to the fact that the vessels were then at Cienfuegos, and would soon be unloaded and ready to report for their molasses cargo. This notification brought on quite a correspondence; Somerville in each instance forwarding letters and telegrams from libelant, received by him, to the Sugar Products Company, and then informing libelant of the statements and requests of the Sugar Products Company. In no instance did Somerville undertake to act on his own initiative without being advised by the Sugar Products Company, or to accept any notification from libelant given directly to him.

In the course of these negotiations, the Sugar Products Company sought to have the charters canceled. This was declined by libelant; the Sugar Products Company then sought to have the vessels sent to Santiago, Cuba, for their cargo. This was refused by libelant, who finally agreed that they would accept the cargo from any good Cuban port to the west of Cienfuegos, but would not go to the eastward, as that would be out of their route to port of discharge. Libelant notified Somerville on April 24th, by letter, that the vessels would be ready in a few days to proceed to port of loading, and asked what port they should proceed to. This was one of the several notifications to the same effect given by libelant to Somerville & Co., who finally requested libelant to take up the matter directly with the Sugar Products Company in New York, and Somerville forwarded to the Sugar Products Company the information contained in libelant's letter of April 24th, and it appears that this information was received by the Sugar Products Company on April 27th. On April 29th libelant wired the Sugar Products Company in New York, as follows:

"Schooners W. D. Hossack and G. J. Boyce under charter to you to load molasses now at Cienfuegos, Cuba, awaiting orders. Must have loading point named at once. Advise what port and to whom they shall report."

On April 30th the Sugar Products Company wired libelant in Mobile:

"Please instruct the masters schooners Hossack Boyce wire Sugar Products Company, Havana, for loading points."

On the same day, April 30th, libelant wired the Sugar Products Company, Havana:

"Advise where and who will load schooners Hossack-Boyce with molasses."

It appears from the evidence that libelants never received a reply which was sent by the Sugar Products Company from Havana, stating where the schooner should proceed for cargo.

On May 2d libelant again wired the Sugar Products Company, New York:

"Have cabled Sugar Products Company, Havana, for loading point Hossack-Boyce. Cannot get any reply. These vessels ready, waiting orders where to proceed for cargo. Will claim demurrage for all time lost on this account. Must have information at once."

To this, on May 3d, the Sugar Products Company wired libelant:

"Providing you waive all rights demurrage to date, will load smaller vessel Bahia Honda, larger one Havana."

On the same date, May 3d, libelants replied by wire to Sugar Products Company, New York:

"Your wire. We have exercised every effort to avoid demurrage, and we see no reason why we should waive our rights of charter party. Unless we hear from you contrary by to-morrow noon, we shall order Boyce Bahia Honda, Hossack Havana for your loading."

On May 4th the Sugar Products Company wired libelant at Mobile:

"Advise us when Hossack-Boyce would be ready to load. For intelligent answer your cable."

To this, on May 5th, libelant replied:

"Hossack-Boyce now ready Cienfuegos awaiting order, advise."

On May 6th the Sugar Products Company, Havana, wired libelant at Mobile:

"Send Hossack Boyce Havana."

This was a cablegram, which the testimony shows was not received by libelant.

Again, on May 8th, the Sugar Products Company wired from Havana to libelant at Mobile:

"Cable 6th. Send both Havana."

There were also certain cables offered in evidence, passing between the Sugar Products Company at Havana and New York.

On May 9th libelant wired the captain of the schooners at Cienfuegos to report to the Sugar Products Company at Havana to load molasses for Mobile.

[1] The first question to be determined under the contentions made by the parties in this case is the construction of the terms written into the charter party for the voyage—

"from the port of Mariel or Bahia Honda, Cuba, to Gulfport, Miss., or Mobile, Ala. (owner's option), one port only to be declared on signing the bills of lading."

It is conceded by both parties that the latter part of this statement gives to the owner of the vessel the option to deliver the cargo either to Gulfport, Miss., or Mobile, Ala., but the question arises as to who has the option as to where the vessel shall load, whether at Mariel or Bahia Honda. Neither the court nor the proctors have been able to find any direct authority on this question. I shall therefore rule on it as one of first impression.

As the charterer was to provide the cargo for the vessel, it is manifest to me that the option as to port of loading was put into the charter party for the benefit of the charterer, so that he might direct the vessel to the port at which he had assembled his cargo. I therefore hold that the duty was on the charterer to name the port of loading. It was therefore the duty of the charterer, when he knew the vessels would shortly be ready, and was asked as to which port the vessel should proceed, to inform the vessel promptly, so that it could proceed without delay.

[2] It is contended in this case that Somerville & Co. were the agents of the Sugar Products Company, and notice to Somerville & Co. was all that was necessary. Somerville & Co. signed the charter party for the Sugar Products Company, but they are careful to show, in signing it, where their authority to do so comes from, namely, "per their wire of March 27, 1918." There is no direct proof of the authority of Somerville & Co. to bind the Sugar Products Company, nor to receive any notice intended for them. The correspondence shows that, while Somerville & Co. did receive letters and telegrams in reference to having the charter party canceled, and as to when the vessels would be ready, and where they should go for their cargoes, it also shows that in no instance did Somerville & Co. undertake to act without first submitting the request or notification to their principals. I do not think, therefore, that Somerville & Co. were in a position to bind the Sugar Products Company by having a notice served upon Somerville & Co. which was intended for the Sugar Products Company.

The first definite intimation which was conveyed to the Sugar Products Company that these vessels were ready to proceed for their cargoes was by the wire of libelants to them, dated April 29th, and I think they had received from Somerville & Co. sufficient notification that libelants were insisting upon the performance of their charters, and that it was their duty to answer this wire at once. Instead of doing so, they sought to shift the responsibility for giving this information to their Havana office, and libelants did not receive the delayed notifications which were apparently sent from the Havana office. I therefore find that the time should begin on the day after the receipt by the New York office of libelants' telegram of the 29th, which would be April 30th, and any delay thereafter would be at the cost of the Sugar Products Company.

The testimony shows that the G. J. Boyce had discharged its cargo, and was ready to proceed for its cargo, some days prior to this time, so that the time of this vessel should begin on April 30th. The tes-

timony further shows that the Hossack was not ready to proceed for cargo until May 2d, so its time should begin on May 3d.

[3] The testimony further shows that there was a delay in getting the clearance of these vessels. In this particular matter the testimony is not as clear as I would like to have had it, for it did not show whether the delay was caused by the fault of the captain or of the shipper, but all the testimony I have is that of the captain that the clearance papers were taken out by the shipper and brought to him by them. From this testimony, the clearance was made by the shipper, and, if there was an unjustifiable delay, it would appear that this delay was caused by the shipper.

Therefore the Sugar Products Company should be charged with whatever delay there was in having the vessel cleared. I therefore find that the Hossack is entitled to 7 days' and the Boyce to 18 days' time.

A decree will accordingly be entered, appointing a master to ascertain the damages.

UNITED STATES v. MEINEL & WEMPLE, Inc., et al.

(District Court, S. D. New York. February 24, 1919.)

WAB 15—TRADING WITH ENEMY ACT—OFFENSES.

Correspondence by the American agent of a German insurance company with a foreign agent, relative to the business, between October 6 and October 30, 1917, held not to constitute an offense under Trading with the Enemy Act Oct. 6, 1917 (Comp. St. 1918, §§ 3115½a-3115½j), in view of the provision of section 4 (a) of the act (section 3115½bb), suspending its operation in that regard for 30 days.

Criminal prosecution by the United States against Meinel & Wemple, Incorporated, Edward Meinel, and William Y. Wemple. On demurrer to indictment. Demurrer sustained.

Francis C. Caffey, U. S. Atty., of New York City, and Earl B. Barnes and Candler Cobb, Asst. U. S. Attys., both of New York City), for the United States.

Charles A. Towne and Leon O. Bailey, both of New York City, for defendants.

MAYER, District Judge. The question on this demurrer is simple and does not need much exposition. The indictment charges defendants with violating sections 3a and 16 of the Trading with the Enemy Act (Act Oct. 6, 1917, c. 106, 40 Stat. 412, 425 [Comp. St. 1918, §§ 3115½b, 3115½bb]), which became law on October 6, 1917.

The defendant Meinel & Wemple, Incorporated, is a domestic corporation, and the individual defendants, Edward Meinel and William Y. Wemple, are respectively president and secretary-treasurer, and directors, thereof. The corporation was engaged in the insurance business, and the offense charged is that between October 6, 1917, and October 30, 1917, the corporation and the individual defendants attempted to have business communications with one Paul Clausen, a resident

of Copenhagen, Denmark, and an agent and intermediary of a German, and therefore an enemy, partnership, by the name of H. Mutzenbecher, Jr.

Attached to the indictment as exhibits are copies of 11 communications from defendants to Clausen between October 9, 1917, and October 30, 1917, inclusive. All the communications on their face are of a routine business character, except that of October 30, 1917, which is merely a cablegram containing the words "Impairment unlikely," and that is nothing more than a statement of defendants as to their conclusion in respect of the fire insurance interests which they represented. Among the communications are Sanborn map corrections—a perfectly familiar proceeding in the fire insurance business. It was suggested in argument that these corrections might have conveyed information to the enemy, but, if so, then the charge would have been under another statute, and no such charge is made here, nor does the indictment disclose a sinister purpose.

The sole question in the case is whether the communications alleged in the indictment were lawful within 30 days after the passage of the act; i. e., within 30 days after October 6, 1917.

On April 6, 1917, when war was declared, the President issued a proclamation with regard to the transaction of the business of insurance in the United States by companies domiciled in Germany, whereby such companies were permitted to transact business as theretofore, with the sole exception that they were prohibited from transmitting money from the United States into Germany. On July 13, 1917, the President issued an additional proclamation by the terms of which insurance companies domiciled in Germany and in countries allied with Germany were prohibited from writing marine and war risks, and the inhibition against the transmission of funds from this country was continued in force.

Prior to the passage therefore, of the Trading with the Enemy Act, the business of insurance companies domiciled in Germany could be freely conducted here, provided that the limitations contained in the presidential proclamations were not transgressed.

It is plain that the Congress realized, in view of this business situation, which the President in his judgment deemed proper for the welfare and protection of American interests, that there could not be a successful change overnight, and therefore a grace of 30 days was given, as will appear infra, within which to do such things as were proper and necessary in regard to the legitimate requirements of the business relations arising out of this insurance situation.

The intent of the "Trading with the Enemy Act" was, of course, to shut off trade and financial aid from the enemy, but the problems involved were so many and varied in character that large discretion was conferred upon the President, to the extent, inter alia, of allowing him to license insurance companies to continue business.

To make the legislation effective certain acts were prohibited and offenses defined. In section 3 it was provided:

"(a) For any person in the United States, except with the license of the President, granted to such person, or to the enemy, or ally of enemy, as pro-

vided in this act, to trade, or attempt to trade, either directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, any other person, with knowledge or reasonable cause to believe that such other person is an enemy or ally of enemy, or is conducting or taking part in such trade, directly or indirectly, for, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy."

In section 16 it was provided:

"Sec. 16. That whoever shall willfully violate any of the provisions of this act or of any license, rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this act shall, upon conviction, be fined not more than \$10,000, or, if a natural person, imprisoned for not more than ten years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by a like fine, imprisonment, or both. * * *"

Section 4 (a) of the act provides as follows:

"(a) Every enemy or ally of enemy insurance or reinsurance company, and every enemy or ally of enemy, doing business within the United States through an agency or branch office, or otherwise, may, within thirty days after the passage of this act, apply to the President for a license to continue to do business. * * *

"For a period of thirty days after the passage of this act, and further pending the entry of such order by the President, after application made by any enemy or ally of enemy insurance or reinsurance company, within such thirty days as above provided, the provisions of the President's proclamation of April sixth, nineteen hundred and seventeen, relative to agencies in the United States of certain insurance companies, as modified by the provisions of the President's proclamation of July thirteenth, nineteen hundred and seventeen, relative to marine and war-risk insurance, shall remain in full force and effect so far as it applies to such German insurance companies, and the conditions of said proclamation of April sixth, nineteen hundred and seventeen, as modified by said proclamation of July thirteenth, nineteen hundred and seventeen, shall also during said period of thirty days after the passage of this act, and pending the order of the President as herein provided, apply to any enemy or ally of enemy insurance or reinsurance company, anything in this act to the contrary notwithstanding. * * *

"For a period of thirty days after the passage of this act, and further pending the entry of such order by the President, after application made within such thirty days by any enemy or ally of enemy, other than an insurance or reinsurance company as above provided, it shall be lawful for such enemy or ally of enemy to continue to do business in this country and for any person to trade with, to, from, for, on account of, on behalf of or for the benefit of such enemy or ally of enemy, anything in this act to the contrary notwithstanding. * * *

"If no license is applied for within thirty days after the passage of this act, or if a license shall be refused to any enemy or ally of enemy, whether insurance or reinsurance company, or other person, making application, or if any license granted shall be revoked by the President, the provisions of sections three and sixteen hereof shall forthwith apply to all trade or to any attempt to trade with, to, from, for, by, on account of, or on behalf of, or for the benefit of such company or other person. * * *" Comp. St. 1918, § 3115½bb.

It is impossible to imagine language which more clearly indicates that any person could trade with a German insurance interest for 30 days after October 6, 1917, before such trade became unlawful under this act.

It is contended in support of the indictment that this 30-day period did not apply to a case where the trading was through an intermediary,

but such contention is both strained and illogical. If Clausen was not an intermediary, and not an enemy, then the trade was not unlawful. The allegation as to the unlawful nature of the trade rests upon the proposition that it is claimed that defendants, in point of fact, communicated and traded with the enemy, because, it is asserted, Clausen was a mere conduit of communication. If the trade was with the enemy, then it was not unlawful, because within the 30 days of grace which the statute allowed. If this conclusion is correct, no crime is charged in the indictment, and the demurrer must be sustained.

As an indictment of this character must have had a serious effect upon the personal and business standing of defendants, it is but just to them to state that nothing in the indictment reflects upon them, either personally or in a business way. Their acts were entirely lawful, and, so far as this charge is concerned, they did what they had full right to do under the law.

Demurrer sustained.

COHEN v. TREMONT TRUST CO.

In re STERNBURG.

(District Court, D. Massachusetts. December 11, 1918.)

No. 820.

1. BANKRUPTCY ⇨303(3)—PREFERENCE—EVIDENCE.

Evidence that a bankrupt, whose sole bank account, which was kept with defendant trust company, had become inactive and merely nominal, had endeavored to secure large loans from the defendant, *held*, in connection with other facts, to establish that defendant had reasonable cause to believe the bankrupt insolvent when he paid two notes not yet due by a third party's check.

2. BANKRUPTCY ⇨166(4)—PREFERENCE—EVIDENCE.

Evidence merely that a bankrupt's account with defendant trust company had been inactive, and that he had requested larger loans, etc., *held* insufficient to show that defendant had reasonable cause to believe bankrupt insolvent when it received payment for two notes, one of which was not yet due.

Suit in equity by George I. Cohen, trustee in bankruptcy of Israel Sternburg, against the Tremont Trust Company. Decree for plaintiff for partial relief.

See, also, 249 Fed. 980.

Jacobs & Jacobs, of Boston, Mass., for plaintiff.

Asa P. French and Jonathan W. French, both of Boston, Mass., for defendant.

MORTON, District Judge. This is a suit in equity by the trustee of Israel Sternburg, a bankrupt, to recover certain payments made by Sternburg to the defendant, upon the ground that they were preferences. The case was heard in open court. The facts are as follows:

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

The payments in question were two, each of \$500, the first being made by Sternburg to the defendant on December 1, 1916, the second on December 14, 1916. The payment of December 1st was upon two notes held by the defendant for \$250 each, one of which fell due on that date, and the other on December 8th. The payment of December 14th was also upon two notes of \$250 each, one of which fell due December 15th, the other on December 22d. There is no doubt that at the time of making the payments Sternburg was deeply insolvent, and the only question is whether the defendant had reasonable cause to believe that to be the fact, and that the payments to it would result in preferences in its favor.

Sternburg had carried on a retail shop in Washington street, Boston, for many years preceding his failure. In the spring of 1916 he ceased doing his banking business at the Prudential Trust Company, and began to do business and to deposit with the defendant. He was given by it a borrowing credit not exceeding \$1,000, of which he continuously availed himself, and he kept with the defendant his only bank account. After November 13, 1916, he ceased making deposits of receipts from his business, and thereafter made only one deposit, viz. \$307, on December 1st. On that date he had a balance of \$194.14, which, with the deposit, made \$501.14, \$500 of which was on that day paid to the defendant in payment of the first two notes above mentioned (due December 1st and December 8th). From that time until the failure Sternburg's balance was only \$1.14. The payment to the defendant on December 14th (covering the notes due December 15th, and December 22d) was made with the check of a third party.

In the latter part of November Sternburg's shop was attached on mesne process, and the attachment continued a few days until it was dissolved by a bond on which Meyer Goldman and Rudnick appear as sureties. On or about December 7th another attachment was placed on the shop, which was also dissolved by a bond, with the same sureties, given on December 14th.

An involuntary petition was filed against Sternburg on December 19, 1916, on which adjudication was made July 8, 1917. The schedules showed liabilities of about \$8,400; the only substantial assets consisted of the stock in trade and fixtures in the store. On February 15, 1917, the defendant loaned the bankrupt's wife \$2,500 on a mortgage of the stock and fixtures in the store. This money was obtained for use in composition proceedings by Sternburg. Sternburg was a fraudulent bankrupt, who has been denied his discharge (see memorandum of decision in this court dated March 25, 1916), and his testimony given in this proceeding impressed me as being unreliable. He was obviously endeavoring to assist and protect the defendant, regardless of the truth.

The respondent's president, Mr. Simon Swig, testified that about the 1st of December Sternburg came to him and asked for a credit of \$2,000—i. e., \$1,000 more than he then had; that the witness refused to grant the request; that Sternburg thereupon said he would make other banking connections; that the witness did not keep run of the details of the deposit account himself, and that if he had done so, he

should have supposed from what it showed that Sternburg was carrying out his plan of liquidating his loans with the defendant, in order to be in a better position to open business with some other bank; that he himself knew nothing about the attachments on Sternburg's store, and supposed him to be all right; that advance payment of notes was not infrequent, and might well occur under such circumstances.

The case does not, however, turn on what Mr. Swig knew or believed, but upon what the defendant had reasonable cause to believe. It must be held to knowledge of such facts as were evident from its own books. At the time of Sternburg's talk with Mr. Swig, the defendant knew that Sternburg had for more than two weeks suspended all deposits; it knew that he made no assertion of having any other deposit account, or of having made arrangements with any other bank; it knew that he was asking for larger loans. At that time the first attachment on the bankrupt's shop had just been dissolved. Within a week after the first payment to the defendant, and before the second payment to it, the shop was again attached; and within three weeks the bankruptcy petition was filed. On the very day that the second attachment was dissolved by the bond given by the bankrupt and his brothers-in-law, the last two notes were paid to the respondent. At that time Sternburg's balance had for two weeks been \$1.14, and the account had been inactive for over a month. He had no other bank account, and the defendant had no sufficient reason to suppose that he had any other. The check which paid the last two notes was not Sternburg's drawn on another bank, but, as above stated, a third person's. One of these notes was not due for a week. Subsequent to the failure, the respondents advanced \$2,500 to the bankrupt's wife on arrangements made with him, and on a transaction of a somewhat unusual sort for a trust company, in order to assist the bankrupt in his effort at composition.

[1] It seems to me that the facts in the defendant's possession at the time of the second payment were amply sufficient to lead a careful man to the conclusion that Sternburg was insolvent and on the edge of failure. The defendant does not stand in any better position because knowledge of those facts was split up among several of its officers or agents, who did not exchange information.

[2] As to the first payment the case is close. The cessation of activity in the account, coupled with the request for larger loans was, it seems to me, under the circumstances, enough to excite inquiry, which, in turn, could hardly have failed to disclose that Sternburg's shop had been under an attachment. But the attachment had been dissolved, and the facts then open to the defendant would hardly be sufficient to warrant a finding of reasonable cause on its part to believe the debtor insolvent. The real question on this branch of the case is whether somebody connected with the defendant was not closely in touch with Sternburg's affairs, and arranging for payment of the notes in return for future assistance in composition proceedings. There may be ground for suspicion that this was so; but the evidence is not sufficient to justify such a finding.

On all the evidence I find and rule that the plaintiff is not entitled to recover the payment of December 1st, and is entitled to recover the payment of \$500 made on December 14th.

Decree accordingly.

CAMPBELL v. BERRYMAN et al.

In re BERRYMAN.

(District Court, N. D. Georgia, E. D. January 6, 1919.)

No. 33.

EVIDENCE Ⓒ591—**PARTY CALLED BY ADVERSARY—EFFECT OF TESTIMONY.**

Where plaintiff is compelled to rely on the testimony of defendants to make out his case, and calls them as witnesses, he is not bound by their general statements of bona fides of a transaction; but finding may be for him, if the other testimony is so inconsistent with such statements as to show they are untrue.

In Equity. Suit by G. L. Campbell, trustee, against Sim Berryman and another. Heard on report of special master. Case re-referred to master.

See, also, 256 Fed. 405.

Erwin, Rucker & Erwin, of Athens, Ga., and Dorough & Adams, of Royston, Ga., for trustee.

Stephen C. Upson, of Athens, Ga., and Alex S. Johnson, of Royston, Ga., for defendants.

NEWMAN, District Judge. G. L. Campbell, as trustee in bankruptcy for Sim Berryman, bankrupt, filed a petition against Mrs. M. E. Cheek and Sim Berryman on the equity side of this court, seeking to set aside a certain deed and transfer of bond for title from Sim Berryman to Mrs. M. E. Cheek; the original petition charging that said deed and transfer of bond for title were without consideration, and made for the purpose of hindering, delaying, and defrauding the creditors of Sim Berryman, and at a time when Sim Berryman was insolvent, and the said Mrs. M. E. Cheek had knowledge of the facts alleged.

This case was referred to Austin Bell, Esq., as special master, and he heard the case and has made a report. He says in his report, among other things:

"The plaintiff, having introduced the defendants as his witnesses, though he might show they were mistaken, cannot take the position that they were unworthy of belief; hence, the evidence being insufficient to show the defendants are mistaken in their testimony as to the material points in the case, the plaintiff is bound by their evidence, and the result is necessarily a finding in favor of the defendants."

There has been considerable argument by counsel as to whether the special master was correct in his view of the law in thus refusing to consider any objections to the testimony of these witnesses for the plaintiff.

It seems to have been a case where the plaintiff was compelled to rely upon the testimony of the defendants to make out his case, and in this respect, as well as many other respects, is very much like the case of *McLean v. Clark and others* (C. C.) 31 Fed. 501. The decision in the case referred to was by Judge Brown, at that time a judge of the District Court, afterwards a member of the Supreme Court of the United States.

A number of cases have been cited on the subject, but this case has impressed me more than any of the others. The second headnote of this case, relating especially to the point in question here, is as follows:

"Where a party is called as a witness by the opposite party, the latter is not bound by his general statement as to his motives or intention in a particular transaction, but may draw any inference from his testimony which the facts stated by the witness seem to justify."

As I gather from the master's report, he was unwilling to consider the criticisms made on the testimony of Berryman and Mrs. Cheek.

A number of grounds were urged why the testimony of these two witnesses, instead of sustaining their case, as held by the master, showed conclusively that the transaction was fraudulent, and made for the purpose of defrauding the creditors of Berryman, with Mrs. Cheek's knowledge. The case of *McLean v. Clark*, supra, takes a different view of the law from that apparently held by the master in this case. In the opinion in that case it is said:

"It is insisted, however, that as *McLean* was called as a witness by the defendants, they are bound by his statements that the transaction was bona fide, and that *Shaw* has no interest in this suit. We do not so understand the law. While it is undoubtedly true, as a general rule, that a party offering a witness in support of his case represents him as worthy of belief, and will not be permitted to impeach his general reputation for truth, or impugn his credibility by general evidence, he has never been considered as bound by his general statements as to motives or intention, or his bona fides in a particular transaction, but may draw any inference from his testimony which the facts stated by the witness seem to justify. Particularly is this true where the party is compelled to prove his case from the mouth of the opposite party, who may be presumed to be hostile to him. In a similar case (*Chandler v. Town of Attica* [C. C.] 22 Fed. 625), Judge Wallace held, in passing upon a similar issue, that the court was 'at liberty to disregard the testimony of the parties, so far as it is incredible, and to interpret the transaction in a way consistent with the ordinary conduct and motives of business men.'"

Counsel for defendants here rely mainly upon the case of *Dravo v. Fabel*, 132 U. S. 487, 490, 10 Sup. Ct. 170, 171 (33 L. Ed. 421). In that case, in the opinion by Mr. Justice Harlan, it is said:

"So that, when the plaintiffs used the depositions of *Dippold* and *Fabel*, taken 'as under cross-examination,' they made those parties their own witnesses. While the plaintiffs were not concluded by their evidence, and might show they were mistaken, it could not be properly contended by the plaintiffs that they were unworthy of credit. The evidence must be given such weight as, under all the circumstances, it is fairly entitled to receive."

It seems to me that there is no inconsistency between the language used here and that used by Judge Brown in the *McLean v. Clark* Case, supra. If the testimony of the witnesses itself showed such inconsistency as made it unworthy of belief, there was no necessity for showing

either general bad character or lack of truthfulness. Their testimony, in such a case, if it shows clearly, as claimed here, that it is unworthy of belief, destroys itself. I think it is perfectly evident that if the master agreed with the contention for the plaintiff, and consequently thought the testimony of Berryman and Mrs. Cheek, not only failed to show that the transaction was bona fide, but showed the contrary, and that it was fraudulent and void, he had a right to so hold. As I understand it, he felt he could not hold that the transfers were not bona fide, when they swore they were, although he may have believed the testimony was ample, outside of their own statements as to the bona fides of the transaction, to show that this was not true.

I think the master erred in this, and consequently the report ought to be sent back to him, that he may find whether, under a proper view of the law, these transfers were made in good faith, and were not made for the purpose of hindering, delaying, and defrauding creditors. I think the law is, and the master should find, as stated in *McLean v. Clark*, supra, that the plaintiff is not entitled to impeach the testimony of Berryman and Mrs. Cheek by proving them to be unworthy of belief generally, but he should hold that their testimony as to the bona fides of the transaction is not entitled to be believed, if their other testimony, and the inferences necessary to be drawn from it, show that their statements as to the good faith of the transaction are not true. In other words, if they swore that these deeds were made in good faith, and their other testimony as to facts which occurred in connection with and as a part of the case showed that their statements of good faith cannot be true, he is not compelled to believe their statements as to their motives and intention in the matter.

Counsel for the defendant say in their brief :

"Witnesses swore that the conveyances were bona fide, and made at the time that they were dated. No other evidence to the contrary; so how could the master have found otherwise than this, aside from the *Dravo Case*?"

As I have stated, if the other evidence in the case shows it could not have been true that the conveyances were bona fide, the master would have the right to so hold, notwithstanding the fact that Berryman and Mrs. Cheek swore they were made in good faith. The fact that they were put up as witnesses by the plaintiff does not require the master to believe something which is incredible. For instance, if the evidence was clear that the transfers were dated back, as claimed by the plaintiff; instead of being made in 1913, were made some time in 1915, and within four months of the bankruptcy proceeding.

With these statements of the proper rule of law, the report is sent back to the master, with instructions to reconsider the case, hearing any further arguments or any further testimony that may be offered, and decide it in view of the law as herein endeavored to be stated.

CAMPBELL v. BERRYMAN et al.

In re BERRYMAN.

(District Court, N. D. Georgia, E. D. March 21, 1919.)

No. 33.

FRAUDULENT CONVEYANCES ⇨295(1)—EVIDENCE.

Circumstances, though suspicious, *held* insufficient to justify setting aside conveyance as fraudulent.

In Equity. Suit by G. L. Campbell, trustee, against Sim Berryman and another. Bill dismissed.

Dorough & Adams, of Royston, Ga., and Erwin, Rucker & Erwin, of Athens, Ga., for trustee.

Stephen C. Upson, of Athens, Ga., for defendants.

NEWMAN, District Judge. This case has been before the court heretofore on exceptions to the report of the special master, and an opinion was filed by me on January 6, 1919 (256 Fed. 402), in which it was held that the special master had erred, and directed that the case be re-referred to him for further consideration.

Recently, while in Athens, counsel for both plaintiff and defendants appeared before me and asked that I hear the whole case on the merits, as the special master felt himself disqualified. An order was made to that effect, and argument was had on the merits of the case before me. The question is whether the transfers from Sim Berryman to Mrs. Cheek, his mother-in-law, are fraudulent and void.

As the opinion above referred to, heretofore filed in this case, shows, the principal witnesses offered by the plaintiff on the hearing before the master were Sim Berryman, Mrs. Cheek, Alex S. Johnson, and Linton Johnson, and there were other witnesses whose testimony was not so material as that of those named. The special master, in his report, which, as stated, I have heretofore considered and passed upon, on questions of law in the case, says this:

"The plaintiff having introduced the defendants as his witnesses, though he might show they were mistaken, cannot take the position that they are unworthy of belief; hence, the evidence being insufficient to show the defendants are mistaken in their testimony as to the material points in the case, the plaintiff is bound by their evidence, and the result is necessarily a finding in favor of the defendants."

I differed with the special master about that, and in the opinion filed on January 6th, after citing authorities, held as follows:

"If the testimony of the witnesses itself showed such inconsistency as made it unworthy of belief, there was no necessity for showing either general bad character or lack of truthfulness. Their testimony, in such a case, if it shows clearly, as claimed here, that it is unworthy of belief, destroys itself. I think it is perfectly evident that if the master agreed with the contention for the plaintiff and consequently thought the testimony of Berryman and Mrs. Cheek not only failed to show that the transaction was bona fide, but showed the contrary, and that it was fraudulent and void, he had a right to so hold. As I understand it, he felt he could not hold that the transfers were

not bona fide when they swore they were, although he may have believed the testimony was ample, outside of their own statements as to the bona fides of the transaction, to show that this was not true."

The special master had stated in his report that:

"While there are a number of suspicious circumstances connected with this case, such as the evidence of Mrs. A. Berryman to the effect that Mrs. M. E. Cheek told her in 1916 that the land belonged to Sim Berryman (which Mrs. M. E. Cheek denied), and the statement of Sim Berryman on March 9, 1915, that the land was his (in an application for a loan), the failure to record the deed, the failure to change the tax returns from Sim Berryman to that of Mrs. M. E. Cheek, the statement of Sim Berryman at one time that he borrowed money from his mother-in-law over a period of 15 or 20 years prior to 1913, and his statement on another occasion that he borrowed money from her for a period of 8 years, yet, suspicious as these circumstances may be, they are susceptible of explanation, and, while these things may leave an exceedingly bad taste yet the positive sworn testimony of the grantor and the grantee and other witnesses in the case to the effect that, regardless of how much he borrowed each year, in 1913, on a settlement or an accounting, it was agreed that Sim Berryman was indebted to Mrs. M. E. Cheek in the sum of \$8,000 or \$9,000, and Berryman testifying that this amount was correct, and that he agreed to it, and all the witnesses testifying that the deed and the transfer of the bond for title were made in payment of the existing indebtedness, and were executed and delivered on the date they bear, circumstances adduced by the evidence which would tend to create an atmosphere of suspicion are not sufficient to overcome the positive sworn testimony of these witnesses."

The testimony to which the master alludes is now before me. At the time of the argument in this case at Athens I was impressed with the argument of counsel for the plaintiff, and was very doubtful what should be done in the case; but since I have been back in Atlanta I have gone through the testimony carefully, and after full consideration of the same I do not see that it justifies a finding for the plaintiff. I think the special master stated the case very well in the language I have quoted above. It is very suspicious, and, as he expresses it, "leaves a bad taste in the mouth," yet, in my opinion, it is not sufficient to justify setting aside the conveyances involved on the ground that they were made to hinder, delay, and defraud creditors, and that they are fraudulent in character. I have held the matter up, and taken time to think about it, and that is my conclusion. While the case looks gravely suspicious, it is not such as would authorize a finding in favor of the plaintiff.

The decree must be that the bill be dismissed.

DAVIS v. BALTIMORE & O. R. CO.

(District Court, D. Massachusetts. February 11, 1919.)

No. 932.

1. COURTS ⇨323—JURISDICTION OF FEDERAL COURTS—FRAUDULENT REMOVAL INTO DISTRICT.

The burden rests upon a defendant to prove that the removal of plaintiff from one state to another was for the purpose of conferring jurisdiction on the federal court in that state.

2. COURTS ⇨274—JURISDICTION OF FEDERAL COURTS—DISTRICT OF SUIT—CORPORATIONS—“DOING BUSINESS IN DISTRICT”—“PRESENT IN DISTRICT.”

A railroad company, which operates no line of road within a federal district, but merely maintains an office therein for solicitation of passenger and freight business, paying the rent and salaries of the employes, *held* not doing business nor “present in the district,” in such sense as to be subject to suit in the federal court therein.

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

At Law. Action by Earl A. Davis against the Baltimore & Ohio Railroad Company. On plea in abatement. Plea sustained.

Nathan B. Bidwell and John T. Wheelwright, both of Boston, Mass., for plaintiff.

Frederick Foster, of Boston, Mass., for defendant (specially).

MORTON, District Judge. The plaintiff brought this action at law against the defendant to recover damages for loss of consortium through personal injuries sustained by his wife while a passenger in the defendant's railroad train in the state of West Virginia. Service was made on “Edwin E. Baekey, New England passenger agent and in charge of its (defendant's) business at Boston in said district” (marshal's return). The defendant has appeared specially, and has pleaded (1) that the plaintiff was not a citizen and resident of Massachusetts at the time when suit was brought; and (2) that the defendant was not doing business, nor legally found, within this district at that time, and that the agent upon whom service was made was not authorized to receive service of process against it. The matter was heard by the court on oral and documentary evidence.

[1] Upon the first question, viz., whether the plaintiff was a citizen and resident of Massachusetts, judgment was given orally at the conclusion of the arguments, substantially as follows:

“As to the question of diversity of citizenship, the test is whether it existed at the time when the suit was brought, namely, on October 29, 1917. Undoubtedly the plaintiff was a citizen of Massachusetts to start with. The defendant undertakes to establish, first, that the plaintiff lost his Massachusetts citizenship and became a citizen of West Virginia; and, second, that his return to Massachusetts was for the purpose of instituting these actions. As to the first, the case is close. The plaintiff had no time contract with his employer, and, when he went down to Lamberton, was not committed to stay there, if he did not like it. His letters showed plainly that he regarded the removal as more or less of an experiment. He continued to live there almost a year, but never under satisfactory conditions. He never took his household goods there;

they always remained in Massachusetts, at the home of his wife's family, with whom he had previously lived. Aside from his statement in the draft registration, I should be inclined to say that the intention to abandon unconditionally the domicile in Massachusetts and take up one in West Virginia was not established.

"But it is unnecessary to decide this question, because, even if it be thought that a West Virginia domicile was acquired, I have no doubt that it was abandoned when the plaintiff returned to Massachusetts, and abandoned for other reasons than those connected with this litigation. It devolves upon the defendant to establish that the return to Massachusetts was for the purpose of conferring jurisdiction on this court. There is no evidence at all that that was the fact, except such inferences as can be properly drawn from the facts that the plaintiff returned on October 16th (his wife had returned in the previous May, and was already living here with her parents), and that the suit was brought about two weeks later. There were many and entirely adequate reasons why the husband should return to Massachusetts, reasons which had nothing to do with any claim for damages by his wife. I have no doubt that they were the motives which controlled his action. The case is not one in which the change of jurisdiction changes substantial rights, and no reason has been suggested why the plaintiff derived any material advantage in this litigation by bringing it here, instead of in West Virginia. No motive is shown which would have led him to attempt a colorable change of residence for the purpose of bringing this action. I am satisfied that the plaintiff is a citizen and resident of Massachusetts, and that the requisite diversity of citizenship exists."

[2] The second question, viz., whether the defendant was doing business within this district and was legally present herein at the time of service, and whether the agent upon whom service was made was authorized to receive service of process against the defendant, was taken under advisement. The facts in relation thereto are as follows:

The defendant does not own or operate, and never has owned or operated, any railroad within this district. Its railroad does not extend farther north than New York, if so far. It hired an office in Boston and paid the rent therefor; and it had done so for a number of years. Baekey (on whom service was made) was in charge of this office and had other employes under him. He and they were hired and paid by the defendant. They were employed to solicit freight and passenger business for the defendant, and they did so actively. The defendant's name was displayed on the window of the office, with the words "Passenger Office" or "Ticket Office," and upon its timetable folders, under "Boston," Mr. Baekey's name appeared as "New England Passenger Agent." The defendant's name appeared in the telephone index in connection with the office referred to. The list of cities in the folders contained about 60, among them being Los Angeles, Cal., Seattle, Wash., New Orleans, La., Chicago, Ill., Atlanta, Ga., Kansas City, Mo., and Minneapolis, Minn. Speaking generally, it included the principal transportation points in continental United States. At each of them, the defendant apparently maintained agents with duties more or less like Mr. Baekey's.

It does not appear that any tickets were actually sold by Mr. Baekey or the men in that office. Tickets could be obtained there, but in exactly what way does not appear. Nor does it appear that any money or property belonging to the defendant was kept in this district, nor that bills owing to it were collected here by Baekey or his assistants, nor that bills of lading were issued by them.

On the question whether a defendant corporation was doing business in any given district to such an extent that it can be said to have been corporately present there, the cases shade into one another. In *St. Louis Southwestern Ry. Co. v. Alexander*, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77, *Reynolds v. M., K. & T. Ry. Co.*, 228 Mass. 584, 117 N. E. 913, and *Walsh v. Atlantic Coast Line Ry.*, 256 Fed. 47, D. C. Mass., Feb. 19, 1916, the corporation was held to be present. In *Green v. C., B. & Q. R. R. Co.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, and in *American Electric Welding Co. v. Lalanc & Grosjean Co.*, 256 Fed. 34, D. C. Mass., July 31, 1917, it was held not to be present. This case seems to me to be distinguishable from the *Walsh Case*, and to fall within the latter class of cases rather than in the former.

The plea in abatement will therefore be adjudged good, and the action dismissed.

GRAUSTEIN v. RUTLAND R. CO.

(District Court, D. Massachusetts. March 4, 1919.)

No. 914.

1. COURTS ⇨274—JURISDICTION OF FEDERAL COURTS—DISTRICT OF SUIT—"DOING BUSINESS"—"PRESENT IN STATE."

A foreign railroad company, having no line of road in Massachusetts, but maintaining an office in Boston and an agent authorized only to solicit business and take orders for tickets, which he obtained from a tourist agent supplied with tickets by such company and others, *held* not doing business or present in the state, so as to be subject to suit there under Judicial Code, § 51 (Comp. St. § 1033).

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

2. COMMERCE ⇨92—SUIT TO ENFORCE ORDERS OF INTERSTATE COMMERCE COMMISSION—JURISDICTION.

Interstate Commerce Act Feb. 4, 1887, § 16, as amended by Act June 18, 1910, § 13 (Comp. St. § 8584), providing for suits against railroad companies to enforce orders of the Interstate Commerce Commission in the district in which the complainant resides, does not authorize service of process beyond such district.

At Law. Action by Ida S. Graustein against the Rutland Railroad Company. On plea in abatement. Plea sustained, and action dismissed.

William H. Garland, of Boston, Mass., and William A. Graustein, of East Cambridge, Mass., for plaintiff.

Ralph A. Stewart, Choate, Hall & Stewart, and Walter A. Dane, all of Boston, Mass., for defendant (specially).

MORTON, District Judge. This plea in abatement raises the questions (1) whether the defendant is within the jurisdiction of the court and subject to suit here; and (2) if not, whether service on it in Vermont was good. The facts are as follows:

[1] The defendant is a Vermont corporation. Its principal place

of business is in that state. It neither owns nor operates any railroad within this district. The process issued against it in the present suit was served in Boston, upon one Burrell, and upon one Marsters, each of whom is said in the marshal's return of service to have been an agent of the defendant. Burrell was employed by the defendant on a salary. His office was a room in the Old South Building on Washington street. On the door of this room was a sign giving his name, with the addition "General Agent Rutland Railroad." He kept there and used with the defendant's assent stationery marked "Rutland Railroad." The rent of the room was paid by the defendant. None of its tickets were kept there. Burrell's duties were to solicit business for it, and to take orders for tickets which he obtained from other persons, usually from Marsters. On the folder time-tables issued by the defendant, Burrell's name appears in a list of ticket agents through New England. Burrell occasionally discussed the adjustment of claims; but it does not appear that he ever decided any question of that sort, or had any authority to act for the defendant, except in the solicitation of business and the procuring of tickets in the manner stated.

Marsters was a "tourist agent," whose office was at 248 Washington street. He represented various railroads, among them the defendant. He was supplied by it with a small stock of local tickets, issued by it for passage over its lines outside of Massachusetts, which he was authorized to sell on its account. When a prospective passenger desired a ticket from Boston to a point on the Rutland Railroad, Marsters obtained it from the Boston & Maine Railroad, which issued to him the tickets over the Rutland Railroad as agent for the Rutland. Marsters, in what he did for the defendant, acted under the supervision of its general passenger agent. No part of his office rent or expenses were paid by it. It does not appear whether Marsters worked on a commission or on a salary.

I am unable to distinguish this case from *Green v. C., B. & Q. R. Co.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, as the facts in the Green Case are stated by McPherson, J., in *Goepfert v. Compagnie Gen. Transatlantique (C. C.)* 156 Fed. 196, at page 198. As I am bound by the Green decision, I rule that the defendant was not so present or represented within this district as to be subject to suit here under section 51 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [Comp. St. § 1033]). See, too, *Davis v. B. & O. R. R.* (D. C. Feb. 11, 1919), 256 Fed. 407.

[2] It follows that the case must be dismissed unless jurisdiction is specially conferred by Interstate Commerce Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384, as amended by Act June 18, 1910, c. 309, § 13, 36 Stat. 554 (U. S. Compiled Stats. § 8584), which reads as follows:

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the [Circuit Court] of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the [Circuit Court]

of the United States shall proceed in all respects like other civil suits for damages."

"To obtain jurisdiction there must be service." *Moody, J., Green v. C., B. & Q. R. Co., supra.* In addition to the service on Burrell and Marsters, above described, copies of the order of this court for the defendant to appear and answer in this suit were served on the defendant's principal officers at Rutland, in the state of Vermont, where its principal office is located. Is such service good?

It is, of course, within the power of Congress to provide that process from a federal court may run and be served anywhere in the United States. Such jurisdiction, being of exceptional character, ought not to be assumed by a court without clear statutory authority therefor. So far as I am aware, in every case in which the process of a District Court runs beyond its own district, there is explicit provision to that effect, which is lacking in the section under discussion. This absence is highly significant in view of related statutory provisions. In the analogous matter of suits to enforce certain orders of the Interstate Commerce Commission (see U. S. Compiled Stats. §§ 993, 994), it is specially provided that—

"The orders, writs and processes of the District Courts may in these cases run, be served, and be returnable anywhere in the United States." U. S. Comp. St. § 995.

This provision applies to a section beginning, "The venue of any suit hereafter brought to enforce * * * any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made" (U. S. Comp. St. § 994), which is fully as strong for the plaintiff as the provision in section 8584 on which she now relies, viz., that "the complainant * * * may file in the * * * district in which he resides," etc. Again, in the section of the Interstate Commerce Act relating to joining two or more defendants in cases to enforce orders of the Commission—this is a case against a single defendant—it is provided:

"Service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office." U. S. Comp. St. § 8584, cl. 3.

The language of section 8584 is substantially equivalent to that of section 51 of the Judicial Code, viz., that "suit shall be brought only in the district of either the plaintiff or the defendant," under which it is settled that the plaintiff cannot sue in his own district unless he can get service on the defendant there. *In re Keasbey & Mattison Co.*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402.

I therefore reach the conclusion that section 8584 does not authorize process to be served beyond the district in which the suit is filed.

Plea in abatement adjudged good; action dismissed.

In re REED.

(District Court, N. D. Georgia. March 14, 1919.)

BANKRUPTCY \Leftrightarrow 407(5)—DISCHARGE—GROUND OF REFUSAL—FALSE FINANCIAL STATEMENT.

Omission from statement made by bankrupt to bank, on which he obtained credit, of his indebtedness to usurious money lenders, is not cured, as regards its being ground for denial of discharge, by omission from his statement of an equity in real estate of practically the same amount, owned by him.

In Bankruptcy. In the matter of Thomas Reed, bankrupt. On objections to discharge, and petition to review special master's report, deciding against bankrupt. Decision affirmed.

King & Spanding, Rosser, Slaton, Phillips & Hopkins, and J. J. Slaton, all of Atlanta, Ga., for objectors.

Hendrix & Silverman, of Atlanta, Ga., for bankrupt.

NEWMAN, District Judge. The objection to discharge is on the part of the Atlanta National Bank and others, and the chief ground of the objection is:

"For that the said bankrupt, on or about the 25th day of October, 1913, made a statement in writing to the Atlanta National Bank, a copy of which is hereto attached, made a part hereof, and marked Exhibit A, and that, on the basis of said statement, the said bankrupt obtained money from the said Atlanta National Bank; that said statement was a materially false statement in writing made by said bankrupt to the Atlanta National Bank for the purpose of obtaining money or credit; and that said bankrupt, based upon such statement, did obtain money, to wit, the sum of \$1,500."

There is another objection upon the ground that the bankrupt failed to keep books of account, so that his financial condition might be ascertained; but the second ground was not passed upon by the master, for the reason that, having passed upon the first ground in the manner in which he did, it was unnecessary to determine the second objection.

There is no question made here that the bankrupt did not make the statement claimed to have been made (the statement being in writing and in evidence); but the claim is that at the time he made the statement, and omitted the fact that he owed \$1,500 to King Bros., he owned real estate worth substantially the amount of the debt he owed to King Bros., which he also left out of his statement, and this, it is claimed, offset his failure to state his indebtedness to King Bros., and rendered the statement not materially false for that reason.

The question which has been argued before me, and which is conceded by counsel for both sides to be purely a question of law, is whether the omission from the statement made to the bank of his indebtedness to King Bros. is cured by the fact that he also omitted a like amount in real estate which he owned. This question is not new, and seems to have been before the courts in a number of cases.

The main case relied upon by the objecting creditors is that of In

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

re Maaget (D. C.) 40 Am. Bankr. Rep. 221 (245 Fed. 804), in which the court held as follows, as stated in the headnotes:

"Neither a bankrupt nor any one else may defend a written statement of his financial condition, merely by showing that the balance is substantially correct.

"A financial statement from which a bankrupt knowingly omits an enforceable liability for the purchase price of goods, even though he thought it would do no harm, and that he was not then liable, is sufficiently false to bar a discharge."

This decision was by Judge Hand, of the District Court for the Southern District of New York, and subsequent to this the case of *In re Kerner* (D. C.) 245 Fed. 807 (40 Am. Bankr. Rep. 183), arose in the same court, and the decision by Judge Hand, as stated by the headnote, was as follows:

"Where a bankrupt, who issued a financial statement in January, omitted from his list of assets goods purchased for the spring trade, and omitted from the list of his liabilities debts incurred by the purchase of such goods, his offer of composition must be denied, despite his claim that it was customary in the trade to omit from the financial statement such assets and liabilities."

In the body of the opinion Judge Hand says:

"This case falls directly under my ruling in *Re Maaget* [D. C.] 245 Fed. 804, and I shall follow it, unless it appears that it has been overruled in *Re Rosenthal*, 231 Fed. 449, 145 C. C. A. 443. The opinion in that case does not pass upon the point, and I have no means of determining whether it was raised on the appeal. In any event the opinion below does not diverge from *In re Maaget*, but quotes it with approval, and the case has the distinguishing point that the bankrupt, who could not read or write, may well have supposed the statement to have been true. I cannot find that any court has decided that, where a bankrupt deliberately chooses to omit a liability for the purchase price of goods still on hand, he has made a true financial statement. Scierter is, of course, a necessary element in the charge, and it would be a defense to show that the bankrupt, however erroneously, supposed that the liability did not in fact exist."

In that case a confirmation of composition was denied by reason of the false statement. This case, however, subsequently went to the Circuit Court of Appeals for the Second Circuit, and is reported in 41 Am. Bankr. Rep. 507 (250 Fed. 993, — C. C. A. —). The headnotes in that case are as follows:

"Where it appears that an alleged bankrupt in the cloak and suit business furnished a financial statement to a creditor in January, which was made as of November of the preceding year, and omitted therefrom spring merchandise and liabilities for the same amount, and there is nothing to show that if the omission had been set forth in the statement the credit would not have been given, an application for the confirmation of a composition offered by the bankrupt should not be denied because of said omission.

"A statement in order to bar a discharge under section 14b of the Bankruptcy Act must be 'materially' false. It must not only be intentionally untrue if it is to deprive the bankrupt of his discharge, but it must be untrue as respects a material matter; that is, a matter, if disclosed, would have caused the party who was to act upon the statement to withhold the credit which he extended."

The decision, as shown by the headnotes just quoted, is by a majority of the court; Judge Hough dissenting. There are other au-

thorities cited, but these two are the main authorities relied upon, and I think this case must be decided on its own peculiar facts.

If the fact that the bankrupt owed money to King Bros., who were usurious money lenders, had been disclosed, would the bank have loaned him the \$1,500? There was no evidence on this question, either in favor of or against the bankrupt; but I think it is reasonable to conclude that the fact that he owned an equity in real estate of practically the same amount would not overcome the effect, in the lender's mind, of the fact that he was borrowing money, and at that time owed money, at a high and usurious rate of interest.

If the decision of the majority of the court in *Re Kerner*, supra, should be considered as deciding the law of this matter, the facts in that case are so different from this that I would be unwilling to follow it, as I am requested to do here. In this case the bankrupt owed this \$1,500, which he must have known, or certainly should have known, and he failed to put it in his statement to the bank, made for the purpose of obtaining a loan there. The fact that he owed this \$1,500 would, of itself, be a material omission without reference to the character of the debt, and when the character of the debt is considered it is clearly material.

In my opinion this is a materially false statement under the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. §§ 9585-9656]), and should deny the bankrupt his discharge. Consequently I think the special master decided the case correctly, and his decision must be affirmed.

In re DELMONICO'S.

(District Court, S. D. New York. January 4, 1919.)

BANKRUPTCY ⇨249—**RECEIVERS**—**CONTINUATION OF BANKRUPT'S BUSINESS.**

Receivers in bankruptcy of Delmonico's, after operating the business for three months at an increasing profit, granted leave to continue the same until sale or appointment of a trustee.

In Bankruptcy. In the matter of Delmonico's, alleged bankrupt. On application by receivers for leave to continue business. Granted.

Zalkin & Cohen, of New York City, for plaintiff.

Rosenberg & Ball, of New York City, for defendant.

MAYER, District Judge. This is an application by the receivers, Maurice P. Davidson and Grosvenor Nicholas, for leave to continue the business of Delmonico's, now being conducted by them, until a sale thereof or until the election of a trustee.

These receivers were appointed by this court on October 4, 1918. During the first month of operation, in October, the result showed a net loss of \$10,000, in round numbers, on a total business of \$39,000, in round numbers. November showed a net profit of some \$9,500, on a total business of nearly \$87,000, and December showed a net profit of upwards of \$10,000, on a total business of \$86,000, and it is estimated that the business for January, 1919, will show a substantial profit.

This encouraging progress has been accomplished by highly intelligent administrative effort on the part of the receivers, who have instituted necessary economies and have endeavored to eliminate waste, while at the same time keeping the business up to its traditional standards, and, indeed, improving the service to the patronizing public.

During the operation of the business by the receivers, all rent and taxes which have accrued during their occupancy have been paid. The business is substantial, and there are about 200 employés, many of whom have been at Delmonico's in one capacity or another for many years. "The Delmonico tradition of conservatism and excellence," the receivers state, has been "carefully preserved."

In addition to the gratifying results obtained by the application of good business methods, it is probably true that the business of this old-time restaurant has improved, to some extent at least, because of sentimental reasons. Delmonico's dates back to 1825, and was established about 1845 at what later became the site of the old Steven's Hotel at 7 Broadway. When croton water was introduced into the city, the occupants of the houses fronting on Bowling Green erected a fountain, consisting of a rough stone structure, over which the water was conducted by means of a pipe. The design called forth considerable adverse criticism from visitors from out of the city, and the incident and mention of Delmonico's are thus recorded by the poet John Godfrey Saxe:

"And now Mr. Brown
Was fairly in town,
In that part of the city they used to call 'down,'
Not far from the spot of ancient renown
As being the scene
Of the Bowling Green,
A fountain that looked like a huge tureen
Piled up with rocks, and a squirt between.
* * * * *
And he stopped at an Inn that's known very well,
'Delmonico's' once—now 'Steven's Hotel';
(And to venture a pun which I think rather witty,
There's no better Inn in this Inn-famous city!)"

"(Note: The Greatest Street in the World—Broadway. By Stephen Jenkins, Knickerbocker Press.)"

About 58 years ago, in 1861, Delmonico's moved from the Bowling Green section to Broadway and Fourteenth street. In 1876 the next move was made to Twenty-Sixth street and Fifth avenue, and in 1897 the establishment again moved, this time to Forty-Fourth street and Fifth avenue, where it now is. These moves of this famous restaurant mark the progress of the active life of the city as it gradually developed toward the north, although each move was attended with the usual foreboding prophecy that the location was too far uptown and ahead of its time.

Throughout these many years of existence, now rapidly reaching a century, the effort of Delmonico's has been to adhere to some simple and comfortable traditions. The theory is that the relation of host and guest still exists. Some of the well-known figures have gone, such as the white-haired John (quite typical), who, it is said, after three

score and ten of a life of urbanity towards the patrons and thrift for himself, now spends a vigorous and happy old age on his New Jersey farm.

The guest still continues to have identity. He is respectfully, but cheerfully, greeted by name as he enters his favorite room or takes his favorite seat. While across the table he is discussing the affairs of the day, or closing a business transaction, or telling his tribulations to his lawyer, the waiter does not hover about, but approaches only when he is beckoned. In the quiet and dignified room in which at the end of the day busy men of the city are wont to dine with each other, one may hear oneself think as well as talk, without the din of the orchestra, and with only the occasional faint sound of the strains of music from the more pretentious rooms where those disposed to be more formal may gather.

In the banquet halls great and important addresses have been made at public gatherings by leaders of thought in their day and generation. Here, too, many young folks have gone forward into life with the good wishes of their relatives and friends. Within these walls the débutante has attended her first formal party, under circumstances different only as to time and dress from those which her mother and grandmother remember.

Throughout all the years, the effort has been to keep for the New Yorker and the visitor from elsewhere a place of dignity and quiet, and to resist those innovations, some of which have resulted in eliminating the individual and depriving the patron of that individual attention for which at least some guests still crave.

Those who know this history and these characteristics have been loath to see Delmonico's go. It is their loyalty which in part, at least, has been responsible for possibilities of a future, and the hope (in which this court will assist) is that the business may continue, and go on, so that the institution may be kept alive, and not merely find its place on a page of some book reminiscent of New York.

Application granted.

BENEDICTO et al. v. WEST INDIA & PANAMA TELEGRAPH CO.,
Limited, et al.

(Circuit Court of Appeals, First Circuit. March 19, 1919.)

No. 1374.

1. COURTS ⇔101—INJUNCTION SUIT—NUMBER OF JUDGES—PORTO RICO AS
"STATE."

Porto Rico is not a state, within Judicial Code, § 266 (Comp. St. § 1243), inhibiting the granting, till hearing by three judges, of interlocutory injunction restraining action of officers under statute of states, on ground of unconstitutionality of statute.

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

2. COURTS ⇔438—JURISDICTION—DISTRICT COURT FOR PORTO RICO—EFFECT
OF STATUTE.

The new Organic Act of Porto Rico March 2, 1917, § 41 (Comp. St. 1918, § 3803qq), providing that the United States District Court for that island shall have jurisdiction of all cases cognizable in the District Court of the United States, "and shall proceed in the same manner," is a grant of general equity power, and not intended to be qualified, relative to injunction of action under laws of the island, by Judicial Code, § 266 (Comp. St. § 1243), as to injunction of action under laws of states.

3. TERRITORIES ⇔18—INTERSTATE COMMERCE ACT—APPLICATION TO PORTO
RICO—CABLE RATES.

New Organic Act of Porto Rico March 2, 1917, § 38 (Comp. St. 1918, § 3803p), declaring that the Interstate Commerce Act and its amendments shall not apply to Porto Rico, means the local and intra-island affairs and rates, and not rates by cable lines with other countries, over which, otherwise, the Interstate Commerce Commission has jurisdiction.

4. TELEGRAPHS AND TELEPHONES ⇔33(1)—REGULATION OF CABLE RATES—IN-
JUNCTION.

Because the acts and threatened acts of the Public Service Commission of Porto Rico, as to reducing rates on foreign cable business, interfere with plaintiff's rights and business, and are without warrant, as well as to avoid multiplicity of suits, there is jurisdiction in equity, as against claim of adequate remedy at law.

5. INJUNCTION ⇔114(3)—PARTIES—ACTS OF PORTO RICO COMMISSION.

The people of Porto Rico is not an indispensable party to suit to enjoin acts and threatened acts of the Public Service Commission of the island, in reducing rates on foreign cable business, interfering with plaintiff's rights and business.

6. COSTS ⇔238(1)—ON APPEAL—NONAPPEARANCE OF APPELLEE.

Affirmance of decree will be without costs; there being no actual appearance or brief filed by appellees.

Appeal from the District Court of the United States for the District of Porto Rico.

Suit by the West India & Panama Telegraph Company and another against Jose E. Benedicto and others, composing the Public Service Commission of Porto Rico, and another, for injunction, restraining enforcement of an order for reduction of foreign cable rates. Decree for plaintiffs, and defendants appeal. Affirmed.

Col. Edward S. Bailey, Asst. Judge Advocate General, War Department, of Washington, D. C. (Howard L. Kern, Atty. Gen., of Porto Rico, on the brief), for appellants.

Francis H. Dexter, of San Juan, Porto Rico, for appellees.

Before JOHNSON and ANDERSON, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. We see no occasion for delaying the decision of this case by reason of the suggestion that certiorari proceedings are pending in the case of the People of Porto Rico et al. v. American Railroad Company of Porto Rico (decided by this court December 4, 1918) 254 Fed. 369, — C. C. A. —, as there would seem to be no sense in which that case could bear upon this, whichever way it may be decided, and that is so because, if it should be held by the Supreme Court that interstate commerce jurisdiction goes to the local affairs of Porto Rico, it would not be decisive of the questions here, and in the event of its being held that such jurisdiction does exist in Porto Rico in respect to local railroad rates, it would have no conclusive bearing, because the questions in this case differ from that, not only as to the question in respect to the three judges required by section 266 of the Judicial Code of the United States (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. § 1243]), but as to the class of commerce involved.

The decision in the People of Porto Rico v. American Railroad Company of Porto Rico was upon the ground that there were no questions there in respect to interstate, interterritorial, or interpossessional situations, with the suggestion that it was quite possible that conditions might be created in the island, through corporate and business relations, which would make its intra-insular railroad business an interterritorial or an interpossessional business, as by connecting with other territories or possessions, while in this case the rates in question sought to be regulated clearly relate to intercommunication by cable between Porto Rico, the United States, the republic of Cuba, and foreign countries, either directly or in conjunction with other lines.

[1] The point is taken that the United States District Court of Porto Rico was without power to deal with the injunction questions involved by reason of section 266 of the Judicial Code, to which reference has been made, where it is provided that no interlocutory injunction restraining the action of officers acting under statutes of states shall be granted upon unconstitutional grounds by a single justice or judge, nor until the application shall be heard and determined by three judges, or a majority of them. So we have to consider whether equity procedure in the island of Porto Rico is subject to the provisions of this section, and we think it is not.

It is quite possible, if the intent were clear, that—under rules of liberal construction, and under such cases as Metropolitan Railroad v. District of Columbia, 132 U. S. 1, 9, 10 Sup. Ct. 19, 22 (33 L. Ed. 231), where it is said, "It is undoubtedly true that the District of Columbia is a separate political community in a certain sense, and in that sense may be called a state"—Porto Rico might be accepted as a state for certain limited purposes, but we think it not clear under the rela-

tionship which exists between the United States and that island, and without regard to whether it is strictly that of a possession or a quasi territory, that Congress intended to delegate to the local assembly authority to regulate rates in respect to instrumentalities of commerce between Porto Rico and the United States, and foreign countries.

Our view of section 266 of the Judicial Code of the United States is that its purpose was to prevent inordinate and precipitate federal interference with statutes and Constitutions of the states of the Union, which under their relations with the federal government are broadly administering their own laws, in a very substantial sense, as independent sovereignties.

We think the leading idea of Congress was in deference to the supposed independent jurisdiction of states, as such, and to safeguard their laws against hasty and inconsiderate federal interference.

We have no occasion to inquire whether section 266 might not apply to continental territories more closely related to the United States than that of the possession, or quasi territory, of Porto Rico.

Section 266, which we are considering, is, of course, so far as the states of the federal Union are concerned, a limitation upon the usual course of equity procedure as administered in the courts of the United States prior to its enactment; but the plenary power of the federal government in respect to the laws and Constitutions of the states is not, in any substantial sense, like its plenary power over a possession such as Porto Rico. Consequently, the theory of the relation between the federal government and the states of the Union does not encourage or justify the independent equity interference with the laws of the states that would be deemed reasonable, necessary, and justifiable in respect to a possession like Porto Rico.

Under the Organic Acts of Congress, the United States District Court for Porto Rico takes equity jurisdiction, in its comprehensive sense, with the authority and the duty to administer equity according to its usual and ordinary course, and we hold that view because we think that the provision in respect to three judges has reference to state statutes and Constitutions, because of the independence and peculiar relationship of the states to the federal government, and not to Porto Rico, and because the administration there of the three-judge provision would be locally inconvenient and practically inapplicable, and because it is not clear that Congress intended that interlocutory injunction questions should require the presence of three judges in primary equity proceedings in that Island.

[2] Section 41 of what is called the New Organic Act of Porto Rico provides that the United States District Court for that island "shall have jurisdiction of all cases cognizable in the District Courts of the United States, and shall proceed in the same manner" (Act March 2, 1917, c. 145, 39 Stat. 951 [Comp. St. 1918, § 3803qq]); but this we think was a grant of general equity powers, and, in conferring such general jurisdiction, that Congress did not intend to qualify it by section 266, which, as we have said, relates to the laws and the Constitutions of the states under their peculiar relations and reserved rights under the federal Constitution.

[3] It is true that the Act of March 2, 1917 (39 Stat. pt. 1, p. 964, § 38 (Comp. St. 1918, § 3803p), declares that the Interstate Commerce Act and its amendments shall not apply to Porto Rico; but this, we think, means the local and intra-island affairs and rates of Porto Rico, and not to cable lines, in respect to the rates of which parties in foreign countries and in the United States are interested.

The jurisdiction of the Interstate Commerce Commission in respect to rates is very broad, and it includes telegraph, telephone, and cable companies engaged in sending messages from one state, territory, or district of the United States to another state, territory, or district of the United States or to any foreign country.

There can be no question but that submarine lines are instrumentalities of interstate commerce, because, as said in *Hopkins v. United States*, 171 U. S. 597, 19 Sup. Ct. 47, 43 L. Ed. 290:

"It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between the citizens of different states, and the power to regulate it embraces all the instruments by which such commerce may be conducted."

And it was distinctly held in *Pensacola Teleg. Co. v. Western Union Co.*, 96 U. S. 1, 24 L. Ed. 708, that the telegraph is an instrument of commerce.

Under our system of governments, if the so-called independent states of the Union create corporations which contemplate business outside of the state, their interstate commerce instrumentalities at once become subject to federal regulation and control.

Now, without regard to the strict question whether Porto Rico is a territory or a possession, and without regard to its local insular affairs, it has territorial or possessional relations with the United States, and, as said in the *Didricksen Case*, 227 U. S. 145, 148, 33 Sup. Ct. 224, 57 L. Ed. 456, its organization is in most essentials that of those political entities known as territories; and one of the corporations in question was organized under the laws of England, and the other under the laws of France, and they are now operating under the authority of the United States, and though seated in the island, which has a local assembly, with powers and limitations somewhat like the Legislatures of our states and continental territories, they are using their instrumentalities for the purpose of rendering service which goes outside the island, and to interstate communities, and to different possessional territorial communities, and are therefore, as we think, subject to the usual authority of the United States jurisdiction created for the regulation of service of that character.

It is highly improbable, and, we think, contrary to reason, that Congress ever intended to make an exception to its general line of policy by delegating to the local assembly of Porto Rico legislative authority and control, in respect to rates upon interpossessional or interterritorial commerce instrumentalities, an authority which, under our system, does not exist in the Legislatures of the States, and which it has not intrusted to the continental territories of the United States, like Alaska.

The simple result of this view, and this decision, is to relegate ag-

grieved parties in respect to rates upon Porto Rican instrumentalities used in interpossessional United States, and foreign commerce to the same jurisdiction and to the same tribunal that regulates interstate commerce and instrumentality rates in the United States, and like rates upon instrumentalities used between the United States, her continental territories, and foreign countries.

The conclusion is that, while Congress, under its plenary power, had the unquestionable right to do so, it never has delegated to the legislative assembly of Porto Rico authority to regulate interpossessional, interterritorial, interstate, or foreign cable rates, and that the local legislative body, therefore, was without authority to create a commission for that purpose, and that, while the Interstate Commerce Commission may not exercise jurisdiction in respect to Porto Rican intra-island rates, that it has jurisdiction over her interpossessional and foreign instruments of commerce. We think, therefore, that the District Court of the island was right in holding that the assembly was without authority over the subject-matter of cable rates.

The conclusion also is that the District Court was not under the limitation of section 266 of the Judicial Code, in respect to three judges, and that it was within its proper jurisdiction in restraining the action of the commission which reduced the rates 40 per cent., or something like it, and it being a case within its jurisdiction, and coming here on appeal from a final decree, we have no doubt of the power of this court to pass upon the propriety of the decree.

[4, 5] The appellants contend that the plaintiffs below had a full, adequate, and complete remedy at law, that the people of Porto Rico was an indispensable party, and that the District Court was therefore without jurisdiction. These contentions cannot be sustained. The acts and threatened acts of interference with the plaintiff's rights and business were, and are, as we have held, without warrant, and on that ground, as well as to avoid a multiplicity of suits, there is plainly jurisdiction in equity. *Ex parte Young*, 209 U. S. 123, 159, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570, and cases cited.

[6] The decree must be affirmed, but without costs because there was no actual appearance or brief filed by the appellees.

The decree of the District Court is affirmed, without costs.

BENEDICTO, Treasurer, v. PORTO RICAN AMERICAN TOBACCO CO.

(Circuit Court of Appeals, First Circuit. March 19, 1919.)

No. 1368.

STATUTES \Leftrightarrow 110½(1)—SUBJECT AND TITLE—INSPECTION LAW—REVENUE PROVISION.

Under the Organic Law of Porto Rico, Jones Act, § 34 (U. S. Comp. St. 1918, § 3803n), inhibiting a bill containing more than one subject, which shall be clearly expressed in the title, and providing that an act embracing a subject not expressed in the title shall be void as to such part, Act Porto Rico Dec. 3, 1917, entitled "An act to amend" Act March 11, 1915, "entitled an act to protect Porto Rican cigars from misrepresentation," by providing for inspection, and issuance of stamps of guaranty, is void as to section 3, which, contrary to the title, intentionally converts what was simply an inspection law into an inspection law and a revenue law, by providing fees for guaranty stamps, which will yield large surplus revenues.

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

Suit by the Porto Rican American Tobacco Company against Jose E. Benedicto, Treasurer of Porto Rico. Decree for plaintiff, and defendant appeals. Affirmed.

Col. Edward S. Bailey, Asst. Judge Advocate General, War Department, of Washington, D. C. (Howard L. Kern, Atty. Gen., of Porto Rico, on the brief), for appellant.

H. L. Brown, of New York City (A. H. Burroughs, of New York City, and J. H. Brown, of San Juan, Porto Rico, on the brief), for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge. This an appeal from an interlocutory decree of the District Court of the United States for the District of Porto Rico granting a temporary injunction restraining the defendant below, who is treasurer of Porto Rico, from seizing cigars or little cigars of the plaintiff below, found in unstamped packages, and from prosecuting the plaintiff or any of its officers by reason of omitting to affix guarantee stamps on packages containing cigars and little cigars before exporting the same or removing them from its factory for consumption in Porto Rico.

The plaintiff is a New Jersey corporation engaged in the manufacture of cigars, little cigars, and cigarettes in Porto Rico, and has there invested in its plant, machinery, and land more than \$5,000,000. Its average weekly output in its Porto Rican factories is about 4,000,000 cigars and 1,500,000 little cigars. More than 90 per cent. of its cigars and practically all of its little cigars are exported to the United States. The cigars are packed and sold in boxes containing from 5 to 50 each; the little cigars, in boxes of 10 each.

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

The Legislature of Porto Rico passed an act approved on December 3, 1917, entitled:

"An act to amend an act entitled an act to protect Porto Rican cigars from fraudulent misrepresentation, by providing for adequate expert inspection, and the issue of stamps of guarantee covering the origin of tobacco used in the manufacture of such cigars, intended for exportation and for other purposes.' approved March 11, 1915."

This act requires the treasurer of Porto Rico to furnish to the manufacturers of cigars or exporters of leaf tobacco stamps to be known as guarantee stamps for cigars intended for exportation or consumption in Porto Rico and for leaf tobacco for exportation, and said—

"stamps shall be necessarily affixed to each original box or package, regardless of its capacity, so as to be visible to the consumer before they are removed from the place of manufacture or place of preparation, for exportation, or consumption in Porto Rico."

See section 2.

In section 3 it is provided that—

"The denomination of each guarantee stamp for original boxes or packages containing cigars for export or consumption in Porto Rico shall be one cent each, and twenty-five cents each for packages containing leaf tobacco, scraps or stripped tobacco for export."

The defendant construes this act to cover the plaintiff's little cigars and to require a one-cent stamp to be affixed to each box of 10 little cigars. The act so construed throws upon the plaintiff an expense of \$1 per 1,000 for its little cigars, amounting to \$125,000 a year for stamps on little cigars alone. The little cigars are mostly tobacco cigarettes, and are claimed by the plaintiff to differ radically from cigars in size, shape, contents, and cost. The act also requires a stamp to be affixed to each box of from 5 to 50 cigars, which imposes upon the plaintiff for stamps a cost of from 25 cents to \$2 per 1,000 cigars. The total expense to the plaintiff of the act as construed by the defendant is not less than \$150,000 per year.

Section 1 of the act provides for the employment of three additional internal revenue agents, who shall be tobacco experts, at salaries of \$1,500 each per annum, charged with the duty of registering brands of cigars manufactured in Porto Rico, of securing and preserving statistics in relation to leaf tobacco grown in Porto Rico and exported therefrom, as well as the inspection and examination of all tobacco on the premises of manufacturers of cigars and cigarettes for the purpose of preventing and detecting fraudulent use of guarantee stamps issued for cigars manufactured in Porto Rico, and for the purpose of detecting in the exportation of cigars or leaf tobacco such as are wrongly marked, misbranded, or falsely advertised as Porto Rican.

Although the aggregate salaries of the three inspectors of internal revenue agents provided for is only \$4,500, the defendant claims that the total annual expenditure entailed by the enforcement of the act will somewhat exceed \$21,500.

The tobacco business is one of the chief industries of Porto Rico, and statistics were available to the Legislature before the passage of

the amended act from which the approximate amount of revenue derivable under the provisions of the act could be easily ascertained. The plaintiff alleges, and on this record it must be taken as established, that the Legislature intended to realize under this act a revenue of at least \$80,000 above the expense of collection.

The plaintiff has invested a large part of its capital in various brands of little cigars, and claims a trade and good will therein worth \$500,000. The plaintiff's little cigars are sold mainly to dealers and distributors in the United States at prices ranging from \$9 to \$13 per thousand. The cost of \$1 per thousand for stamps required by this act represents from 8 per cent. to 11 per cent. of the wholesale price, and is alleged to be in excess of the plaintiff's profit on such sales. On Porto Rican tobacco used by the plaintiff's competitors in the United States and exported by the bale, such competitors would have to pay for stamps only 25 cents on each bale, from which 16,000 to 18,000 little cigars could be manufactured. But the stamps on a like number of little cigars manufactured by the plaintiff in Porto Rico, for sale in competition with manufacturers in the United States using similar tobacco, would be more than 50 times the stamp charge imposed under this act on the tobacco exported by the bale and manufactured in the United States. The result, as the plaintiff claims, will be, if the stamp charge is continued, to destroy its business, good will, and property in its brands of little cigars, worth at least \$500,000.

Shortly after this act became operative, the defendant notified the plaintiff that, if it failed or refused to affix stamps both to its packages of cigars and little cigars, he would, under the provisions of the act, seize and confiscate them and institute criminal prosecution besides. On March 3, 1918, the defendant threatened to seize and confiscate, at San Juan, 72 cases, containing 765,000 little cigars intended for shipment from San Juan to New York, unless stamps were affixed thereon. The plaintiff thereupon affixed said stamps, under protest, in order to ship these little cigars to New York. The defendant actually seized 15,000 cigars and little cigars which had been sold and delivered by the plaintiff to local dealers in San Juan without stamps, and threatened criminal prosecution for violation of the act. The plaintiff, claiming that the stamp charge was entirely confiscatory as applied to the little cigars, and that the act was being wrongly construed by the defendant, refused to attach guarantee stamps. Thereupon, on April 3d, the defendant seized some 10,000 cigars and 10,000 little cigars intended for shipment from San Juan to New York, and 2,000 little cigars which had been sold to local dealers, and threatened criminal prosecution. Other facts are alleged showing disorganization of plaintiff's business by the defendant, and irreparable injury done or threatened, or both. The bill was filed on April 6, 1918, and supported by affidavit. A restraining order was issued on the same day. On April 8, 1918, the defendant appeared specially by the Attorney General of Porto Rico, and by a special motion urged that the proceedings should conform to section 266 of the Judicial Code of the United States (Act March 3, 1911, c. 231; 36 Stat. 1162 [Comp. St. § 1243]). This motion was denied on April 29, 1918, with an

opinion. On April 26, 1918, the defendant appeared specially and by special answer set up that the bill was in reality against the people of Porto Rico and that the court was therefore without jurisdiction. In substance the defendant either pleaded ignorance or admitted the material allegations of the bill.

The defendant's justification of his proceedings was supported by an affidavit of himself and of one Rivera, an internal revenue agent. The counter affidavit of one Toro, the president of the plaintiff company, was filed on May 20, 1918. On August 26, 1918, the District Judge, in a careful opinion, sustained the jurisdiction and ordered a preliminary injunction issued substantially as prayed for.

The plaintiff's chief contentions, all in effect sustained by the District Court, are as follows:

"(1) That the act is void, because it violates the provisions of the Organic Law of Porto Rico as to entitling—in that while the title of the act gives notice of an inspection purpose only, the act is in fact essentially a tax measure, and extends to cigars for local consumption and to export leaf while the title is limited to cigars for export.

"(2) That the tax imposed under the guise of inspection deprives plaintiff of its property without due process of law, and denies it the equal protection of the law.

"(3) That the act unduly burdens interstate commerce, and is also void because it imposes a tax on exports in violation of the Organic Law, and otherwise exceeds the powers granted the local Legislature by the Organic Act."

It is manifest that the defendant's actual and threatened interference with the plaintiff's business and property will, if wrongful, do the plaintiff irreparable injury, for which it has no plain and adequate remedy at law. If the defendant's course is not justified under the statute, the plaintiff, a citizen of New Jersey, is entitled to equitable relief as against the defendant. *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Weyman-Bruton Co. v. Ladd*, 231 Fed. 898, 146 C. C. A. 94. The suit is not one against the people of Porto Rico. *Philadelphia Co. v. Stimson*, 223 U. S. 605, 620, 32 Sup. Ct. 340, 56 L. Ed. 570, and cases cited.

The Legislature of Porto Rico derives its powers under a grant from Congress, now and at the time of the passage of the act in question from the Jones Act of March 2, 1917 (39 Stat. 951, c. 145 [Comp. St. 1918, §§ 3803a-3803z]). It has no powers except those granted expressly or by necessary implication by Congress. In section 34 of the Jones Act the following provision appears:

"No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

This provision is found in many state Constitutions; it must be given a reasonable, although not a narrow or technical, construction. *Carter County v. Sinton*, 120 U. S. 517, 7 Sup. Ct. 650, 30 L. Ed. 701; *Jonesboro City v. Cairo & St. Louis R. R. Co.*, 110 U. S. 192,

4 Sup. Ct. 67, 28 L. Ed. 116; *Fish v. Stockdale*, 111 Mich. 46, 69 N. W. 92; *State v. Tibbets*, 52 Neb. 228, 71 N. W. 990, 66 Am. St. Rep. 492; *Henderson v. Insurance Co.*, 135 Ind. 23, 34 N. E. 565, 20 L. R. A. 827, 41 Am. St. Rep. 410; *Richard v. Stark County*, 8 N. D. 392, 79 N. W. 863; *N. W. Manufacturing Co. v. Wayne Circuit Judge*, 58 Mich. 381, 25 N. W. 372, 55 Am. Rep. 693; *Lacey v. Palmer*, 93 Va. 159, 166, 24 S. E. 930, 31 L. R. A. 822, 57 Am. St. Rep. 795.

The title to the Act of December 3, 1917, is:

"An act to amend an act entitled 'An act to protect Porto Rican cigars from fraudulent misrepresentation, by providing for adequate expert inspection, and the issue of stamps of guarantee covering the origin of tobacco used in the manufacture of such cigars. intended for exportation, and for other purposes,' approved March 11, 1915."

It purports to amend sections 1, 2, 3, and 6 of the Act of March 11, 1915. Referring, for substance, to the Act of March 11, 1915 (Laws of Porto Rico of 1915, No. 31, p. 60), we find in sections 1, 2, and 6 provisions for inspection, slightly different in scope and in some matters not now material, from the provisions contained in the Act of December 3, 1917. But section 3 is radically changed. In the old act it reads:

Section 3: "No charge shall be made for guarantee stamps to be furnished to cigar manufacturers under the provisions of this act."

In the amended Act of December 3, 1917, it reads:

Section 3: "The denomination of each guarantee stamp for original boxes or packages containing cigars for export or consumption in Porto Rico shall be one cent each, and twenty-five cents each for packages containing leaf tobacco, scraps or stripped tobacco for export."

It is this radical change in section 3 that throws an expense or tax upon the plaintiff of approximately \$150,000 a year.

The plaintiff's claim is that this change in section 3 makes the amended act not only an inspection act, but a revenue act; that the title of the amended Act of December 3, 1917, gives no notice of a purpose to raise revenue, and that the revenue feature of the amended act is therefore invalid under the quoted provision from section 34 of the Organic Act.

Added emphasis is given to this claim—that the title gave no notice to it and other parties affected by the proposed tax—by the deposition of its president to the effect that he keeps himself acquainted with—"proposed legislation in the Legislature of Porto Rico and for such purpose obtains copies of the bills presented in either branch of the Legislature; that from the title of the Act No. 50, approved December 30, 1917, deponent had no notice that the bill which resulted in the said law contemplated a tax or revenue measure; that if deponent had had any reason to believe or suspect from the title of said bill, which was identical with the act referred to, that a revenue law was under consideration, he would have asked for a hearing before the proper committees of the Legislature, to show that the tax resulting from the provisions of such bill and law was destructive to the interests of plaintiff corporation."

It is fair inference that, if the facts now before the court had been before the Legislature, no such act would have been passed. At any

rate, we are not warranted on this record in holding that the Legislature's failure to comply with the express requirements of the Organic Act was the cause of merely theoretical or hypothetical damage to the plaintiff. It is not improbable that the Legislature would, on the facts now shown, have regarded the act as inconsistent, not only with the plaintiff's rights, but with the general public interest of Porto Rico, including therein the continued prosperity of tobacco manufacturing in the island of Porto Rico, now apparently greatly endangered by the discriminatory tax imposed upon manufactured tobacco as compared with tobacco exported in bales.

We think the plaintiff's first contention must be sustained.

Inspection laws are a well-recognized type of legislation. *Foote v. Maryland*, 232 U. S. 494, 34 Sup. Ct. 377, 58 L. Ed. 698; *Turner v. Maryland*, 107 U. S. 38, 2 Sup. Ct. 44, 27 L. Ed. 370; *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455.

Inspection necessarily involves expense, and the Legislature is, within rather wide limits, given discretion to fix inspection fees adequate to cover the expense. *Red "C" Oil Co. v. North Carolina*, 222 U. S. 383, 393, 32 Sup. Ct. 152, 56 L. Ed. 240; *Patapsco Guano Co. v. North Carolina*, 171 U. S. 345, 18 Sup. Ct. 862, 43 L. Ed. 191. But if, under the guise of imposing inspection fees, the Legislature has really enacted a revenue law, then the law ceases to be merely an inspection law; it becomes also a tax or revenue law, and its validity or constitutionality must be determined on principles other than those applicable to inspection laws. *Foote v. Maryland*, supra; *Patapsco Guano Co. v. North Carolina*, 171 U. S. 345, 18 Sup. Ct. 862, 43 L. Ed. 191; *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455; *Savage v. Jones*, 225 U. S. 501, 525, 32 Sup. Ct. 715, 56 L. Ed. 1182.

The Act of December 3, 1917, is plainly labeled an inspection law, and only an inspection law. It is in fact, and on this record it must be held that it was intended by the Legislature to be, also a revenue law.

It is not disputed that the tobacco industry is one of the chief industries of Porto Rico, and that statistics with relation thereto were readily available to the Legislature which enacted this law. The plaintiff alleges, and supports the allegation by affidavits, which are not contradicted, that the Legislature expected to realize at least \$80,000 a year as revenue through the amendment of the old inspection law.

As the act was intentionally made a revenue measure, the cases of accidental excess returns from inspection fees are not in point. *Patapsco Guano Co. v. North Carolina*, 171 U. S. 345, 18 Sup. Ct. 862, 43 L. Ed. 191; *Red "C" Oil Co. v. Board of Agriculture (C. C.)* 172 Fed. 695. There is no substantial denial of the plaintiff's claim that if the act is permitted to be enforced the plaintiff alone will pay an annual tax of about \$150,000 a year. It is in effect admitted that the outside limit of expense under the act is \$21,500. The old Act of March 11, 1915, appropriates \$12,000 for salary and other incidental expenses of the act.

That the claim of \$150,000 a year expense to the plaintiff alone is not merely prophetic is shown by the undisputed fact that in the period between March 1, 1918, and about April 13, 1918, the plaintiff was required to purchase about \$12,000 worth of stamps, or at the rate of about \$2,000 a week. The plaintiff claims this expense to be less than the average throughout the year; there is certainly nothing in this record to indicate that it is below the average.

The result is we must hold that the amendment of December 3, 1917, made the old inspection law into an inspection law and a revenue law; that the bill thus contained "more than one subject"; that the new subject of revenue provision was not "clearly expressed in the title"; and that the act is void as to the revenue features not so expressed, because ultra vires the Porto Rican legislative powers.

Other grounds of the decision below, ably argued by learned counsel, we find no occasion to consider. No opinion is expressed as to whether the act in question interferes with interstate commerce, or whether the plaintiff is, under the act, deprived of its property without due process of law.

We affirm the decision of the court below on the single ground that the act of the Porto Rican Legislature is, as to the revenue features of the act under the quoted provision of the Organic Act, invalid. As this court has decided in No. 1374, *Benedicto v. West India & Panama Tel. Co., Ltd.*, 256 Fed. 417, that section 266 of the Judicial Code, which requires three judges to sit in injunction cases involving the alleged unconstitutionality of a state statute, does not apply to equity procedure in Porto Rico, we have no occasion to consider it here. Moreover no question of unconstitutionality is involved in this case, as we have dealt with it.

Decree affirmed, with costs.

BAIN et al. v. WHITE et al.

(Circuit Court of Appeals, Fifth Circuit. February 27, 1919.)

No. 3170.

1. APPEAL AND ERROR ⇨1008(2)—REVIEW—FINDINGS OF COURT.

Where jury was waived and all matters submitted to the judge, his findings on issues of fact are, at least, entitled to as much consideration as a verdict, and so will not be disturbed on appeal, if there was evidence furnishing a basis therefor.

2. CONTRACTS ⇨280(5)—DRILLING WELL—PERFORMANCE—"GOOD CLEAN HOLE."

Conclusion that contract to drill oil well which, when completed to depth of 2,000 feet, shall be a "good clean hole," had not been carried out, is warranted; it appearing that a piece of piping had been left in such condition that either withdrawal of the pipe stem or mere lapse of a short time resulted in the hole being obstructed by the pipe; a "good clean hole" being one free from those things, presence of which would render it incapable of the uses for which it was designed.

3. **CONTRACTS** ⇨221(3)—**DRILLING WELL—DEMONSTRATING PERFORMANCE.**
Contract for drilling oil well, price to be paid only on the sinking of a good clean hole to the depth of 2,000 feet, impliedly requires demonstration to owner of depth and character of well before he is to accept and pay for it.
4. **CONTRACTS** ⇨64—**CONSIDERATION.**
If agreement, after contractor had claimed to have completed drilling of oil well, to postpone measurement and delivery, was a new contract requiring consideration, the then advancing by owner to contractor of money for pay roll was an implied consideration.
5. **CONTRACTS** ⇨280(5)—**DRILLING WELL—PERFORMANCE.**
Refusal to permit contractor for drilling oil well to use, for purpose of overcoming a cave-in, a size of pipe which will reduce the size of hole contracted for, is justified.
6. **CONTRACTS** ⇨322(3)—**DRILLING WELL—PREVENTION OF PERFORMANCE—EVIDENCE.**
Evidence in action by contractor for drilling oil well *held* to warrant finding that failure of well to be a good clean hole was not due to any failure of owner to furnish necessary piping, as agreed.
7. **CONTRACTS** ⇨220—**DRILLING WELL—OPTION OF CONTRACTOR—DUTY AS TO FURNISHING PIPING.**
Contract for drilling oil well, providing for owner furnishing piping, for commencement of work within a reasonable time, and for no payment, except on the sinking to a depth of 2,000 feet of a well with a good clean hole, and giving contractor option to deepen a hole commenced by another, or drill a new well, did not require owner, on failure of contractor, after deepening the old hole, to get the required well, to furnish additional piping for drilling another well.
8. **TRIAL** ⇨388(1)—**REFUSAL TO FIND—CONSTRUCTION OF JUDGE'S STATEMENT.**
Statement or holding of judge, on the evidence submitted, that the facts were too indefinitely developed to authorize a judgment, was not a refusal to make a finding on the evidence, but amounted to no more than that plaintiffs, seeking damages on the theory that they were entitled to recover contract price for drilling oil well, less cost of drilling, had failed to establish that cost.

In Error to the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Action by Robert Bain and another against J. P. White and another. Judgment was adverse to plaintiffs, and they bring error. Affirmed.

L. A. Carlton, of Houston, Tex., for plaintiffs in error.

Charles R. Brice and Wm. A. Dunn, both of Roswell, N. M., and Sam Streetman, of Houston, Tex., for defendants in error.

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

BATTIS, Circuit Judge. A contract between White, of one part, and Bain and Knott of the other, provided for the drilling by the latter of a well in Hockley county, Tex. The parts of the contract having bearing upon the present controversy are:

Section 3, which provides that the well should be sunk to a depth of 2,000 feet, unless a flow of oil, gas, or water is secured before that depth is reached; section 5, which recites that J. M. Mook & Son had undertaken to drill a well that had not been carried to completion, and provides that Bain and Knott might use this hole, if they thought

proper; section 6, providing for the compensation, and that, if the drillers fail to sink the well to a depth of 2,000 feet, they should be held to have breached the contract and entitled to no compensation; section 7, providing that the work should be done in a good and workmanlike manner; section 8, with a provision to this effect, "It is a further condition and undertaking of the parties of the second part that the well, when completed to a depth of 2,000 feet, shall be a good clean hole"; section 9, providing that White "agreed to furnish and deliver at site of well all piping, with drive shoes for bottom of pipes necessary for completion of the well."

The questions necessary for determination were: (1) Was the well when completed to a depth of 2,000 feet, a good clean hole? (2) If there was a failure to deliver a "good clean hole" 2,000 feet deep, was this the result of White's failure to furnish necessary piping? (3) Assuming the failure of the first well, did the drillers have a right to drill another, the piping to be furnished by White, and did the refusal of White to furnish additional piping, whereby the drilling of another hole was prevented, result in loss and damage to the drillers?

[1] The questions do not come to this court as matters for primary determination, but involve a consideration of whether there was evidence from which the conclusions of fact forming the basis of the judgment could have been drawn. Under a stipulation by the parties, the jury was waived, and all matters at controversy submitted to the trial judge. The extent to which, under such circumstances, the finding of the District Judge is conclusive, is the subject of discussion in the briefs of the parties. This, at least, may be said of the applicable law: The findings of the trial judge upon issues of fact submitted to him are entitled to as much consideration as the verdict of a jury. The case is disposed of upon the assumption that they are not entitled to greater consideration. Applying the rule applicable to verdicts of the jury, the question as to each of the issues suggested would be whether there was evidence furnishing a basis for the conclusion reached.

Even if the testimony of all the witnesses tendered by defendant be eliminated, it would be possible, under the rule announced, to sustain the finding of the court. All of the evidence which was introduced to show that the plaintiff was at any time in a position to deliver "a good clean hole" 2,000 feet deep is that of the plaintiff Bain and his employé, Philip Cezeaux. Both of these witnesses unequivocally testified that on the 18th of December, 1914, the contractors had ready for delivery to White "a good clean hole" 2,000 feet deep. If they had not testified further, and if no other evidence had been introduced, the statements would doubtless have required a judgment for plaintiffs. The effect, however, of the testimony of both witnesses, is, in large measure, destroyed by their subsequent statements. Bain testified (Record, 96):

"About the 12th or 15th, I got a note from the driller, and he wrote me to come out on the 18th, and he would measure the well out to me.

"Q. This pipe was still in there when you went back? A. When I went back when?

"Q. When you went back on the 18th of September? A. They had sidetracked it then.

"Q. Now, you stated that the condition of the well was such that, to leave it a few hours with the drill stem, this pipe might run over again and obstruct the well? A. Yes.

"Q. That was the condition when Mr. White was there in December? A. Why, I suppose it was. We had pulled the pipe on the 18th, and he was up there on the 20th. We had the hole in good shape on the 18th.

"Q. Well, you could have measured it out to him on the 18th? A. Yes, sir.

"Q. And within an hour or two, or perhaps three or four hours, it would have been in a condition that you couldn't have measured it. A. Well, it might. Then, again, I have known them to stand there for three months, and you go right back to the bottom. This well had a cave in it at the bottom of the 6¼."

Again he testified (Record, 104):

"Q. Then, when you reported that you were down 2,000 according to the contract, the well at that time was not a good hole on account of this casing, was it? A. It was a good hole, good and clean and down 2,000 feet.

"Q. Well, it was clean, but would you call it a good hole? A. Well, it is a good deal better hole than I drilled in lots of other places."

Again he testified (Record, 104):

"Q. Now, when you claimed to have this contract completed, the condition of the well was such that there was a broken pipe, that had been sidetracked, that was liable to lean over in the well and obstruct it at any time? A. Well, it did do it; yes, sir.

"Q. You found that obstruction in there when you went back in January? A. Yes, sir.

"Q. It might have been in there when Mr. White came over, might it not? A. It might have been, yes, sir; but it wasn't in there—

"Q. Now, when you pulled your drill out and stopped your drilling, it is possible that pipe leaned right back into the hole at that time? A. No, sir; I don't think so. We had pulled it out to put on a new bit.

"Q. You had some trouble with that pipe in there before, had you? A. No, sir.

"Q. The next time you attempted to put your drill stem in, why you found it obstructed with this pipe you had sidetracked? A. After the well had stood for 10 days without any work."

Mr. Bain testified (Record, 81):

"Well, we went on down with the well, and got down 2,000 feet. We had two measurements; one measurement was 1,973 feet, and one measurement was 2,018 feet.

"Q. When was that? A. That was, I think, the 3d day of November.

"Q. Third day of November, 1914? A. 1914. Mr. White sent Mr. Walker out there to receive the well, and I told Mr. Walker I couldn't deliver it to him; that I had twisted some pipe off."

Philip Cezeaux, after having testified (Record, 143 et seq.) that, on the 18th of December, 1914, there was a "good clean hole," ready for delivery, further testified (Record, 151):

"Q. Now, you were speaking about this being a good clean hole. It had a drill bit and stem in it, did it not? A. Yes, sir."

Again (Record 152):

"Q. Were you the driller that broke the drill stem in the hole? A. I broke it off on the 2d or 3d of November."

The statement of plaintiff and one of his employés that, having reached a depth of 2,000 feet or more on the 18th of December, they had a clean open hole at that time, must be taken in connection with the other

statements of the same witnesses, to the effect that, prior to that time, a pipe had been twisted off in the well and had been sidetracked; and in connection with the facts with reference to which they testified as to developments, when an effort was made to resume work.

When Mr. White was at the well on the 20th of December, to measure and receive the well, it was not practicable for the measurements to be made. The drill stem had been pulled up, and it would have been necessary to raise steam and do a number of hours of work before it could have been again forced to the bottom of the well. The only practicable way to measure the well was by measuring the drill stem. It was not practicable to measure it with a cord and weight. The method by which, under the rotary process, a well is drilled, requires the presence in the well of mud, introduced from the top through the drill stem, and this mud is not totally removed until the well is finished and washed out. An ordinary plumb bob could not have penetrated this mud to the bottom, nor could a suspended joint of pipe. On account of the delay which would have been occasioned in getting the drill stem to the bottom, and then taking it out for measurement, it was agreed that the measuring of the well should be postponed until the 1st of January. When an effort was made about that date to prepare the well for measurement, it was found that the piece of pipe which had been sidetracked had fallen into the well. Whether this was the result of the withdrawal of the drill stem, or came from some other cause, does not appear; but it was apparent that, on the 18th of December, the time plaintiff and his employé fixed as a date upon which the well was down to 2,000 feet, with a good, clean hole, the conditions were either that the sidetracked pipe had already fallen back into the hole, or that the hole could be obstructed by the falling back into it of the sidetracked pipe.

[2] The District Judge was warranted in the conclusion that the contract had not been carried out, when it was made to appear that a piece of piping had been left in such condition that either the withdrawal of the drill stem, or the mere lapse of a short period of time, would result in the hole's being obstructed by the pipe. By a good clean hole is not to be understood one which is free from mud, but one which is free from those things, the presence of which would render the hole incapable of the uses for which it was designed. The witness stated that on the 18th of December the hole was a good clean one. He could have known nothing to support such a conclusion, other than that, before the drill stem was withdrawn, it rotated without difficulty, and that it was withdrawn without difficulty. The District Court was not without warrant in rejecting these conclusions of the witnesses, and reaching a conclusion of his own that at that time, when the well was tendered for measurement, the conditions were such that the well did not meet the requirements of the contract.

[3] Plaintiff in error contends that the contract makes no provision for the measurement of the well. It is, perhaps, an implied obligation of almost every contract that the person who undertakes to do something shall, upon the completion of his work, or his claim that the work is completed, make a reasonable showing of the truth of that

claim. It is certainly not ordinarily contemplated that one who has contracted to pay for completed work should pay merely upon the statement of the contractor that the work had been done. This must be the case as to contracts of the kind here under consideration. White was certainly not expected to pay the drillers \$19,000 for a clean hole, 2,000 feet deep, without something to evidence that the hole was 2,000 feet deep and that it was clean. He was not compelled to rely upon the statement of the contractor. If these propositions have not been formulated into legal principles, they are, at least, accepted by the business world; and the contractors in this case recognized the obligations they were under to show to the owner that they had carried out the contract. They realized, or at all events understood, that they were to make a delivery to White of a good clean hole, 2,000 feet deep, and that they were to demonstrate to White the depth and character of the hole before he was to accept the well and pay the price.

[4] When, on the 20th of December, it became apparent that it was not practicable to measure the hole on that day, it was agreed between the parties that the measurement and delivery should take place at a future date. If it should be said that this was a new contract, and that there was necessity for a consideration to support it, an implied consideration was furnished by the advancing by White to the contractor on that day of money to pay employés.

At no time thereafter was the contractor in a position to make a delivery of a good clean hole, 2,000 feet deep. When the drill stem was again put down, the obstructing pipe made it impossible for the bottom of the hole to be reached; and, notwithstanding the fact that work continued for some time thereafter, the obstruction was never passed.

[5, 6] A provision of the contract is to the effect that the necessary piping should be furnished by White. The plaintiff contends that, if the well was not finished as a clean good hole, to a depth of 2,000 feet, this was the result of the failure upon the part of White to furnish piping in accordance with the terms of his contract. There is evidence to the effect that there was a cave-in in the well, and one of the witnesses for the plaintiff testified that the caved-in part should have been protected by casing; and he also testifies that it would have been practicable to have cased off the caved-in part, and says that, if it had been done, there would have been no difficulty in completing the well to the depth required by the contract. This could not, however, be done without the use of smaller pipe than $6\frac{1}{4}$, and the reduction in the size of the hole. White refused to furnish this smaller piping, or to permit the reduction of the hole. He was acting entirely within his rights.

The evidence fails to show that, at any time prior to the time when the contractors assumed the well to have been finished, was there any effort to secure additional casing, other than that wanted for a reduced hole. At all events, if there is evidence which may be so construed, it is in direct conflict with the testimony of White. At no time during the efforts to carry out the contract was all the available piping used. There is evidence that one or more joints twisted in two,

and there are generalizations to the effect that some of the piping was old and not in good condition. The record, however, fails to show that additional piping was, on this ground, demanded. Or, again, if any part of the evidence may be so construed, it was in conflict with the testimony of White.

While the record shows that there was a cave-in, it does not indicate that the cave-in was the cause of the inability to finish the well. Apparently the difficulty was with pipe which was stuck in shale; and the shale, according to the evidence, was of a firm formation, which did not cave. The cave-in was below the pipe that could not be moved. It is not made to appear that any amount of pipe of the required dimension could have met the difficulty.

There was no suggestion, at the time of the trouble with the stuck pipe, that it resulted from any failure upon White's part to perform his part of the contract. Nor was there any contention, when plaintiff was undertaking to get the well in a condition for delivery, that the trouble could be met if he would do his duty under the contract.

The facts seem to be that, exercising the option which the contract gave them, the contractors concluded to use the old Mook well. This well had been abandoned by Mook because of the impracticability of completing it to 2,000 feet, and the difficulties which the original contractor could not overcome were not successfully met by the new contractors.

While the contractors reached a depth of 2,000 feet, and thereby, to that extent, tested the territory, and by so doing benefited the owner, yet the contract specifically provided that no payment should be made, except upon completion of the well, with a good clean hole. The contract price was a large one. Two-thirds of the distance had already been drilled. If the well could be completed without trouble, the contract would be an exceedingly profitable one. To get the benefit of this chance, the contractors assumed risks that went against them. They are not, under the terms of the contract, entitled to anything, having failed to furnish the only thing for which White agreed to pay.

[7] The contract provided that the contractors could drill a new well, or deepen the Mook hole. When it became apparent that the Mook hole, as deepened by the contractors, would have to be finally abandoned, the contractors proposed to begin an entirely new well. To this White made no objection. The contractors, however, insisted that White should furnish the piping. This he was unwilling to do, except to the extent to which piping was on the ground or could be taken from the old well. Failing to secure any further agreement from White with reference to the piping, the entire contract was abandoned. The contract gave to the contractors the right to use the Mook well, or to make a new location. It gave them the right to the necessary piping for the well, not limited to the piping in the Mook well. They exercised the right to use the Mook well, and they used so much of the piping which had been furnished for the Mook well as they desired. A provision of the contract was that the work should begin within a reasonable time. The suggestion of the starting of a new well did not come until more than 18 months after the signing of the contract. It

would have been entirely within the rights of White to refuse to furnish any piping for, or to permit the location of, a new well. He, however, had no objection to the contractors' continuing their effort to secure the contract price, but did decline to furnish additional piping. In doing this he was entirely within his rights.

[8] The District Judge apparently disposed of this feature of the case upon the assumption that the contractors had the right to put down a new hole, and to demand of White the necessary piping. Acting upon this theory, he permitted the introduction of evidence as to the cost of drilling wells in the territory in which this well was located. The evidence upon this issue was very divergent and conflicting. It was developed that some \$17,000 had been expended by Mook on the well, and that plaintiffs had spent approximately \$13,000 in trying to complete it; yet plaintiffs testified that they could have put down another well in the same locality to the depth of 2,000 feet for about \$6,000. The testimony of persons who had drilled wells in this territory was to the effect that the cost would be more than \$20,000.

Upon the evidence submitted the trial judge held that the facts were too indefinitely developed to authorize a judgment. This statement or holding by the judge is criticized as a refusal to make a finding upon the evidence; but, in legal effect, it amounts to no more than that the plaintiffs, seeking damages upon the theory that they were entitled to recover the contract price, less the cost of drilling a well, had failed to establish such cost. White was under obligations to furnish piping for one well, seasonably begun, but not for another, proposed to be started a year and a half after the contract was made. But if the obligation to furnish additional piping had existed, and if White breached the contract, it would be necessary to sustain the holding of the District Judge, as the evidence as to the cost of a well was conflicting.

Upon each of the propositions upon which the plaintiffs have depended, conflicting testimony was introduced, upon which the District Judge found in favor of the defendant. Under the law we would not be authorized to overrule these findings, and the judgment will have to be

Affirmed.

STAR-CHRONICLE PUB. CO. v. NEW YORK EVENING POST, Inc., et al.

(Circuit Court of Appeals, Second Circuit. January 20, 1919.)

No. 171.

1. CONTRACTS ⇐26—CONTRACT BY CORRESPONDENCE—OFFER AND ACCEPTANCE.

Correspondence held to contain an offer by defendant and acceptance by complainant, constituting a contract by defendant to furnish complainant for its newspaper daily special cable dispatches from the Peace Conference in Paris, so long as the President remained in Europe.

2. CONTRACTS ⇐147(2)—CONSTRUCTION—INTENTION.

The primary rule in the construction of contracts is to give effect to the intention of the parties at the time they entered into the contract, and in ascertaining their real intention the courts look to what the par-

ties said, and if the language used is ambiguous it is to be interpreted in the sense that the promisor knew, or had reason to know, that the promisee understood it.

3. CONTRACTS \Leftrightarrow 155—CONTRACTS BY CORRESPONDENCE—CONSTRUCTION AGAINST PARTY USING WORDS.

Where a contract is evidenced by correspondence, a letter is construed most strongly against the writer.

4. CONTRACTS \Leftrightarrow 154—CONSTRUCTION—REASONABLENESS.

An interpretation which evolves the more reasonable and probable contract should be adopted, and every intendment is to be made against a construction under which it would operate as a snare.

5. CONTRACTS \Leftrightarrow 93(1)—VALIDITY—MISTAKE BY ONE PARTY.

A contract in writing, evidenced by an offer by one party and its unequivocal acceptance by the other, cannot be avoided by the party making the offer, on the ground that it was made through mistake or inadvertence.

6. INJUNCTION \Leftrightarrow 59(1)—SUBJECTS OF PROTECTION—RESTRAINING BREACH OF CONTRACT.

That a contract was entered into by one party through mistake will not prevent the granting of an injunction against refusal to perform by such party, if complainant is otherwise entitled thereto.

Knox, District Judge, dissenting.

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

Suit in equity by the Star-Chronicle Publishing Company against New York Evening Post, Incorporated, and David Lawrence. From an order denying a motion for preliminary injunction, complainant appeals. Reversed.

This cause comes here on appeal from an order in which a motion for a preliminary injunction was denied. The complainant is a corporation organized under the laws of the state of Missouri, and has its principal place of business in the city of St. Louis in that state. It is engaged in the publication of a daily evening newspaper under the name of the St. Louis Star. The defendant corporation is organized under the laws of the state of New York, and has its principal place of business in the city of New York. The defendant David Lawrence is alleged to be a resident of the city of New York and to be associated in business with the New York Evening Post.

The defendant Lawrence is alleged to have been engaged in writing from Washington, D. C., dispatches dealing with questions of public importance and is said to be a specially and peculiarly qualified Washington correspondent. The New York Evening Post has advertised Lawrence as an "interpreter of political Washington," and as possessing the rare ability to interpret events, political, legislative, diplomatic, in the light of the history of all these fields; as enjoying the implicit confidence of the officials at Washington, and by reason of this fact being able to include in his dispatches information not obtainable by others; as enjoying peculiar opportunities to participate in councils and conferences of importance in Washington which give him particular and peculiar insight into the conditions there. It also advertised to the effect that "what David Lawrence discusses is not obtainable in any other Washington service." It also stated, in soliciting clients for this service, that the newspapers subscribing to it would have the exclusive right for the city in which its paper was published to this service, which service, the defendant stated, would give dignity, authority, and prestige to the paper subscribing for it. His dispatches have been syndicated by the defendants, and also copyrighted, and are published under Lawrence's name in various newspapers in the United States, and it is alleged that they have acquired a reputation for accuracy and for containing important information not otherwise obtainable.

It is averred that the complainant and the New York Evening Post, Incorporated, hereinafter referred to as defendant, entered into a contract by

which it was provided that the latter would furnish the former with the Lawrence dispatches, but that the defendant informed the complainant, contrary to its contract, that after December 31, 1918, it would cease to furnish it with Lawrence's dispatches, and would thereafter furnish the same to its competitor, the St. Louis Post-Dispatch; the St. Louis Star and the St. Louis Post-Dispatch being the two principal evening daily papers published in St. Louis.

The complainant states that it has complied with all the terms and conditions of its contract, and has paid all the sums of money provided for therein, which payments have been accepted by the defendants. The complainant also avers that immediately after its contract was made it advertised in large display advertisements in its own and other newspapers in St. Louis that it had secured the exclusive right to publish the Lawrence dispatches in St. Louis.

The complainant prays:

(1) That the defendant, its servants and agents, and the defendant Lawrence, be enjoined from failing to furnish to the complainant the "Lawrence service" in accordance with the terms of the contract.

(2) That so far as possible the damages sustained by the breach of the contract be ascertained, and that defendants be decreed to pay over the amount thereof to the complainant.

(3) That the defendants be enjoined from furnishing the "Lawrence service" to any other newspaper published in St. Louis.

(4) That defendants be enjoined as aforesaid during the pendency of the action.

(5) That the complainant have such further relief as may be just.

The defendant Lawrence, being in Europe when the action was commenced, was not served, and has not appeared by counsel. The defendant put in no answer, but appeared in the cause by its attorneys.

The complainant on December 20, 1918, obtained an order to show cause, on December 23, why an injunction should not be issued during the pendency of the suit. At the hearing an affidavit, made by the business manager of the defendant, was presented in opposition.

The injunction was denied; the court stating in its opinion that "the facts must, however, be much plainer than they are to enforce upon the defendant a contract which it did not make, and which it had no reason to suppose any one would think it had made."

W. Christy Bryan, of St. Louis, Mo., and Harry D. Nims, of New York City, for appellant.

White & Case, of New York City (Robert Forsyth Little, of New York City, of counsel), for appellees.

Before ROGERS and MANTON, Circuit Judges, and KNOX, District Judge.

ROGERS, Circuit Judge (after stating the facts as above). The common-law courts as a general rule redressed all injuries by giving the party wronged pecuniary damages, and it made no difference whether the action sounded in contract or in tort. It was not so in the courts of equity which afforded in proper cases the remedy of specific performance compelling one who committed a breach of contract to specifically perform his agreement, or enjoined him from not doing as he agreed. This equity did, where money damages afforded an inadequate relief, either because their amount could not be ascertained, or, if ascertainable, would not enable the party wronged to obtain the thing for which he contracted.

In the case under consideration the complainant seeks for an injunction upon the theory that the amount of his damages cannot be ascertained, and that, even if they could be determined, which we think they

could not be, they would not enable it to obtain the information which the Evening Post represented was not obtainable by others than Lawrence, as no other correspondent enjoyed his peculiar opportunities or had his peculiar insight into conditions.

[1] It appears that on June 12, 1917, the complainant and the defendant entered into an agreement whereby the former was to be furnished by the latter the Lawrence dispatches from Washington. That agreement was for one month's trial, with option of renewal. On July 11th of that year the Evening Post wrote the complainant, inquiring whether it would give a definite order for the Lawrence Washington news service until at least January 1, 1918. This offer was accepted, with a request that complainant would give one month's notice, if it desired to continue the service after January 1, 1918. On October 26, 1917, the complainant wrote the defendant that it would like to accept the Lawrence service upon a one-year basis from January 1, 1918, with the understanding that the service would continue indefinitely after the expiration of the one-year agreement unless 60 days' notice was given by either party to the other. On October 30th the defendant wrote complainant that it accepted the revised arrangement. On October 28, 1918, the defendant gave complainant 60 days' notice of the cancellation of the contract on and after January 1, 1919. Then followed telegrams and letters in which complainant sought a reconsideration of the matter; the defendant declining to reopen the matter, inasmuch as it had agreed that the Post-Dispatch of St. Louis was to have the Lawrence service from Washington on and after January 1, 1919. Then on November 15, 1918, the defendant wrote complainant's managing editor as follows:

"Dear Sir: We are planning to send Mr. David Lawrence to the Peace Conference in Europe; if the President goes, he will accompany him on his trip through Europe. We shall write you later as to the details of the arrangement, but are notifying you at this time, in order that you may not in the meantime commit yourselves otherwise. Our plan is to substitute for the time being Mr. Lawrence's service from Washington by a daily cable from Europe.

"There will be only a slight additional cost, due to the cable expenses, but we expect to keep this down to a minimum through the co-operation of the 22 members of the syndicate.

"Will you please advise us as to your willingness to enter into this arrangement, conditioned, of course, on our final decision to send Mr. Lawrence to the Peace Conference."

And on November 18, 1918, David Lawrence wrote the owner of the complainant's paper as follows:

"My Dear Mr. Roberts: Thanks for your letter of November 14th. I had a letter to-day from Mr. Seymour, saying that he felt very uncomfortable about the whole situation, but did not see how the contract with Pulitzer could be broken. I shall be in New York again Friday and Saturday, and learn whether it is an absolute necessity.

"I am planning to go to Europe for the Peace Conference and will be away two months at least. I see not the slightest objection in the world to the making of a special contract between the New York Post and the St. Louis Star for this European service as a substitute temporarily for the Washington service. That would carry at least two months into the new year.

"I shall know more about the whole thing after I have been in New York and will write you then."

On the same day the complainant's general manager wrote the defendant's business manager as follows:

"Dear Sir: In the absence of Mr. Taylor, I am answering your letter of the 15th inst. relative to the possibility that David Lawrence will go to Europe for the Peace Conference, and inquiring whether the Star would be willing to enter an arrangement for his cablegrams. I telegraphed you this morning that it 'certainly would want the Lawrence cables if he goes abroad,' and this message I hereby confirm.

"In this connection may we not assume that the transfer of Mr. Lawrence from Washington to Europe and our acceptance of his cable letters, instead of his Washington letters, would operate to cancel the arrangement which the Evening Post has made with another St. Louis paper for his Washington letters beginning January 1, 1919? It has been with intense regret that we have contemplated the loss of the Lawrence Service, and, as Mr. Roberts has explained to you, we have frankly felt that we were badly treated, and naturally to begin taking his European cables merely to lose them to our competitor just as they start would be most unfortunate for us.

"Therefore may we not hope that you will find in his transfer to Europe another valid reason for continuing his letters (whether domestic or cable) uninterruptedly to the Star?

"Your early reply is requested."

On November 25, 1918, the defendant's business manager sent to complainant's general manager the following letter:

"Dear Mr. Bradley: I have read with great interest and considerable approval your letter of November 18th. It would seem to me entirely possible for this long discussion to end as suggested in the second paragraph of your letter. I will either write or wire you in a day or two more definitely.

"When we wrote you on November 15th concerning our plan to send Mr. David Lawrence to the Peace Conference, we mentioned an additional expense, promising to keep it down to the minimum. The length of time Mr. Lawrence will stay in Europe will depend on the President's plans. He will return to Washington with the President. It is estimated that this trip will take about eight weeks, and that the extra cost will be over \$1,300 per week for cable tolls, traveling expenses, etc. Three-quarters of this expense will be borne by the New York Evening Post, and we ask our clients to pay the remainder. In distributing this expense, we ask you to pay us \$40 per week, commencing December 9th and until Mr. Lawrence is back in the United States.

"We hope we have made the facts entirely clear, and of course you understand, also, that there will be a period of no daily service while Mr. Lawrence is going over and a second period when he is returning, when you will be paying the regular fee for the service plus the above assessment. In other words, we have worked out the assessment to the above low figure with due consideration for the loss of service while Mr. Lawrence is on the ocean. If we were to assess you for a proportion of the actual cables sent over, it would involve considerable bookkeeping and would charge you a much higher rate of assessment.

"Mr. Lawrence will go abroad when the President sails, and will travel on the same vessel, if that is permitted to correspondents. He will begin filing daily cable dispatches as soon as he arrives in Europe. As in Washington, Mr. Lawrence will not duplicate the routine press association stories, but will send his own signed exclusive news and interpretive dispatches, providing a valuable feature which the routine news cannot give. He will explain what is most vital to American newspapers and their readers, the American point of view at the Peace Conference. He will cable a minimum of 4,500 words weekly, at urgent cable rates to assure its immediate delivery, and his stories will be telegraphed at once from New York to newspapers availing themselves of this service. He will be at the Peace Conference as long as the President remains there, and, should the President visit other foreign capitals, Mr. Lawrence expects to accompany him."

To this on November 27th the complainant replied by a telegram which read:

"Your letter November 25th received. We accept terms on Lawrence cables and are starting to-morrow to advertise big."

And on November 29th the defendant telegraphed complainant as follows:

"Regret cannot supply all of Lawrence Peace cables. Post-Dispatch holds us to contract from January first on. If you prefer to cancel your contract and not start service we will cancel at once. Please advise as Lawrence leaves to-day."

On November 30th defendant telegraphed complainant as follows:

"Unable to alter decision stated in last telegram much to our regret stop will supply Lawrence until December thirty-first according to our contract with you but beyond that we cannot."

On the same day complainant telegraphed defendant as follows:

"Your telegram November twenty-ninth received stop. We are utterly unable to understand your action as your offer of the Lawrence cables to the Star was made repeatedly and all terms accepted by us stop. You knew of the Post-Dispatch complication when you offered them to us stop. We have already publicly advertised the service in the St. Louis newspapers and gave you notice of our intention to do so before we began stop. We now demand that you fulfill your contract with us stop. Please answer promptly."

The learned District Judge was of the opinion that this correspondence did not disclose the contract upon which the complainant relies. We find ourselves unable to take his view of the matter. In the letter of November 25th the defendant proposed unconditionally to furnish the complainant the Lawrence Peace Conference cables, not up to January 1, 1919, but "until Mr. Lawrence is back in the United States," and it asked the complainant to instruct its cashier to put defendant on its payroll until that time.

This proposal the complainant accepted by its telegram of November 27th. To undertake to make this definite proposal conditional because of the first paragraph of the letter is to give to that paragraph a meaning which in our opinion is altogether unwarranted. That paragraph relates to the complainant's letter of November 18, 1918, and that letter dealt with two distinct subjects: (1) The Lawrence Peace Conference cables which the complainant stated it wanted. (2) The Lawrence service from Washington, as to which the complainant asked if the acceptance of the cable letters from Europe might not operate to cancel the arrangement giving the Post-Dispatch the Lawrence service from Washington beginning January 1, 1919.

In view of the unconditional proposal contained in defendant's letter of November 25, 1918, as to the Peace Conference cables, the natural inference it seems to us is to construe the first paragraph of the letter of November 25th as relating solely to the question whether the defendant would cancel its agreement with the Post-Dispatch for the Washington service after Lawrence's return to the United States. It is evident that complainant put that construction on it for in its telegram of acceptance it stated that it was "starting to-morrow to advertise big,"

and in its issue of the next afternoon appeared a full page advertisement which contained in display type the following:

"You can sit in at the Peace Conference. The day to day deliberations of the Peace Conference to be held at an early date in Versailles will shape the future destinies of the peoples of both hemispheres. David Lawrence the Star's special correspondent—the man 'on the inside' at Washington—will accompany the President and the American Peace delegates to Versailles, and will send special cables daily which will appear in St. Louis exclusively in the Star."

It is not probable that such an advertisement would be inserted in a reputable newspaper, if its owner supposed that possibly they had no contract which justified it; and there is nothing in the correspondence that we have been able to discover which indicates on the part of the complainant that it intended to take the cables only down to January 1, 1919. The complainant's letter of November 18, 1918, expressed its unwillingness to enter into any such arrangement as that as being "most unfortunate for us." The practical construction placed on the contract by the complainant the Supreme Court has said "is always a consideration of great weight." *Insurance Co. v. Dutcher*, 95 U. S. 269, 273 (24 L. Ed. 410).

[2, 3] The primary rule in the construction of contracts is to give effect to the intention of the parties at the time they entered into the contract. *Commonwealth v. West Virginia*, 238 U. S. 202, 236, 35 Sup. C. 795, 59 L. Ed. 1272. And in ascertaining their real intention the courts look to what the parties said. *Metropolis National Bank v. Kennedy*, 17 Wall. 19, 21 L. Ed. 554. If the language used is ambiguous, it is to be interpreted in the sense that the promisor knew, or had reason to know, that the promisee understood it. *United States v. Cooke* (D. C.) 207 Fed. 682; *Nellis v. Western Life Ins. Co.*, 207 N. Y. 320, 100 N. E. 1119; *American Lithographic Co. v. Commercial Casualty Ins. Co.*, 81 N. J. Law, 271, 80 Atl. 25. Where a contract is evidenced by correspondence, the letter is construed most strongly against the writer. *McElravy, etc., Co. v. St. Joseph's Home for Girls* (Mun. Ct.) 143 N. Y. Supp. 235.

[4] If the words of a promise may have been used in an enlarged or restricted sense, they will, in the absence of circumstances calling for a different interpretation, be construed in the sense most beneficial to the promisee. *White v. Hoyt*, 73 N. Y. 505, 511. Where a contract is ambiguous, it will be construed most strongly against the party employing the words concerning which doubt arises. *Phoenix Ins. Co. v. Slaughter*, 12 Wall. 404, 20 L. Ed. 444; *Simon v. Etgen*, 213 N. Y. 589, 107 N. E. 1066. The law holds a man responsible for ambiguities in his own expressions, and he has no right to induce another to contract with him on the supposition that his words mean one thing, hoping that a court may make them mean another thing. *Blose v. Blose*, 118 Va. 16, 86 S. E. 911. If an ambiguity exists in this case, and we think there is none, it arises from the language used by the defendant and not from that used by the complainant; and courts hold that an interpretation which evolves the more reasonable and probable contract should be adopted. *Barnsdall Oil Co. v. Leahy*, 195 Fed. 731, 115 C. C. A. 521.

And it is very improbable, as we have said, that this complainant would have entered into a contract taking the Peace cables for two weeks only to lose them at the end of that time to their competitor. Every intendment is to be made against a construction of a contract under which it would operate as a snare. *Hoffman v. Ætna*, 32 N. Y. 405, 88 Am. Dec. 337.

[5] That the first paragraph of the defendant's letter of November 25th related to the Washington dispatches is in fact admitted in the affidavit filed in the case by the writer of that letter. Having made this admission, he then states that the balance of "this letter" was the form of letter sent to all subscribers to the Lawrence syndicate. It is not unlikely that the incorporation of that matter in the defendant's letter to the complainant was a mistake or an inadvertence. But conceding that this was the case does not affect the question which this court has to consider.

In *Pollock on Contracts* (Williston's 3d Ed.) pp. 563, 564, the writer says:

"Mistake does not of itself affect the validity of contracts at all. * * * The general rule of private law is that mistake as such has no legal effects at all. This may be more definitely expressed as follows: When an act is done under a mistake, the mistake does not either add anything to or take away anything from the legal consequences of that act either as regards any right of other persons or any liability of the person doing it, nor does it produce special consequences of its own."

In *Leake on Contracts* (Canadian Ed.) p. 211, the law is stated as follows:

"Where there is a mistake in the expression of the agreement, the effect is different in the case of the mistake of one party only, and in that of a mistake common to both. For the simple case of a mistake of one party only in the expression of the agreement, it is sufficient to recur to the elementary principle that the law judges of the matter of an agreement exclusively from the expressions of intention which are communicated between the parties. Consequently, as a general rule, an agreement is not affected by the mistake of either party in expressing the terms of which the other party has no notice or intimation. In the case of an agreement in writing this is no more than an application of the general rule that the written terms cannot be varied by extrinsic evidence of intention; and it is the duty of the court in general to construe and apply an agreement in writing without regard to the views of either party respecting the meaning."

In *Page on Contracts*, vol. 1, § 79, that writer says:

"Every sane person is held to intend the legal consequences of his voluntary acts. Accordingly, if a person of legal capacity, and not acting under fraud, misrepresentation, duress, or undue influence, goes through the outward form of binding himself by contract, he cannot avoid liability thereon by claiming that unknown to the adversary party, he made his offer or acceptance under mistake of fact, and that he did not intend to make such offer."

And the same writer in section 85 says that—

"While in pure mistake no relief can be given ordinarily where one party has by mistake expressed his intention in terms differing from those intended, a different rule applies where the adversary party knew of such mistake and did not disclose it."

In *Black on Rescission and Cancellation*, vol. 1, § 131, it is said:

"A party cannot have relief against a contract or other obligation into which he has entered in ignorance of material facts, or under a mistake as to such facts, where no fraud or imposition was practiced upon him, and his ignorance or mistake is entirely due to his own negligence or lack of proper attention, or to the failure to exercise such reasonable care and thoughtfulness as may be expected in business transactions from men of ordinary care and prudence."

In *Kerr on Fraud and Mistake* (4th Ed.) 477, 478, it is said that—

"The law judges of an agreement between two persons exclusively from the mutual communications which take place between them. If the terms of the proposal of the one are unambiguous and unmistakable, and the answer of the other is an unequivocal and unconditional acceptance the latter is bound, in the absence of fraud or warranty, however clearly he may afterwards make it appear that he was laboring under a mistake in his acceptance of the proposal."

And for like reasons the proposer must be bound although he may have labored under a mistake in making his proposal.

The text-writers have correctly stated the decisions, and we shall refer only to a few. In *Tamplin v. James*, 15 Ch. Div. 215, 217, it is said that—

"Where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, the defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake."

This court held, in a carefully considered case in which the opinion was written by Judge Wallace, *Moffet, Hodgkins & Clarke Co. v. City of Rochester*, 91 Fed. 28, 33 C. C. A. 319 (1898), that a court of equity is without power to rescind a contract solely on the ground of a mistake by one party. The complainant in that case had submitted a proposal to do certain public work for the city of Rochester. Its bid for the contract awarded it was \$273,000 below that of the next lowest bidder. The evidence satisfactorily proved that it had made two clerical errors in its proposal, one of which amounted to \$36,800 and the other to \$27,000, with the result that its bid was \$63,800 less than it otherwise would have been. The errors were due to the haste with which the complainant had considered the specifications and prepared its proposals. The cases were fully examined, and the court in its opinion said:

"The salutary power of courts of equity to rescind or reform contracts which do not express the real intention of the parties is not to be extended to cases where the contract, because of the mistake of one of the parties, fails only to express the meaning of that party, and he seeks relief purely on the ground of his own mistake. The correct rule is as stated in *Addison on Contracts*: 'Where a mistake is unilateral, and the party by whom it was made is the sufferer, relief will not be granted unless there has been some undue influence, misrepresentation, surprise, or abuse of confidence.' 2 *Add. Cont.* p. 1182."

In *Griffin v. O'Neil*, 48 Kan. 117, 29 Pac. 143, the court held that a contract was binding upon both parties under the following circumstances: A. made an offer to sell cattle for a stated price, which B. accepted. A. gave B. a bill of sale and received the purchase price. Then A. discovered that in making his offer he had made a mistake in

calculating his figures as to the price. The court said that if the vendor made a mistake in his figures, and the vendee had no knowledge of the mistake, but relied upon the price stated, the vendor was responsible and must suffer.

Where a principal, A., makes a mistake in sending a telegram to his agent, by reason of which the agent makes a contract with B. on behalf of his principal different from that which the principal intended the agent should make, and B. accepts without knowledge of A.'s mistake, it is held that the latter is bound. *Hasbrouck v. Telegraph Co.*, 107 Iowa, 160, 77 N. W. 1034, 70 Am. St. Rep. 181.

In *Pond-Decker Lumber Co. v. Spencer*, 86 Fed. 846, 30 C. C. A. 430, the Circuit Court of Appeals in the Fifth Circuit held that, where the agent of a railway company wrote a shipper that his railroad would carry his freight to a certain place at the rate of 36 cents per 100 pounds, when the rate was 66 cents per 100 pounds, the fact of the agent's mistake did not prevent the agreement, which the shipper had accepted, from being a valid contract. "We think," said the court, "the contract with Fletcher was a valid contract."

[6] This brings us to a consideration of the remedy. The very meager argument made to this court by defendant's counsel had little to say upon this as upon the other phases of the case. It was, however, stated that the *Post-Dispatch* had an absolute right to an exclusive publication of the Lawrence service and that the defendant could not be enjoined from delivering the service under its contract with that paper. It is enough to say that the *Post-Dispatch* has not been made a party to this proceeding, and has not intervened therein, and its rights will not be determined. It is sufficient for our present purpose to know that the defendant has made a valid contract in which it has agreed to furnish to the complainant the Lawrence cables from the Peace Conference, and that the service contracted for is by defendant's own admission unique and peculiar and not otherwise obtainable. That complainant is entitled to receive such European cables, received from Lawrence during the Peace Conference, is clear. It has been held that in many cases a court may decree specific performance although the party against whom the decree is sought entered into the contract through a mistake which he would not have made if he had taken reasonable care. *Tamplin v. James*, 15 C. D. 217; *May v. Platt*, [1900] 1 Ch. 616; *Swaishland v. Dearsley*, 29 Beav. 430, approved by *Baggallay*, L. J., 15 C. D. 218; *Dyas v. Stafford*, 7 L. R. I. 606. And if a mistake made by one party to a contract does not prevent a decree of specific performance, it will not prevent the issuance of the injunction if the complainant is otherwise entitled thereto.

It has been sometimes said that the jurisdiction to grant an injunction restraining a breach of contract is substantially coincident with the jurisdiction to grant specific performance, and that it is governed by the same doctrine and rules. When Mr. Pomeroy in 1883 wrote his great work on Equity Jurisprudence, he called attention to the fact that the English courts had more freely used injunctions to prevent the violation of contracts than the majority of the American judges had been willing to do, and declared that the English courts enjoined the viola-

tion of some contracts, even though they could not be specifically enforced, and added:

"The American decisions, with few exceptions, refuse to adopt this doctrine."
4 Pomeroy's Eq. Jur. § 1341.

In 1905, when Mr. Pomeroy's son published the two volumes supplementary to the original work, in alluding to the above statements, he stated that which is undoubtedly true that—

"These remarks have hardly the force, at the present day, that they possessed at the time when they were written. Indeed, the English and American courts appear to have changed places in respect to their attitude towards one important class of contracts, those for personal services." Pomeroy's Eq. Jur., vol. 5, p. 497n.

It is true that, as the jurisdiction to grant an injunction is discretionary, the court in exercising it has regard to the way in which the granting of the injunction will affect the rights of other persons. *Hope v. Gloucester Corporation*, 1 Jur. N. S. 320; *Tubbs v. Esser* (1910) 26 T. L. R., 146. But there is nothing in this record which discloses that the equities of the Post-Dispatch are in any wise superior to the equities of the complainant herein.

The order denying the motion for a preliminary injunction is reversed, and the case remanded to the District Court, with directions that the defendant, the New York Evening Post, Incorporated, be enjoined and restrained from refusing and failing to furnish to the complainant the daily cable dispatches which it receives from Europe from its correspondent Mr. Lawrence in accordance with the offer made by it in its letter of November 25, 1918.

It is so ordered.

KNOX, District Judge, dissents.

HANNEVIG et al. v. R. W. J. SUTHERLAND & CO.*

(Circuit Court of Appeals, Second Circuit. January 15, 1919.)

No. 155.

1. ARBITRATION AND AWARD ⇐57—AWARD—GROUNDS FOR VACATION.

An award of arbitrators cannot be set aside because of the failure to determine a question submitted to them by the agreement for arbitration, but upon which no evidence was presented.

2. ARBITRATION AND AWARD ⇐60—SUFFICIENCY OF AWARD—CERTAINTY.

An award of arbitrators that is sufficiently certain to be obligatory as a contract is valid.

Ward, Circuit Judge, dissenting.

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

Suit in admiralty by Christopher Hannevig and Vidkunn Johnsen, copartners as Hannevig & Johnsen, against R. W. J. Sutherland & Co. Decree for respondent, and libelants *re*. Affirmed.

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

*Certiorari denied 249 U. S. —, 39 Sup. Ct. 336, 63 L. Ed. —.

Bullowa & Bullowa, of New York City (Ferdinand E. M. Bullowa and Emilie M. Bullowa, both of New York City, of counsel), for appellants.

Harrington, Bigham & Englar, of New York City (Dix W. Noel, of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. Appellants sought to recover in their libel filed September 12, 1916, \$61,750 for two months hire of the steamship Asahi Maru, paid to the appellee under the terms of the charter party, for one reasonably direct voyage of said vessel from the United States to the Far East; that the voyage was interfered with because the appellee did not deliver the vessel to the appellants on August 18, 1916, when they were obliged to do so. A cross-libel was filed, asking \$50,000, claimed to be due from the appellants for the balance of hire of the said vessel under the charter party, and this in addition to the \$61,750 paid in advance for the first two months and for the return of which the first libel was filed. To this appellants filed their answer, and claimed a loss of \$100,000, as damages which they sustained because of the alleged prevented use of the vessel. On November 25, 1916, when the answer to the cross-libel was filed, the voyage which the vessel was making had not been completed. After issues were joined on the libel and cross-libel, the parties entered into a stipulation for the submission to a board of arbitrators of all matters in controversy between them, arising in connection with said vessel, whose findings should be conclusive of the issues in the said suits, and that a decree or judgment might be entered in said causes in accordance with the award. The questions presented to the board of arbitrators were as follows:

(1) Were appellants liable for charter hire under a charter party dated March 22, 1916, and what amount of charter hire, if any, remained due.

(2) Whether appellants were entitled to disaffirm this charter party and recover back a payment on account of charter hire amounting to \$61,750 by reason of the failure to deliver the vessel.

(3) Whether appellants were entitled to damage by reason of the failure to deliver.

(4) Whether there was any liability for detention of cargo by owners of the steamship under claim of lien.

Under the stipulation, each party selected an arbitrator and the two selected a third. The board of arbitrators made their award on October 22, 1918, finding that appellants were liable for charter hire from March 22, 1916, until the date the steamer was redelivered, at the rate stipulated in the charter party, to wit, £6,500 per calendar month, but did not determine the date of redelivery, and that appellants were not entitled to recover damages by reason of the failure to deliver, or because of detention of cargo by owners of the steamship under a claim of lien.

Upon these findings, on motion, a final decree was granted dismissing the libel of appellants upon the merits and an interlocutory decree

upon the cross-libel of appellee, decreeing that the latter was entitled to recover from appellants the charter hire at the rate of £6,500 per calendar month, from August 23, 1918, to the date of redelivery of the vessel. This authority to enter a decree was granted by the terms of the stipulation. The decree is now challenged by the claim of the appellants that the award was not a final decision on all matters in controversy between the parties arising in connection with the steamship. The stipulation provided for submission to the board of arbitrators of a full statement of their claims and demands. Paragraph 5 of the stipulation provided:

"In consideration of the said payment of hire to be made the said R. W. J. Sutherland as aforesaid, and transfer and assignment of the sum of thirty thousand (\$30,000) dollars heretofore deposited with the National Surety Company, as hereinbefore provided, the said R. W. Sutherland undertakes and agrees to procure the release of the cargo recently discharged from the said steamship Asahi Maru at Yokohama, and now held by the owners of the said steamship under a claim of lien for hire, and cause said lien to be released, the question of liability by reason of said lien, as between the parties hereto, to be one of the questions submitted to the arbitrators herein."

The decree is further challenged because the date of the redelivery of the ship was not determined by the arbitrators in their award.

The District Judge dismissed the libel of appellants and vacated the attachment, sending the subject of cross-libel to a reference to determine the question of the date of redelivery of the vessel. The appellants cannot be heard to complain of the practice in thus disposing of the cross-libel by an interlocutory decree, for it is not made the subject of any of the assignments of error.

Under the provisions of the stipulation for arbitration:

"Both parties were obligated to submit to the arbitrators, a full statement of his or their claims and demands, together with such documents and proofs in support thereof as he or they may deem necessary or advisable."

The date of redelivery of the vessel, and therefore the exact amount of hire to be paid, was not formally raised at the arbitration, for the reason that the voyage had not been completed at the time the cross-libel was filed.

[1] The board of arbitrators substantially disposed of all the issues presented upon the pleadings in the two admiralty cases in deciding that the appellants were not entitled to a return of the advance hire, or to any other damages for the alleged breach of charter party, and that they were liable for hire at the rate specified in the charter from August 23, 1917, until the date of redelivery to her owners in Japan. Nor can the award be attacked as incomplete because it failed to determine the question of liability by reason of the lien upon cargo for charter hire, asserted by the Japanese owners at Yokohama. An examination of the proceedings before the board of arbitrators fails to disclose any pecuniary damage resulting to appellants from the cargo seizure at Yokohama or to set forth any grounds upon which the board of arbitrators might determine the question of liability therefor. No proof seems to have been brought before the board of arbitrators in connection with this claim. Therefore, the question not having been actually presented to the board of arbitrators, their failure

to make any findings with respect to this item cannot now be urged as a ground for setting aside the award.

Judge Spencer, in *Jackson, etc., v. Ambler*, 14 Johns. (N. Y.) 96, at page 106, said:

"I admit the law to be 'that the award must comprehend everything submitted, and must not be of parcel only.' Under this rule Kyd (172) observes (and he is supported by the cases he refers to) that it must be understood with a considerable degree of limitation; for, though the words of the submission be more comprehensive than those of the award, yet, if it do not appear that anything else was in dispute between the parties beside what is comprehended in the award, the award will be good; as if the submission be of all actions, real and personal, and the award be only of actions personal, it shall be presumed that no actions real were depending between the parties."

If the submission is general, and the adjudication applies in terms to a particular matter, the award purporting to be made of and concerning the matter submitted will be presumed to be good until it is shown that there were other matters presented to the arbitrators which they neglected or refused to decide. *Case v. Ferris*, 2 Hill (N. Y.) 75, 76.

We deem it sufficient answer to the claim that the award is not final for leaving this particular question undecided, in saying that the question was never brought before the board of arbitrators at all.

The English rule was adopted by the Supreme Court in *Karthaus v. Ferrer*, 26 U. S. (1 Pet.) 222, 7 L. Ed. 121, where it was said (page 227):

"That there is a class of cases in the books, in which arbitrators have been held to a more than ordinary strictness in pursuing the terms of the submission, and in awarding upon the several distinct matters submitted, upon the ground of the submission being conditional, *ita quod*, is conceded. The case of *Randall v. Randall* is a leading case of that class. Lord Ellenborough, C. J., in delivering the opinion of the court, says: 'The arbitrators had three things submitted to them; one was to determine all actions, etc., between the parties; another was to settle what was to be paid by the defendant for hops, poles, and potatoes, in certain lands; the third was to ascertain what rent was paid by the plaintiff, to the defendant, for certain other lands. The authority given to the arbitrators was conditional, *ita quod*, they should arbitrate upon these matters, by a certain day. The arbitrators have stopped short, and have omitted to settle one of the subjects of difference stipulated for.'

"This case was adjudged according to the rule laid down in the books: That if the submission be conditional, so as the arbitrator decide of and concerning the premises, he must adjudicate upon each distinct matter in dispute, which he has noticed. Kyd, 177.

"But the rule is to be understood with this qualification: That in order to impeach an award, made in pursuance of a conditional submission, on the ground only of part of the matters in controversy having been decided, the party must distinctly show that there were other points in difference, of which express notice was given to the arbitrator, and that he neglected to determine them."

The rule in New York state was laid down in *New York Lumber Co. v. Schnieder*, 119 N. Y. 475, 481, 24 N. E. 4, 5, where it was said:

"In the absence of some positive proof of neglect or refusal by the arbitrators to decide any of the particular matters presented under the submission, the presumption holds good that their award covers all of the submission. *Ott v. Schroepfel*, 5 N. Y. 482. The parties certainly were bound, under their general submission, to claim before the arbitrators all the demands

coming within the scope of the submission, and in this case the absence of negative proof forbids our disregarding the legal presumption that every such demand was laid before them.

"I think a party is bound, by the very spirit and letter of a general submission, to submit every demand he has arising out of the transaction, or contract, and, if he fails to do so, he should not be heard to complain, in the face of a general award, that there were matters omitted to be passed upon. I think the rule should be a settled one that the submission by parties of all matters in dispute, growing out of a particular transaction, or contract, will estop them from thereafter claiming that the award is not conclusive, if its language and terms, when fairly regarded, are comprehensive. The presumption should be strongly upheld by the courts that the arbitrator's decision was a final adjustment of all matters in controversy."

The mere filing of the claim by the appellants, asserting that part of their claim is based "upon this lien on cargo in Japan," in the absence of any proofs submitted to substantiate anything in regard to it, is not such a submission as to permit the arbitrators to intelligently pass upon the claim; for nothing was placed before them which could result in anything except the final dismissal of any claim against appellants arising from a detention of the cargo. If, later, it should be found that appellants have such a claim, it leaves them free to litigate it.

[2] We think the award of the board of arbitrators is sufficiently final notwithstanding their failure to ascertain in dollars and cents, the exact amount for hire due from the appellants under this award. An award that is sufficiently certain to be obligatory as a contract is valid. *Perkins v. Giles*, 50 N. Y. 228, 236.

Here the arbitrators agreed upon the liability for charter hire, fixing it at £6,500 a month until the date the steamship was delivered to her owners in Japan. This is a matter which the appellants should know, and, once ascertained, makes it easy of calculation in exact amount. The failure to make exact calculations as to this does not invalidate the award. *Parker v. Dorsey*, 68 N. H. 181, 38 Atl. 785; *Burkholder v. McFerran*, 3 Serg. & R. (Pa.) 421.

The further objection, founded upon the alleged disqualification of Mr. Amaral and the charges that the arbitrators were partial and unfair in the conduct of the proceeding, are frivolous. They have been sufficiently answered by the affidavits presented in behalf of the respondent, and we do not consider that they require further comment in this opinion.

Decree affirmed.

WARD, Circuit Judge, dissents.

NATIONAL SURETY CO. v. UNIVERSAL TRANSP. CO., Inc.
(Circuit Court of Appeals, Second Circuit. February 14, 1919.)

No. 168.

1. APPEAL AND ERROR ⇨794—CIRCUIT COURT OF APPEALS—MOTION TO DISMISS OR AFFIRM.

While infrequent, motions to dismiss or affirm are well recognized in the Circuit Court of Appeals.

2. APPEAL AND ERROR ⇨1126—WRIT FOR DELAY—AFFIRMANCE.

The defenses, propounded by traverse to scire facias to obtain execution, being without merit, and the writ of error taken to overruling thereof appearing to be taken for purposes only of delay, judgment will be affirmed on motion.

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

Scire facias by the Universal Transportation Company, Incorporated, against the National Surety Company to obtain execution. Judgment for execution (252 Fed. 293), and the Surety Company brings error. Heard on motion to dismiss or affirm. Affirmed.

Kirlin, Woolsey & Hickox, of New York City (John M. Woolsey, of New York City, of counsel), for the motion.

William J. Griffin, of New York City (T. Langland Thompson and James S. Darcy, both of New York City, of counsel), opposed.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. This plaintiff in error was surety on a bond given to secure the demand of the party plaintiff or libellant in the cases which finally reached us as *The Ada*, 250 Fed. 194, 162 C. C. A. 330, and *Rederiaktiebolaget v. Universal, etc., Co.*, 250 Fed. 400, 162 C. C. A. 470. As the result of the decision last mentioned, judgment for a very large sum was duly docketed in favor of the Universal Company and against the *Rederiaktiebolaget*.

Execution thereupon having been returned nulla bona, and the above-named surety company, as surety, failing to pay on demand, the execution plaintiff (Universal Company) procured from the court below, in which said judgment was docketed and where the surety company's bond remained of record, a writ of scire facias, commanding the surety company to show cause why execution should not issue against it for the amount of the aforesaid judgment.

The surety company filed a traverse in which it first denied any jurisdiction to issue the writ, and then in substance asserted that, because Universal Company had not succeeded in all the claims it had advanced against the *Rederiaktiebolaget* and its steamship *Ada*, and had attempted to collect its final judgment, first by ordinary execution, then through proceedings supplementary thereto, and also by suit against the surety company and on the bond, in the courts of New York, and had done all these things before resorting to scire facias, therefore said Universal Company was "estopped from asserting, claiming, or recovering any amount" from the surety company "by, through,

or from" the bond it had admittedly executed and delivered for the very purpose of securing the demand which had finally been reduced to judgment.

The lower court heard the issues of the traverse before a jury; the plea to the jurisdiction Judge Mayer overruled (opinion reported in 252 Fed. 293); he also overruled the other matters called defenses, and directed judgment that execution issue. All stays of proceedings were refused, and, although this writ was promptly brought, execution did issue against the surety company, which then duly satisfied the writ by payment to the United States marshal. This motion asks for a dismissal on the ground that after such satisfaction this suit "presents no actual controversy" and must therefore be regarded as moot.

[1] While infrequent, motions to dismiss or affirm are well recognized in this court. Rhederi, etc., *Oceana v. Holland*, 241 Fed. 990, 154 C. C. A. 663. It has been held that, in order to entertain the alternative motion to affirm, there must be color of right to a dismissal. *Hinckley v. Morton*, 103 U. S. 764, 26 L. Ed. 458; *Sire v. Ellithorpe, etc., Co.*, 137 U. S. 579, 11 Sup. Ct. 195, 34 L. Ed. 801.

There is here at least color for a motion to dismiss, inasmuch as it is difficult to see how any reversal by us in this wholly ancillary and dependent scire facias proceeding can effectively cause or justify restitution of money paid in legal effect upon the judgment in *Rederiaktiebolaget v. Universal Co.* (a judgment which we ourselves ordered and which is not attacked).

[2] But this is possibly apex juris, and we prefer to grant the motion to affirm on the ground that the defenses propounded in the traverse are wholly without merit. So far as the jurisdictional question is concerned, Judge Mayer has stated the law with sufficient fullness, and we approve his opinion. As to the rest of the traverse, we regard it as frivolous, and are of opinion that this writ was taken for purposes only of delay.

Judgment affirmed, with costs.

N. P. SLOAN CO. v. STANDARD CHEMICAL & OIL CO.

(Circuit Court of Appeals, Fifth Circuit. November 8, 1918. Rehearing Denied December 19, 1918.)

No. 3249.

ARBITRATION AND AWARD ⇌ 82(1)—CONCLUSIVENESS.

Although an agreement to arbitrate may not be binding, yet if the parties submit the controversy to arbitration, the award is binding, unless affected by fraud, partiality, or other improper conduct of the arbitrators.

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

Action by the N. P. Sloan Company against the Standard Chemical & Oil Company. Judgment for defendant, and plaintiff brings error. Reversed.

This was an action by the plaintiff in error against the defendant in error. The sustaining of a demurrer to counts 5 and 6 of the complaint

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

as amended is assigned as error. The following is a copy of count 5 as amended:

"5. Plaintiff further claims of the defendant the further sum of \$9,163.74, with interest thereon from the 8th day of August, 1916, for that heretofore, to wit, on the 23d day of June, 1915, plaintiff and defendant were regular members of a voluntary association known as the Interstate Cotton Seed Crushers' Association, which had regularly adopted a constitution and by-laws and official rules governing transactions in cotton seed products between the members of such association, which were in full force and effect on said 23d day of June, 1915. Section 2 of article I of the constitution of said association provides that said association shall have power 'to enact laws for its government and the government of its members, and rules governing all transactions in cotton seed products by and between its members and to provide and enforce penalties for any violation thereof.' And by section 8 of article V of said Constitution it was provided that immediately after the close of each annual session committee on arbitration of five members each should be appointed at Dallas, Texas, and other places named, and plaintiff avers that the committee on arbitration for Dallas, Texas, was, immediately after the close of the annual meeting of said association which was held at Birmingham, Alabama, on, to wit, May 17, 18, 19, 1915, duly appointed. That by section 7 of article II of the by-laws of said association it was provided as follows: 'The arbitration committee provided for in article V, section 8, of the constitution, shall perform their duties in conformity with the rules of said association.'

"That rule 15, section 3, of said association, was in force on said 23d day of June, 1915, and provided as follows: 'Section 3. When a sale is made of season's or balance of season's output of linters, the seller must ship and the buyer must receive all linters seller makes to the end of the season: Provided, that when estimated number of bales is stated in contract or in confirmation of sale or purchase, the buyer may demand and seller must ship, or may ship whether demanded or not, 15 per cent. in excess of estimated quantity if he makes a sufficient number of bales to enable him to do so, and buyer must receive and pay for same at contract price. Should seller not make the quantity estimated, he shall deliver the number of bales made, and shipment of 85 per cent. of the estimated quantity shall be deemed a fulfilment of the contract. The limitation of each season shall be the 31st of July, so that each season's output of linters shall include everything made up to July 31st.'

"And plaintiff avers that while the plaintiff and the defendant herein were members of said association they made and entered into a written contract, a copy of which is hereto attached, marked Exhibit A, and made a part hereof, for the sale by the defendant to the plaintiff of the cotton linters therein referred to. That under said contract the defendant, between the 23d day of June, 1915, and the 31st day of July, 1916, delivered to plaintiff 1,324 bales of linters, and thereafter refused and failed to deliver 376 bales of said linters of the aggregate weight of, to wit, 192,921 pounds, the balance due plaintiff under said contract, although plaintiff was at all times ready, able, and willing to accept and pay for said linters as provided in said contract, the defendant claiming that by the terms of said contract it was not obligated to deliver said 376 bales or said 192,921 pounds of linters, or any part thereof, and plaintiff having agreed and contracted to sell said 376 bales of linters to another party, was compelled to and did purchase the same in the open market and paid therefor eight and one-quarter ($8\frac{1}{4}$) cents a pound, the market value of said linters at, to wit, time of the breach by the defendant of the contract sued on, amounting to, to wit, \$15,915.98, less freight to New York of \$964.61, making a difference between the contract price and the price which the plaintiff had to pay for said 376 bales of linters \$9,163.74, to the damage of plaintiff as aforesaid.

"And plaintiff avers that by rule 36 of said association, which was in force during the year 1916, it was provided that in case of differences between members of the association concerning transactions in cotton seed products, the same should be settled by arbitration upon the application of either of said

(256 F.)

members, and said rule contains the following: 'And it is fully understood and agreed by and between the members of this association that any award that any of the regular arbitration committees of this association make under this rule, whether such arbitration is held by agreement or ex parte, shall be binding upon all the parties affected hereby, and such award, if final at the instance of any party affected by it, may be made the judgment of any court of competent jurisdiction without other evidence of such award.'

"And plaintiff avers that the differences between the plaintiff and the defendant herein over the said contract of June 23, 1915, were duly and regularly referred to the regular committee on arbitration of said association at Dallas, Texas, and was by said committee on arbitration, after due notice to the defendant herein heard and determined and said arbitration committee thereupon or thereafter did duly render its award in writing in accordance with the rules and regulations of said association, copy of which award, which bears date the 28th day of August, 1916, is hereto attached, marked Exhibit B, and prayed to be taken as a part hereof. And plaintiff avers that in and by said arbitration and said award, the defendant became liable to pay to the plaintiff the sum of \$9,163.74, with interest, wherefore plaintiff sues.

"And plaintiff avers that between the execution of said contract and the 31st day of July, 1916, the market value of linters advanced in price from, to wit, 3 cents per pound to, to wit, 8¼ cents per pound, and by reason of the failure of the defendant to deliver said 376 bales of linters of the aggregate weight of 149,686 pounds, as it had contracted and agreed to do, plaintiff has been deprived of sundry great gains and profits which he might have and would have otherwise acquired to himself by re-selling the said 376 bales of linters at much higher and advanced prices, to wit, 8¼ cents per pound, amounting in the aggregate to a large sum, to wit, \$7,312.16. Wherefore plaintiff sues."

Exhibit A.

"Original.

"N. P. Sloan Company, Cotton and Cotton Linters.

"No. 101.

Philadelphia, Pa., 6/23/15.

"Confirmation of Purchase from Standard Chemical & Oil Co., Troy, Ala.

"Gentlemen: We confirm the following purchase made this day from you:

"Quantity—next season's production of linters estimated 2,000 bales.

"Product—linters.

"Quality—clean average mill runs.

"Price—3c f. o. b., Troy.

"Terms—sight draft bill of lading attached.

"Delivery—1 and 200 bale lots as produced.

"Special—linters to be packed in bales not to exceed 27"x54" and not to weigh more than 550# or less than 400#.

"Any difference between buyer and seller, which cannot be settled direct, shall be settled by arbitration at Dallas in accordance with the rules and regulations of Interstate Seed Crushers' Association.

"Accepted: Standard Chemical & Oil Co., by [Signed] Frank L. Jones, D. Manager N. P. Sloan Company, by W. H. Dunn, Secy.

"This contract is made in duplicate; please sign both copies, and return one."

Exhibit B.

"The Interstate Cotton Seed Crushers' Association.

"Dallas, Texas, August 28, 1916.

"N. P. Sloan Co., Philadelphia, Pa., v. Standard Chemical & Oil Co., Troy, Ala. (Ex Parte).

"The question to be decided by the arbitration: 'Whether Standard Chemical & Oil Company shall pay the N. P. Sloan Co. loss incurred in replacing 376 bales of linters balance due on contract as per proof submitted.'

"The verdict of the committee is that for the fulfillment of this contract the Standard Chemical & Oil Co. should deliver to the N. P. Sloan Co. a mini-

mum quantity of 1,700 bales of linters of an average weight of 475 pounds per bale, or 807,500 pounds at three cents (3c) per pound.

"There is no evidence presented to the committee as to the quantity actually delivered, but this is known to buyer and seller, and deducting this quantity from the 807,500 pounds will give the pounds still due, and the purchase of the N. P. Sloan Co. against the deficiency claimed establishing the price, the Standard Chemical & Oil Co. should pay the N. P. Sloan Co. an amount equal this deficient number of pounds, at the price delivered New York, less the freight from Troy, Ala., and the contract price.

"Costs of this arbitration to be paid by the N. P. Sloan Co. and included in their claim against the Standard Chemical & Oil Co.

"P. G. Claiborne, Chairman.

"J. W. Allison.

"W. F. Pendleton.

"J. S. Le Clercq."

The following is a copy of count 6:

"Count 6. For count 6 the plaintiff adopts all of count 5 as amended, and makes it a part hereof as if fully set out herein, and avers that rule 38 of the Interstate Cotton Seed Crushers' Association provides that all transactions between members of this association as to cotton seed products shall be governed by the rules of the association and that contracts between members shall be subject to all rules of the association."

The demurrer to the two counts above set out was on the ground stated in the opinion.

John London and Geo. W. Yancey, both of Birmingham, Ala., for plaintiff in error.

Fred S. Ball and Edmund R. Beckwith, both of Montgomery, Ala., for defendant in error.

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

WALKER, Circuit Judge (after stating the facts as above). The only ground stated in the demurrers to counts 5 and 6 of the complaint as amended was that—

"The alleged award therein counted on is null and void, because the alleged agreement to refer said matters to said arbitration was null and void as an attempt to oust the jurisdiction of the courts."

That demurrer raised no question of the sufficiency of the allegations of the complaint as to the existence of a difference or dispute between the parties or as to the submission by them of that dispute or difference to the committee mentioned for arbitration. Nor did the demurrer question the sufficiency or validity of the alleged award upon any ground other than that the alleged arbitration agreement was legally invalid, with the result that any award made in pursuance of it is without binding or enforceable effect.

It may be assumed that the pleaded arbitration agreement was not a binding or enforceable one, and that its existence prior to the award constituted no obstacle to a resort to the courts by either of the parties to it for the settlement of any difference or dispute arising between them. Though a submission to arbitration in pursuance of the agreement was revocable at any time before the making of an award, it does not follow that an award made under an unrevoked submission

pursuant to the agreement and the submission is without binding effect. After an agreement to arbitrate has been executed or consummated by the making of an award following a submission by both parties, which was unrevoked when the final action of the arbitrators was taken, the award so made is not deprived of binding effect by the circumstance that before it was made the arbitration agreement did not stand in the way of either party resorting to the courts for the settlement of the controversy. Where parties submit matters in controversy to arbitration, and an award is made pursuant to the agreement of submission, such award is final and binding on the parties, unless the arbitrators are guilty of fraud, partiality, or other improper conduct in making it. *Gardner v. Newman*, 135 Ala. 522, 33 South. 179; *Williams v. Branning Mfg. Co.*, 154 N. C. 205, 70 S. E. 290, 47 L. R. A. (N. S.) 337, and note; 5 *Corpus Juris*, 43, 163; 2 *R. C. L.* 366. Neither of the two counts in question was subject to objection on the ground stated in the demurrer.

Because of the error committed in sustaining the demurrer, the judgment is reversed.

J. W. DARLING LUMBER CO. v. PORTER.

(Circuit Court of Appeals, Fifth Circuit. March 15, 1919.)

No. 3352.

1. APPEAL AND ERROR ⇔78(3)—DECISIONS REVIEWABLE—ORDERS.

Judicial Code, § 128 (Comp. St. § 1120), making final decisions of federal District Courts reviewable on writ of error, is inapplicable to orders sustaining demurrer to a declaration and disallowing application to file amended declaration.

2. COURTS ⇔365—FEDERAL COURTS—STATE DECISIONS.

Ruling of highest state court on what constitutes a final judgment reviewable on writ of error or appeal is not controlling on federal courts within state.

In Error to the District Court of the United States for the Southern District of Mississippi; Edwin R. Holmes, Judge.

Action by the J. W. Darling Lumber Company against Samuel Porter. From orders sustaining a demurrer and disallowing an application to file an amended declaration, plaintiff brings error. Writ dismissed.

T. M. Miller and John D. Miller, both of New Orleans, La., for plaintiff in error.

L. T. Kennedy, of Natchez, Miss., for defendant in error.

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

PER CURIAM. [1, 2] The record in this case shows no action by the trial court other than that on the 16th day of May, 1918, it made an order sustaining a demurrer to a declaration in an action at law, and that, at the succeeding term of the court, in November, 1918, it made another order disallowing an application of the plaintiff in the case to

file an amended declaration. The case is not one within any exception to the rule that the jurisdiction of this court to review by appeal or writ of error is limited to final decisions in the District Courts. Judicial Code, § 128 (Act March 3, 1911, c. 231, 36 Stat. 1133 [Comp. St. § 1120]). The record does not show such a final decision as is requisite to support the writ of error. Whatever may be the rule prevailing in the courts of the state of Mississippi on the question of what constitutes a final judgment reviewable on a writ of error or appeal, under the settled rule prevailing in the federal courts, neither of the above-mentioned orders is such a final decision as is subject to be reviewed on writ of error. On such a question the ruling of the highest court of a state is not controlling on the federal courts sitting in that state. *Amis v. Smith*, 16 Pet. 303, 10 L. Ed. 973; *Dickinson v. Sunday Creek Co.*, 178 Fed. 78, 101 C. C. A. 568; *Treadwell v. Corker & Smith*, 245 Fed. 348, 157 C. C. A. 540.

It follows that the writ of error must be dismissed; and it is so ordered.

**WESTINGHOUSE ELECTRIC & MFG. CO. v. BROOKLYN RAPID
TRANSIT CO. et al.**

(District Court, S. D. New York. January 15, 1919.)

**1. STREET RAILROADS ⇨58—RECEIVERSHIP—SETTLEMENT OF DAMAGE CLAIMS—
COUNSEL FEES.**

Receiver for a large street railway system instructed that it was the policy of the court to make prompt and just settlement of claims for personal injuries, where possible, but that no settlement would be made while a claimant was under contract to pay excessive attorney's fees.

2. STREET RAILROADS ⇨58—RECEIVERSHIP—APPOINTMENT OF CORECEIVERS.

The general purpose of a receivership for a metropolitan street railway system and the duties arising therefrom considered, and in the early stages of such receivership, when the immediate thing desirable is to improve the physical condition of the property, and to increase its operative efficiency, motions by the city and the Public Service Commission for the appointment of additional receivers denied without prejudice.

In Equity. Suit by the Westinghouse Electric & Manufacturing Company against the Brooklyn Rapid Transit Company, the New York Municipal Railway Corporation, and the New York Consolidated Railroad Company. On motion for appointment of coreceiver. Denied.

Walter F. Taylor, of New York City, for plaintiff.

George D. Yeomans, of Brooklyn, N. Y., for Brooklyn Rapid Transit Co.

William P. Burr, Corp. Counsel of New York City, for city of New York.

William L. Ransom, of New York City, for Public Service Commission, First Dist.

Cravath & Henderson, of New York City (Paul D. Cravath and Robert T. Swaine, both of New York City, of counsel), for noteholders, etc.

George S. Franklin, of New York City, for War Finance Corporation.

John J. O'Leary, of New York City, for certain claimants.

Arthur J. Stern, of Brooklyn, N. Y., for landowners affected by extension of various elevated railroads.

Eldon Bisbee and Edgar M. Cullen, both of New York City, for committee of stockholders of Brooklyn Rapid Transit Co.

William Erbe, pro se.

MAYER, District Judge. [1] On page 24 of the report to the court, submitted by the receiver, Mr. Garrison, under the heading of "Malbone Street Accident," said:

"On November 1, 1918, a deplorable accident occurred on the Brighton Beach line, at Malbone street, resulting in 94 deaths and 203 persons injured. Prior to my appointment settlements had been made in 12 death cases, and 102 personal injury cases, at an aggregate cost of about \$138,000. While only an approximation can be given of the amount of damages still accruing, the sum will probably not be less than \$1,100,000. Since my appointment I have authorized the continuation of making settlements up to the point of payment, in order to await the instructions of this court in the premises. Provision will have to be made for raising money to meet these claims, if they are to be paid."

I appreciate fully that persons not familiar with the law, such as those affected by this accident, do not understand court proceedings generally, and do not understand court proceedings of this character. Therefore I make this statement at this time in this formal way, in order that there may be no apprehension on their part, or no mistaken notion which may lodge in their minds. It is the purpose of the court to do everything in its power ultimately to bring about a situation whereby those justly entitled to be compensated for this unfortunate damage to which they have been subjected shall be compensated; and it is the purpose of the court with, as it hopes, the assistance of all who are interested in this receivership, to accomplish such a result as soon as the law and the facts permit it to be accomplished, and the co-operation which the court hopes for aids to that end.

I do not wish any of these unfortunate people to think, as might be suggested to them by persons not familiar with such matters, that any receivership of this kind is for any other purpose than fully to safeguard their rights, and, if possible, accomplish results for them even earlier than the strict legal technique requires, if the co-operation is attained which I hope will be attained.

It is also my purpose to instruct the receiver in respect, not merely of this accident and the claims arising therefrom, but as a general policy in dealing with all accident cases, that from the standpoint of the settlement of cases they shall be advised as to what the expense is to be to the person who is the plaintiff in the case or who makes the claim. I recognize the propriety and necessity of compensation to earnest and diligent counsel who represent any of the persons who are damaged by any injury which may be laid at the door of any of the companies within the receivership, but I am extremely anxious that, in dealing with these unfortunate persons, no situation shall be created which will enhance

the value of those who represent them beyond what is fair and just compensation for representing them; and if there be, perchance, by way of illustration, any 50 per cent. contracts outstanding, I shall not permit the receiver to make any settlement with anybody while such a contract as that is outstanding. I do not attempt to place any specific value upon the services of counsel, because each case stands upon its own merits, and there may be some cases where counsel are justly entitled, by reason of the difficulties, for the trouble, or what not, to a greater compensation than in other cases; but I take this means of letting those concerned know that everything that is just will be endeavored earnestly to be done by the receiver and by this court, and that none of them need be either panicked into an unjust settlement between themselves and the companies, taking less than is fairly and rightly due to them, nor into an undue payment for the obtaining of a settlement.

[2] As far as I can gather from what all the counsel have stated, there is no objection in any quarter to the continuance of the receivership; and as I understood the arguments, their trend inevitably leads to the conclusion that in the interests of all concerned such continuance must be had. Therefore, in so far as the order to show cause is addressed to that subject-matter, an order will be made continuing the receivership pending this litigation.

In respect of the questions of intervention, intervention is permissible under equity rule No. 37 (198 Fed. xxviii, 115 C. C. A. xxviii). Whether or not an order shall be made allowing intervention within the purview of that rule is a matter which requires careful consideration, but one formal application has been made this morning, and upon that point I will consider the subject and in due course determine what shall be done. There is no time limit to be placed upon any application for intervention. Such an application may be made at any time pending the litigation; but it would conduce to the orderly administration of this estate if all those who desire to move for intervention would move with reasonable promptness after they shall have made up their minds as to the course they wish to pursue so that all concerned, including the court, may know within a reasonably short time who are made parties to the litigation, and may likewise know the extent or limit of any order which the court may file in that regard. I therefore hope that by the 3d day of February, 1919, which I believe is on a Monday, that all persons desiring to intervene will move accordingly, although it is to be distinctly understood that any one who does not move by that date has the absolute right to move at any time during the pendency of the litigation, and I will hold in reserve as I look at it now, with the right, of course, to change my mind, the application made on behalf of the Public Service Commission in that regard.

In the conduct of quite a number of receiverships I have always required that notice be given to any responsible person or group of persons who are in one form or another interested in the litigation, whether their interest is of a character which comes within the equity rule to which I have referred or not. The files of this court will show that such has been the proceeding before me as well as before the

other judges in the court in a very considerable number of receiverships, and of course the receiver will be instructed in respect of any applications to the court, to notify the various representatives of committees and of the public bodies which have appeared here to-day. The receiver and the court will naturally be anxious to obtain from any of these creditors and public bodies any information or suggestion or advice which ultimately will go to the solution of the problems here involved. And meanwhile, as to the conduct of the receiver, no one need have any fear that there will be any step taken in this receivership, so far as the receiver and the court here are concerned, which will not be fully known and fully understood. I do not mean, by that, that it will be possible for the receiver and the court to consult with every person in regard to every small detail of daily operation, and for that matter I do not expect that any person of sufficient understanding and judgment to be worthy to be a receiver in this court will be called upon to consult the court as to what might be called the day by day ordinary conduct of the business of these corporations. The receiver was appointed, among other things, upon the theory that he would know, as any person at the head of an important transportation system ought to know, how to deal with the workaday problems that are presented in the operation and conduct of a transit system of this character. But anything that is in any sense substantial, which in any true sense affects not merely the operation of this important system as a system, but affects in a true sense the safety and comfort and the interest of the public at large, anything that is contemplated in such directions will be so thoroughly known and so thoroughly understood that no one can by any manner of means misapprehend that it is the purpose of the court and its arm, the receiver, to conduct this receivership in such manner as to make at least the people of the city a moral partner in the conduct of this receivership.

I think the time is here to depart a little bit from the narrow area of the determination of a motion, because this receivership has very important administrative requirements. Generally speaking, those not skilled in the law do not fully understand what a receivership is and what it means, and those of us who are either at the bar or on the bench are apt to take for granted a considerable amount of knowledge of those things which we must know professionally, and which perhaps others not trained in our profession are not so familiar with. It is very important at the outset of this receivership that there be neither misunderstanding nor misapprehension. The situation of this company may be said to have two general heads—what may be called the physical situation, and what may be called the financial situation.

In respect of the physical situation we have, first, the actual physical condition of these properties that are in the charge of the court. Very shortly after the present receiver was appointed he conferred with the court, and he was instructed by the court as one of the preliminary steps to endeavor to ascertain the physical condition of the transit system, so far as that transit system is under this receivership. I found that the receiver was highly sympathetic with the court's view. It is my desire that a complete physical survey shall be made of this system.

In view of the fact that a deplorable accident has occurred, it is important that every reasonable and humanly possible effort shall be taken that no such thing as that can occur upon this system again, while in any event this system is under the charge of this court. Obviously, where the blame lies for the accident is a matter for judicial determination in other tribunals, so far as fixing the legal liability is concerned in certain particulars. But at once the receiver will make every effort to have this physical condition known, so that all that can possibly be done with the funds at hand and with funds that it is necessary to be obtained shall be done to make this whole system safe for the carriage of the large numbers of our inhabitants and our visitors who are carried upon this system daily.

Desiring to avoid, if possible, any greater burden of expense upon these different companies than was necessary to incur, I have asked the receiver to request the Public Service Commission, and I understand he has so done, to assist him by having their expert men make this physical survey. That request thus made, as I understand, or in any event, to be made, was in a spirit of co-operation.

Utterly irrespective of whatever view may be held by contending parties as to one public body or another, this body is a body charged with certain duties under the law, and, so far as this receiver and this court is concerned, we both look to this body for co-operation, within those duties that it is called upon to perform; and it is our purpose to deal with the Public Service Commission so far as the court is concerned—and when I say the court necessarily I speak for the court's arm, its receiver—it is our purpose to deal with the Public Service Commission, not at arm's length, not with technical resistance, but in a co-operative spirit, desiring wherever possible to observe any requirements that in good judgment and in fair conclusion they deem proper, after an appropriate inquiry, to safeguard the lives and comfort of the traveling public in this city. The Public Service Commission will find upon the part of this receiver no effort technically to avoid whatever may be the proper and just efforts on the part of the Public Service Commission, designed, as I have repeatedly said, for the proper operation of this railroad from the standpoint of safety.

There is a second consideration under that general head. It must be the effort of the receiver, if possible, to attract the good will of those who are daily traveling upon this railroad. It is said—and I make no comment one way or the other—that there is a lack of kindly attitude on the part of the traveling public who use this system towards this road. If that be so, it is the duty and unquestionably the purpose of the receiver, as is well evidenced by his report, which he has gathered in the short time with commendable care—it is his effort, and must be his effort and his duty, to so conduct this railroad as to endeavor to give to the people traveling over it a service which they shall regard as reasonable and fair.

Of course, the result cannot be accomplished at once, because an ideal service will require doubtless a great deal yet to be done, and will require possibly more money than is now at hand. But I think, if it is understood that the receiver and the court approach the problem from

the point of view indicated, that any reasonable man, not misled by misapprehension or misunderstanding, will be very glad, day by day, to see improved conditions, rather than to see unsatisfactory service continued.

Now, in respect of the internal conditions of this company, I thought that the receiver should not make any radical changes, if at all, until after this motion shall have been heard. It seemed to me that it was perhaps inadvisable for him to endeavor to shape the internal policy of this company before he knew whether or not he was to be the single receiver or to be associated with others. Therefore I deemed it unwise that any steps should be taken which would be perhaps misunderstood from one quarter or another, and that, except in so far as imminent demands were to be met, he should endeavor to preserve the status quo until after the hearing and determination of this motion. He has already started to investigate the situation, and from the official of the highest standing in point of authority and compensation to the employé of the humblest duties the receiver will, of course, make a careful investigation, to see, first, what is the ability of the various officers and employés; secondly, what is their compensation; and, thirdly, what in right and justice should be done or should be recommended to be done. By that I do not wish to be understood—because I am talking very frankly—as thinking for one moment that under present conditions of living it would be possible or fair or right to reduce in any manner, shape, or form the present wage of the men who in one capacity or another—men and women, as trainmen and gatemen, and the like, persons working in the power houses and on the tracks—I do not think for one minute that those compensations should be reduced, not through any mere notion in my mind, but because with the present cost of living it is extremely desirous that a fair wage should be paid to these employés, most of whom, so far as I have been able to observe them, are earnest and intelligent and faithful, and who are entitled as a matter of health and safety to the public at large to be compensated at least at the rate at which they are now compensated, with no fear whatever of reduction in that regard. But in respect of others who can be replaced, the receiver, of course, will make a careful examination to ascertain what is best in the interest of the company and its creditors—whether its creditors be individuals or be public bodies—what is best to be done. So much for that.

Now, in respect of the financial situation, the arguments have merely confirmed, together with the report of the receiver laid upon my desk, the conclusion that here is a very difficult situation, but a situation by no means impossible of solution. It is a situation where there are various interests, and no one interest should justly be subordinated beneath its legal rights. By whatever name called, the city has a large interest, and so have those persons who have purchased these notes aggregating outstanding now some \$57,000,000. So likewise have the stockholders, with their holdings of upwards of \$70,000,000. So likewise have the creditors of all kinds, tort and contract. All these have interests, and they will never attain the right result unless their attitude towards each other is one of co-operation.

This receivership can be successful, and I trust will be successful. If it fails to accomplish what all right-minded men hold it is to accomplish, it will fail merely because, through no fault of its own, it does not receive co-operation in every quarter, public and private.

In respect of the financial situation, it was very well said I think by several of the counsel that the situation is quite different from that in which some previous railway situations were found. It is perfectly plain that there must be a result—if there is to be a result—in the readjustment of this company, by whatever name called, whether adjustment, or reorganization, or refinancing, which can be attained only by the concurrence of many elements. The kind of readjustment or reorganization, which is possible where only it is concerned with private individuals who hold securities or stocks, is not possible here in the sense that such an arrangement can be made as has frequently been made outside of the court. That problem is not at hand for the moment. But when the time comes that earnest men, representing all interests, public and private, shall seek to solve this problem, they may as well understand now, all of them, that in view, more especially, of the recent practices and decisions of this court, this receivership will not leave this court until any plan is thoroughly well understood by the court and has the court's approval. That is said because it is fair to state that no longer can those who are only privately interested, in the sense of being private persons—privately interested is not a good phrase; I mean those who are private persons—can no longer arrange the basis upon which the future of the company in receivership shall be conducted, without that basis being of a character which is satisfactory to the court, after full, free, and fair discussion on the part of every one who has a right to be heard.

Having thus, I think, made clear several of the views which the court entertains, and having by practically unanimous understanding made clear to the persons who are or will be tort claimants the position of the court, I come to the final question with which we are now to deal.

Any application on the part of the city of New York, or on the part of the Public Service Commission, is entitled to most careful and most respectful consideration. These gentlemen, who represent those two important public bodies, are either on the one hand the direct selection of the people, or on the other hand the selection of the people by the appointment of the Governor, as the statute provides. Any application which comes from such sources is not lightly to be laid aside. But both Mr. Bisbee and Mr. Erbe have put the matter very aptly. The argument of the learned counsel for the city and the learned counsel for the Public Service Commission indicates that there is lack of agreement between these two great bodies in some respects which were stated. One official thinks that the other body is not entitled to representation. One counsel thinks that, whatever else happens, there should at least be additional representation which would represent the city. I fear there has been a misapprehension as to what a receivership is. Under a receivership—I am stating the very simplest of principles—the property is taken into the possession of the court. It is the court's duty to

conserve the property while thus in its possession. The court has no power to break contracts. Valid outstanding contracts and obligations must be observed. In a situation of this kind there are obviously legal perplexities which will find their solution only in the determination of courts—in some instances perhaps in the determination of the United States District Court of the Southern District of New York; in other instances possibly by the determination of the New York courts. The receiver cannot favor or omit to favor either private or public creditors by any action on his part. He is not a law unto himself, any more than the court is. The receiver is merely the instrument of the court, because theoretically, if the court had the time, it would be the court's duty personally to administer itself the entire receivership.

I think the representatives of the city and of the Public Service Commission manifestly have some firm convictions as to the rights they represent and as to the policies which in their judgment should be pursued. Whether one or two additional men are appointed, it must be plain that it would be impossible for the court successfully or intelligently to conduct a complex receivership of this kind with other receivers, representing not the court, but representing some point of view which might or might not accord with the point of view entertained by the receiver appointed by the court. Such a situation is not known in receiverships. Such a situation might seriously tend to destroy the efficiency of the receivership, and a receivership especially of this character, and might transfer from a forum outside the receivership and the court the controversies which might properly be settled at some place and time other than by this court.

All that this receiver is called upon to do is what I have heretofore stated. He is called upon to see that the road gets into good physical condition, if in any respect anything in that regard is to be done. He is called upon to operate this road to the best of his ability. He is called upon to meet present obligations as best he can. He is called upon to borrow money, upon a proper showing that money is needed. He is called upon to use every effort within his power to obtain, with the aid of the proper officials, the completion of those parts of this road which are not yet constructed, and without which even any uniformed person must see that this road cannot reach its highest earning capacity, not to speak of its failure to supply to the people of the city those transportation facilities which they so hope for, and to which they are entitled.

To repeat again, the whole situation is one where the court is the receiver, and where the court is entitled to have as its aid at all times singularity of purpose. It must be quite plain that the court is unable at this time, either on the one hand to appoint a coreceiver, which would be simply having two men do what in the court's judgment in the circumstances of this case one man could competently do, or on the other hand, accepting, not the court's appointment, but the nomination by a public body of a gentleman charged with various responsible duties, who is necessarily very completely and greatly occupied otherwise, who shall act as receiver, not as the court's arm, but as representing

what is regarded as the rights of one of the very important units which have come into this situation.

I do not for a moment foreclose the proposition that there may readily come in the course of this receivership a time when one or more receivers may be regarded as helpful and necessary to the court. I can imagine that, when the time comes to work out the financial future of this company, the aid of a receiver representing at that time the united view of the public authorities may be of great service, and I do not wish to be understood as dealing with anything but the situation as it now stands upon this 15th day of January, 1919.

There may very well be a time—I repeat—when, especially in dealing with the financial situation, it may become extremely helpful and co-operative to have an additional receiver, but I do not see that that time is here at the moment. At this moment what this receivership is concerned with is to get down to business as fast as it can. It has already started. No one questions the standing and ability of this receiver.

I may add, however, for the information of those who perhaps for the moment have lost sight of the fact that one of the great elements of value to the court of this receiver, in addition to his known qualities of executive ability, is the fact that for many years he had the highly useful experience of being himself a chancellor, a judge of a court of equity, in a great court, which has had a reputation in the history of American jurisprudence second to none, in which court it was his duty to sit where I now sit in the sense of being an administrator, and in which court, through a long and varied experience, he became familiar with the obligations and duties which fall upon a court of equity in an administration of this character. I congratulate, not merely myself, but all those who are concerned, that it was possible to have a man of that peculiar equipment in this extremely important and delicate situation, willing to lay aside in great measure his private practice at the bar and devote himself, both as an administrator and as a former experienced judge, to the great problem with which he will have to deal.

In these circumstances, I deny the motion for a coreceiver without prejudice to its renewal at such time as counsel may be advised.

WESTINGHOUSE ELECTRIC & MFG. CO. v. BROOKLYN RAPID
TRANSIT CO. et al.

(District Court, S. D. New York. March 22, 1919.)

1. CORPORATIONS 474—POWERS—PLEDGE OF BONDS AS COLLATERAL.

Under the law of New York, a corporation has power to pledge its bonds at less than par as collateral to a loan.

2. STREET RAILROADS 58—PLEDGE OF BONDS AS COLLATERAL—VALIDITY AS TO RECEIVER.

Receiver of a New York street railway company instructed not to attack the validity of pledges of its bonds as collateral to secure loans made to the company in good faith at a time when the country was at war and the continuance of the company, as a large public utility company, was of great public concern.

In Equity. Suit by the Westinghouse Electric & Manufacturing Company against the Brooklyn Rapid Transit Company and others. On application by Lindley M. Garrison, receiver, for instructions as to whether he should take any proceeding seeking the return of certain bonds of the Brooklyn Rapid Transit Company, pledged by it as collateral security for bank loans and collateral trust notes.

Upon the obtaining of loans from various banks, the railroad company pledged its bonds as collateral security. These transactions have been referred to in the proceedings as the "induced loans." In other instances, when loans became due, additional bonds were pledged in consideration of new loans in renewal. These are referred to as "renewal loans."

Hornblower, Miller, Garrison & Potter, of New York City (Carl M. Owen, of New York City, of counsel), for receiver.

Cravath & Henderson, of New York City (Paul D. Cravath and Robert T. Swaine, both of New York City, of counsel), for noteholders, etc.

Rushmore, Bisbee & Stern, of New York City (Alfred E. Mudge, of New York City, of counsel), for committee of stockholders.

Scott, Gerard & Bowers, of New York City (Francis M. Scott, of New York City, of counsel), for Corn Exchange Bank.

Larkin & Perry, of New York City (John M. Perry, H. V. Poor, and C. B. Hughes, all of New York City, of counsel), for Central Union Trust Co. of New York.

George S. Franklin, of New York City, for War Finance Corporation.

Cullen & Dykman, of Brooklyn (William N. Dykman, of Brooklyn, of counsel), for Brooklyn Trust Co.

Wingate & Cullen, of New York City (T. Ellett Hodgskin, of New York City, of counsel), for People's Trust Co.

Rumsey & Morgan, of New York City (John Hill Morgan, of New York City, of counsel), for Franklin Trust Co.

Harold Swain, of New York City (Archer P. Cram, of New York City, of counsel), for Title Guarantee & Trust Co.

Godfrey Goldmark, of New York City, for Public Service Commission.

William P. Burr, Corp. Counsel, of New York City (Josiah Stover, of New York City, of counsel), for city of New York.

George S. Ingraham, of Brooklyn, for Nassau Nat. Bank of Brooklyn.

Samuel Seabury, John V. Bouvier, and Robert H. Ernest, all of New York City, for certain tort claimants.

Davies, Auerbach & Cornell, of New York City (Harold C. McCollum, of New York City, of counsel), for Columbia Trust Co.

William C. Orr, of New York City, for Fifth Ave. Bank.

Edward J. Connolly, of Brooklyn, for Hamilton Trust Co. of Brooklyn.

MAYER, District Judge (after stating the facts as above). The approach to the solution of the problem is from several standpoints:

[1] First, looking at the question purely as a matter of law, I think there can be no doubt whatever that, whether the reasoning advanced by Mr. Cravath, and those who stand in the same position, or the reasoning advanced by the receiver, is adopted, the result is the same, certainly as to the so-called induced loans, namely, that under the law of New York a corporation has the power to pledge its bonds at less than par as collateral to a loan. I see nothing to the contrary in the case of *In re Progressive Wall Paper Corporation*, 229 Fed. 489, 143 C. C. A. 557, L. R. A. 1916E, 563, and the list of cases therein cited.

[2] Further, one must look at these questions, if possible, in a large way. If all the authorities were to the contrary, I should strain a very great deal to hold such loans valid. The advances to the railroad by the War Finance Corporation in the summer of 1918 were at a vital time. The War Finance Corporation was organized to assist in just such delicate situations as are here presented, and it would be seriously a source of disturbance if any court were in any manner to leave any doubt as to the validity of advances made under those circumstances at that time.

Similarly, the banks were of great service to this corporation in enabling it to be in funds in connection with important public duties which this corporation was bound to perform. Hence so far as the induced loans, so called, are concerned, in which the banks are interested, I approach their position in precisely the same way as I have indicated I would approach the position of the War Finance Corporation.

Therefore, whether Receiver Garrison's opinion is correct or not as to the reasoning upon which a decision may properly rest, or whether Mr. Cravath's argument is or is not correct, to the effect that the court, in its duty to follow the law as it exists, must approach the conclusion from the standpoint of the reported cases referred to by Mr. Cravath, the result in either case is the same.

When it comes to the question of the so-called renewal loans, I am frank to say that, if necessary, I should look for a means of differentiating the situation from that which was presented in the *Progressive*

Wall Paper Case; and, in accordance with familiar methods and principles, it is well that, if the court can find a different set of facts, especially in equity, to work out an equitable result, the court should endeavor so to do.

The method which the Brooklyn Rapid Transit Company took in its transactions with the banks, when these renewal times came along, was apparently deliberately adopted, and properly so, in order to obviate any question that these loans were other than new loans in law. There is no suggestion of bad faith, no suggestion of just a passing back and forth of pieces of paper under a guise designed to cover the real transaction; but these were genuine transactions, in which the banks safeguarded themselves, in which, for instance, the Corn Exchange Bank (I assume that transaction as typical) meant to put the matter in a shape where the suggestion that this was technically a renewal or extension of a loan, instead of a new loan, could not prevail.

In the next place, there is a force in the proposition which former Judge Scott has advanced for himself and his associates, that the original terms of the collateral note were such, in the requisite for additional collateral, as always to relate back to the original transaction.

Finally, dealing as we are now with a very important situation, where the court is properly and naturally concerned, that at this time financial conditions shall remain as nearly stable as possible, that the financial situation shall not be disturbed by any question as to the validity of transactions which are honorable and honest transactions, I should, and I think properly so, in my discretion as a court of equity, decline to authorize the receiver to do anything to disturb that situation, based as it is upon money actually lent, upon transactions, so far as appears, honestly conceived and honestly carried out in the ordinary course of business of this character which has to do with the financing of a large public utility company.

Whatever the reasoning may be which leads to the result, the result will be the same. I do not approach the result from any definite avenue of reasoning, because that may more properly be the subject-matter of consideration when the time comes for it, if it ever does come (and it may never come), when this question, in a direct, contested litigation, can be carefully considered by a court of competent jurisdiction.

The sole question now, sitting as a court of equity, is what is my duty in respect of instructions to the receiver. And, having thus endeavored to outline my view sufficiently in order to enable those interested to understand my attitude, my instructions are that the receiver shall not at this time, or at any time in his capacity as receiver, other than in some litigation, if such occurs, where he shall have some duty, attack the validity of the collateral either in respect of the induced, the intermediate, or the so-called renewal loans, and an order accordingly may be presented.

UNITED STATES v. BOYLAN et al.

(District Court, N. D. New York. March 3, 1919.)

1. INDIANS ⇨15(1)—ONEIDA LANDS IN NEW YORK—CONVEYANCES.

A conveyance of lands in the remaining Oneida reservation in New York by a member of the tribe residing thereon, made between 1843 and 1892, while Act N. Y. April 18, 1843 (Laws 1843, c. 185), was in force, is invalid to convey any interest, unless executed in conformity to that act, which provided for the appointment of a superintendent of the Oneida Indians and that all conveyances of their lands should be executed before the first judge of Madison county, and should have indorsed thereon the consent of such superintendent.

2. INDIANS ⇨5—STATUS OF INDIANS IN ORIGINAL STATES—AUTHORITY OF UNITED STATES.

While the United States has no ownership in Indian lands in any of the 13 original states, the native Indians who hold and occupy such lands, whether in common or in severalty, by agreement between themselves, are its wards, and it may maintain suits for the protection of their property and rights.

3. INDIANS ⇨15(1)—LANDS—RIGHT OF ALIENATION.

If the state of New York had jurisdiction to authorize the Oneida Indians to hold their lands in that state in severalty, as it did by Act April 18, 1843 (Laws 1843, c. 185), it also had power by that act to impose restrictions upon their alienation, and if such power is solely in the general government, in the absence of legislation by Congress on the subject, there is no right to hold in severalty, and no right of alienation to private individuals whatever.

4. INDIANS ⇨13—LANDS—JURISDICTION OF COURT TO ORDER SALE.

A decree of a court of New York for the sale of lands on the Oneida Indian reservation, and sale thereunder, in a partition suit between a white grantee, who was without valid title, and Indian occupants, to which suit neither the United States nor the state was a party, held void.

5. INDIANS ⇨15(1)—LANDS IN NEW YORK—ALIENATION.

The law of New York, constitutional and statutory, has always prohibited the acquisition by white persons of any Indian lands in the state, except in the manner prescribed by the Legislature; and Pen. Code, § 384a, as added by Laws 1893, c. 692, makes it a misdemeanor for any person to purchase, contract for, or enter into possession of any such lands.

6. INDIANS ⇨15(1)—ONEIDA LANDS IN NEW YORK—ALIENATION—SUIT TO SET ASIDE.

There is no law of the United States which confers on individuals of the Oneida Tribe of Indians in New York power to sell or incumber any of the lands on their reservation, and the United States may maintain a suit to enforce the restoration of any of such lands conveyed or incumbered in violation of the settled policy of both the national and state governments.

At Law. Action by the United States against Julia Boylan and Anna Siver Moyer. Judgment for the United States.

This is an action by the United States against Julia Boylan and Anna Siver Moyer, in the nature of an action of ejectment, to recover from said defendants, for the benefit and protection of a remnant of the Oneida Tribe of Indians, a tract of land situated in the town of Lenox and in the outskirts of the city of Oneida, Madison county, N. Y., containing about 32 acres of land, and which land, it is conceded, formed a part of the original Indian reservation for said tribe

of New York Indians. To avoid repetition, the facts will be stated in the opinion.

Frank J. Cregg, Asst. U. S. Atty., of Syracuse, N. Y., for the United States.

Joseph Beal, of Oneida, N. Y., for defendants.

RAY, District Judge. The lands in question are part of lot 17 on map of Nathan Burchard, hereafter mentioned, and are bounded and described as follows:

"Beginning in the center of the highway leading from Oneida to Munsville, known as the 'west road,' bounded on the south by lands owned by Phebe Lyon and on the east by lands owned by S. H. Farnham, of Oneida, on the north by lands owned and occupied by Daniel Scanandoah, and on the west by said highway to the place of beginning, containing 32 acres of land, be the same more or less."

It is conceded that the Oneida Tribe of Indians, one of the Indian tribes in the United States at the time of the discovery of America, was in the actual possession and occupation of the lands in question, and also of the other lands adjacent to and surrounding them, and continued in possession down to May 23, 1842, when a treaty was made "between the First and Second Christian parties of the Oneida Indians residing in the town of Lenox, county of Madison, and state of New York, constituting the party of the first part, and the people of the state of New York, acting by their agents, the commissioners of the land office, constituting party of the second part." See Book No. 1 of Original Treaties and Other Indian Papers, at page 209. This treaty was duly signed and executed, and contained as a part thereof two schedules, A and B, hereafter referred to.

Article 1, for considerations therein recited, provided and stated that the said party of the first part "do hereby grant, bargain, sell, cede and surrender to the people of the state of New York all the right, title, estate and interest of the said party of the first part in and to all *that part* of their reservation not heretofore released by the said party of the first part to the party of the second part known, and distinguished as lots numbered 1, 3, 4, 5, 7, 10, and 15 by Nathan Burchard's map and certificates of survey, containing 371.34 acres." Articles 2 to 5, inclusive, provide for sales of such lands so ceded, and for payments to the Indians named in Schedule A, known as "Emigrating party." Article 6 provided:

"It is hereby stipulated and agreed that those members of the First and Second Christian parties of the Oneida Indians as are included in Schedule A hereby release, quitclaim and forever renounce to the said Indians named in Schedule B and to those who may succeed them in their right, title and interest, claim and demand whatsoever in and to the said portion of land so set apart, described, reserved and allotted for those of the First and Second Christian parties of said Indians who do not at present intend to migrate, enrolled in Schedule B as aforesaid, all and the residue of the said reservation not now nor heretofore ceded to the people of the said state, known and distinguished as lots numbered two, six, eight, nine, eleven, twelve, thirteen, fourteen, sixteen, seventeen, eighteen, and nineteen as surveyed and allotted by Nathan Burchard; reference is here had to the said map and field book of the said Nathan Burchard and to be filed in the offices of the Secretary of state and surveyor general; when copies thereof are endorsed thereon and

duly authenticated by him they shall forever be deemed the metes and bounds of the lands ceded and those reserved. And those reserved shall be deemed the common property of all the individuals included in Schedule B."

Article 7 provided that the Indians should surrender the lands, and if they belonged to those named in Schedule A such Indians should on payment immediately emigrate and go beyond the jurisdiction of the state of New York; but if they belonged to individuals named in Schedule B, then such persons should give up possession of the lands so ceded.

It is seen that the Indians in the reservation were divided into two classes, those named in Schedule A, and who were to emigrate, and those named in Schedule B, who were to remain and not emigrate, and who were to have and hold and own the remaining lands, which included lot 17, and also lot 19, and which lot 17 included the lands in question, the same as before.

Schedule B gave the names of the "tenants in common and owners of lots No. 17 and 19" (who were not to emigrate) as follows:

"Aaron Cooper, Hannah Cooper, Dolly Cooper, Margaret Cooper, Susan Cooper, Betsey Cooper, Jenney Cooper, Moses Cooper, Moses Charles, Caty Charles, Margaret Charles, Susan Charles, Mary Charles, Elizabeth Cornelius, Daniel Cornelius, Roderic Cornelius, Jenney Cornelius, Job alias Anthony Antone, Cornelius Antone, Thomas Antone, Mary Antone, Mary Antone and Susan Antone."

It is seen that under this treaty the said named persons were designated as the owners as tenants in common of lot 17, which included the lands in question.

These people comprised the Cooper, the Charles, the Cornelius, and the Antone families, and were 23 in number. Mary Charles, one of such Indians (now Schenandoah), was a witness on the trial. Moses and Caty Charles were the father and mother of Margaret who was the mother of Susie and Mary Schenandoah. William Honyost is a brother of Mary, above named. Mary Schenandoah lived on the reservation on the premises in question until some six years ago, when she, with others, was put off by the sheriff of Madison county under the authority of the writ of assistance hereafter mentioned. This was November 30, 1909. She had always lived there with other Indians on that place. Mary Schenandoah was known as Mary Honyost before her marriage. She took that name when her mother, Margaret, married Peter Honyost. Isaac Honyost was her brother, who was born after the treaty of 1842. Lucy Charles married, and took the name George, and became Lucy George, and died in 1870, leaving seven children, Elizabeth, Henry, John, Jenney, Eli, Mary, and Jeanie. Jeanie, John, and Eli died when very young. The husband died recently on the reservation. Mary George had three children, who died in infancy. In April, 1884, Mary Schenandoah, Margaret Honyost, and Isaac Honyost were all living on the reservation and on the 32 acres of land in question.

William Rockwell, an Oneida Indian, son of Margaret Honyost, daughter of Maggie Charles, one of the 23 persons named in Schedule B, gave testimony to the effect that he was born in a house on lot

17 of this reservation, that these premises were occupied by these Indians and their descendants down to the time of the eviction by the sheriff, and occupied by them in common, and that tribal relations, etc., were maintained, and that they had chiefs and held and attended councils. He says there were some 22 or 23 members of the Honyost family, meaning descendants of Margaret Charles, who occupied these premises in the manner mentioned. He testified the members of the Cooper, Cornelius, and Antoine families are all dead, unless it be some of the Coopers. Isaac Honyost once occupied and cultivated the land until the eviction, but died about two years before the trial.

1844, November 12, Moses Charles deeded to Daniel Schenandoah 7.44 acres of land in lot No. 17.

1845, October 4, Aaron Cooper and Elizabeth Skenandoa deeded to Absolom Gregg a part of lot No. 17, which lot is described as containing 62.52 acres, and the deed says, following the description:

"And being the shares and interest of the said Aaron Cooper and of his wife and of his six minor children and also of the said Elizabeth Skenandoa to three acres in and to said lot No. 17."

The recited consideration was \$1,600.

1847, April 15, Thomas Antonia and Betsey Scandandoa deeded to William Miller, in consideration of \$435.78, certain described parts of lot No. 19, but no part of lot No. 17.

1849, September 18, Jobe Antoine conveyed to Absolom Gregg, for \$225, a part of lot No. 19, which is across the road and west of lot 17.

1851, November 24, Polly Antonio, Susan Antonio, and Polly Antoine, 2d, conveyed to William Miller, for \$897.60, 22.44 acres of land in lot No. 19, and there is added to the description this:

"Embracing the three shares of said lot belonging to the three said Indian women, viz. Polly Antone, Susan Antone, and Polly Antone (2d)."

The above deeds were acknowledged before the first judge of the county and were consented to by the commissioner of Indian affairs of the state of New York.

1865, May 13, Katy Charles, Betsey Canada, Susan Antone, and Jacob Antone, "children and heirs at law of Polly Cooper," deeded to John Gregg, for \$120, three acres of land (lot not given), and this deed says:

"The right of way and premises hereby intended to be conveyed being the same conveyed by the said Peter Honyost and Peggy, his wife, to the said Warren J. Gilbert on the 22d day of December, 1859, by warranty deed. The foregoing description is taken from a warranty deed given by Warren J. Gilbert and wife to Polly Cooper, bearing date April 29, 1862."

1868, November 21, a quitclaim deed, not recorded or executed, conveying to Margaret Honyost, for \$100 and love and affection, "all of the real estate which she the said Caty Charles owns or is possessed of, also all of that certain house and lot 7⁰⁴/₁₀₀ acres where she now resides in Lenox on the road to Stockbridge from Oneida, bounded on the north by lands of Daniel Scande," was drawn.

1875, January 16, Betsey Cornelius, for \$332, conveyed to Barney Ratnour the following:

"All that tract or parcel of land situate in the town of Lenox, Madison Co., N. Y., and bounded and described as follows, viz.: On the north by lands belonging to the estate of Jabez Lyon, deceased; on the east by lands belonging to John Green; on the south by lands belonging to John Gregg; on the west by the highway leading from the old Seneca turnpike to the village of Knoxville—containing seven and $\frac{6}{100}$ acres of land, more or less."

1882, May 10, James George, by quitclaim deed, conveyed to Philander Spaulding for \$10:

"All that tract or parcel of land situate in Lenox aforesaid, lying on the east side of the highway called the 'west road' leading from Oneida to Stockbridge, bounded as follows, viz.: Westerly by said highway, southerly by land of Margaret Honyost and others, easterly by land of S. H. Farnum, and northerly by land of Mary Honyost and others, containing seven acres, more or less."

1882, May 19, Henry George, "heir at law of Lucy George," for \$10, conveyed to Philander Spaulding the following:

"All that tract or parcel of land situated in said town of Lenox and being eight acres or thereabouts, set off to said Lucy George, deceased, an Oneida Indian, on the said side of the highway called the 'west road' leading from Oneida to Knoxville, and bounded south by lands of Margaret Honyost, east by lands of Stephen H. Farnam, north by lands of Mary Honyost and others, and west by said highway."

1884, April 11, Margaret Honyost and Mary Honyost, for recited consideration of \$3,000, conveyed to Isaac Honyost the following:

"All that tract or parcel of land situate in the town of Lenox, county and state aforesaid, all that tract or parcel of land described as follows, to wit: Bounded on the west by the highway leading from Oneida to Munnsville, known as the 'west road,' and on the south by lands now owned and occupied by Mrs. Phebe Lyon, and on the east by lands owned by G. H. Farnam, of Oneida, formerly owned by John Green, and on the north by lands now owned and occupied by Daniel Scanadoa, containing thirty-two acres of land more or less."

These clearly are the same lands in question in the instant case.

1884, April 22, Margarette Honyost and Mary Honyost conveyed to Isaac Honyost and William Honyost, for \$3,000, by deed containing certain recitals and statements, as follows:

"All that tract or parcel of land situate in the town of Lenox, county of Madison, and state of New York, and bounded and described as follows, to wit: Bounded on the north by the lands now owned and occupied by Daniel Scanadoa; on the east by lands owned by S. H. Farnam, formerly owned by John Green; on the south by lands now owned and occupied by Phebe Lyon; on the west by the highway leading from Oneida to Munnsville known as the 'west road'—containing twenty-two $\frac{32}{100}$ acres of land, being three shares of seven $\frac{44}{100}$ acres of land each, two of which belong to Margarette Honyost in her own right, and one of which belongs to Mary Honyost in her own right, under an allotment in severalty to the Oneida Indians heretofore made, to the deed of which reference is made for greater certainty, excepting and reserving thereout one acre of land upon which a house now stands, to be taken out of the northwest corner of the piece of land hereby deeded by Mary Honyost; said land lying next to Daniel Scanadoa's land and bounded west by the highway aforesaid and the lines extending equal distances east and south far enough to make one acre of land. This deed is intended to take the place of an undelivered deed executed April 11, 1884, to Isaac Honyost, for the same consideration, and by mistake was made to said Isaac Honyost only, and was therefore undelivered, and this deed is executed by the grantors and accepted by the grantees in the place of said other deed."

This deed was not recorded.

1885, April 10, Philander Spaulding conveyed to Isaac Honyost, for \$50, the following:

"All that piece or parcel of land situate in the town of Lenox aforesaid, laying on the east side of the highway leading from Oneida to Stockbridge, known as the 'west road,' bounded on the westerly by said highway, southerly by lands of Margaret Honyost and others, easterly by lands of S. H. Farnam, and northerly by lands of Mary Honyost and others, containing seven acres of land, more or less. Being the same piece of land quitclaimed to said party of the first part by James George on the 10th day of May, 1882, and the same piece of land quitclaimed to said party of the first part by Henry George on the 19th day of May, 1882."

1898, September 13, Isaac Honyost, for \$1, conveyed to Chapman Schanandoah (machinist on United States gunboat Marietta), subject to a mortgage of \$1,250 given by Isaac Honyost to Patrick Boylan, "and now held by said Boylan's executor, and which mortgage and the interest thereon second party hereby assumes and agrees to pay as a part of the consideration of this conveyance," the following:

"All that tract or parcel of land, situate in the town of Lenox, county of Madison, and state of New York, all that tract or parcel of land described as follows, to wit: Bounded on the west by the highway leading from Oneida to Munnsville, known as the 'west road,' and on the south by lands now owned and occupied by Mrs. Phoebe Lyon, and on the east by lands owned by S. H. Farnam, of Oneida, formerly owned by John Green, and on the north by lands formerly owned and occupied by Daniel Sconandoa, containing thirty-two acres of land, more or less."

1885, April 1, Isaac Honyost gave to Philander Spaulding a mortgage to secure the payment of the sum of \$1,250 on the following premises:

"All that tract or parcel of land situate in the town of Lenox, county and state aforesaid, bounded and described as follows, to wit: Beginning in the center of the highway leading from Oneida to Munnsville, known as the 'west road,' bounded on the south by lands owned and occupied by Phebe Lyon, and on the east by lands owned by S. H. Farnam, of Oneida, on the north by lands owned and occupied by Daniel Sconandoa, and on the west by said highway, to the place of beginning, containing thirty-two acres of land, be the same more or less."

This mortgage was recorded April 2, 1888, in Liber 97 of Mortgages, at page 488, and April 4, 1888, was assigned by Philander Spaulding to Patrick Boylan and duly recorded in Liber 97 of Mortgages, page 488.

Shortly prior to July 3, 1897, Patrick Boylan died, leaving a last will and testament, which was duly proved and probated and recorded July 8, 1897, and July 3, 1897, letters testamentary were duly issued by the Surrogate's Court of Madison county, N. Y., to Joseph Beal, the sole executor in said will named, who duly qualified as such. By said will he gave the said mortgage to his wife.

1905, March 6, said Joseph Beal, as executor of the will of Patrick Boylan, deceased, commenced a statutory foreclosure of said mortgage by advertisement, and in addition to publishing and posting a copy of the notice of sale which, according to the notice of sale, was to take place June 3, 1905, at 10 o'clock a. m., at the office of the

hotel known as the Brunswick, in Oneida, N. Y., was personally served on Isaac Honyost, Nicholas Honyost, Mary Schonandoah, Mary George, and Chapman Schonandoah, and no other person or persons. The affidavits do not show who were in possession or occupation of the premises at the time, or that these persons, or any of them, were. The sale did not take place at the time mentioned, but was postponed four times by a notice, "The above sale is postponed," etc., and finally:

"The above sale is further postponed till the 15th day of July, 1905, at 10 a. m., at the same place.
Joseph Beal, Executor."

The affidavit of Joseph Beal states he acted as auctioneer on the 15th day of July, 1905, and sold the premises for \$1,250, the highest sum bid therefor, to Michael Burke, of Oneida, N. Y. The affidavits relating to such statutory foreclosure by advertisement were recorded August 20, 1905, in Book 216 of Deeds, page 76.

1905, August 29, in consideration of \$1, said Michael Burke and Katheryn, his wife, conveyed the same premises by a quitclaim deed to Julia Boylan, and July 10, 1906, Philander Spaulding and wife conveyed the same premises by quitclaim deed to Julia Boylan for \$1. These quitclaim deeds are recorded.

1906, July 26, said Julia Boylan commenced an action in the Supreme Court of the state of New York for the partition of said lands and premises in question here by filing a summons and complaint and notice of the pendency of the action, or for a sale if partition could not be had without prejudice, in which action Mary George, Noah George, Henry George, Maggie George, wife of Henry George, William Honyost, Mrs. William Honyost, wife of William Honyost, and Isaac Honyost were made defendants. Chapman Schenandoah and his wife were subsequently made parties. The defendants appeared in the action by their attorneys and answered. The issues framed were by consent referred to a referee, Charles R. Coville, to hear, try, and determine, and to take proof of the plaintiff's title, and to ascertain the rights of the respective parties in such real estate, and report whether same was so circumstantial that a partition could be had without great prejudice to the owners, or whether a sale should be had.

The referee reported that partition could not be made without great prejudice, and that a sale should be made, and that the rights, title, and interest of the parties were as follows:

(1) That Julia Boylan was seized and entitled in fee simple to an undivided thirty-one fortieths of same. Her title, if any, came through such statutory foreclosure and quitclaim deeds mentioned.

(2) Mary George was seized and entitled in fee simple to an undivided three fortieths of same.

(3) Henry George was seized and entitled in fee simple to an undivided one fortieth of same, subject to the inchoate dower right of his wife, Maggie George.

(4) That William Honyost was seized and entitled in fee simple to an undivided one fortieth of same, subject to the inchoate dower right of his wife.

(5) That Chapman Schenandoah was entitled to an undivided four fortieths of same, subject to the inchoate dower interest of his wife.

(6) That Isaac Honyost had no interest therein.

A sale was decreed by interlocutory judgment on the report that partition could not be made without great prejudice, etc., and said Charles R. Coville was made referee to sell, and it was decreed that the sale should be for cash.

Neither the United States, nor the state of New York, nor the commissioner of Indian affairs or of the Oneida Indians, was made a party to the suit or proceedings.

The referee to sell sold the premises for \$725, and made and filed his report; but Mr. Justice Lyon, at Special Term, refused to confirm the sale and direct final judgment, on the ground "that no title to or estate or interest whatever in the lands sought to be partitioned in the action is or at any time has been vested in the plaintiff, and that the plaintiff has not and never had the right to maintain an action for partition of said lands," and an appeal was taken to the Appellate Division, which reversed his order and remitted the matter to the Special Term, which directed a confirmation and the giving of a deed to the purchaser. This reversal was on the ground solely that Judge Lyon's order was a reversal of the referee, who was appointed to hear and determine; and that defendant's remedy was by appeal. The merits were not passed upon. See *Boylan v. George*, 133 App. Div. 514, 117 N. Y. Supp. 573.

The findings of the referee are contrary to the evidence in this case. Thereupon a final judgment was entered August 3, 1909, confirming the sale and directing "that said referee execute to the purchaser upon such sale a conveyance of the property sold." The name of the purchaser is not disclosed or stated in such judgment. This judgment also directed the disposition of the proceeds of sale as follows: To the referee, \$25; to the plaintiff's attorney, including an extra allowance of \$36.25, the sum of \$303.78; to the plaintiff, on her costs on appeal, \$89.15; the whole sum to which defendants were entitled, and the balance to the plaintiff, \$307.07. The plaintiff was also awarded a judgment for deficiency on costs awarded of \$6.05. Then, it is claimed, all interest of these Oneida Indians in these lands was extinguished. The referee's deed, executed September 22, 1907, recites that the sale was made to the plaintiff, Julia Boylan, and the deed was executed and delivered to her.

This final judgment, describing the real estate, also directed as follows:

"It is further ordered, adjudged and decreed that the said purchaser be let into possession of said property, and that any of the parties to this action who may be in possession of said premises or any part thereof, and any person who since the commencement of this action has come into the possession of said property sold, or any part thereof, deliver possession thereof to said purchaser on production of the referee's deed of said premises."

The Indians in possession of the premises and occupying them refused to leave or vacate and surrender possession, and a writ of assistance was granted by the Supreme Court November 20, 1909, by

virtue of which the sheriff of the county forcibly ejected and removed them against their protest.

Thereafter said Julia Boylan conveyed the premises to defendant Anna Siver Moyer for \$1,250, and she gave back a mortgage to secure a part of the purchase price and is now in possession.

[1] No one of the several deeds or conveyances executed and delivered by these Indians in and after 1865 was acknowledged by the grantor before the first judge of Madison county, N. Y., nor was the consent of the superintendent of the Oneida Indians obtained or indorsed thereon, as required by section 3 of chapter 185, Laws of New York, passed April 18, 1843. This act is entitled "An act in relation to the Oneida Indians," and sections 1 to 6, inclusive, read as follows:

"The Oneida Indians owning lands in the counties of Oneida and Madison, are hereby authorized to hold their lands in severalty, in conformity to the surveys, partitions and schedules annexed to and accompanying the treaties made with the said Indians, by the people of this state, in the year one thousand eight hundred and forty-two, and now on file in the office of the secretary of state; and the lots so partitioned and designated by said survey to the said Indians, shall be deemed to be in lieu of all claims and interest of the said Indians, in and to all other lands and property in the Oneida reservation, except the mission lot on lot one, and the church lot on lot two, of the Oneida Purchase, of May 23, 1842, which are to be held by the said Indians as tenants in common.

"Sec. 2. The Governor shall appoint a superintendent of the Oneida Indians, who shall hold his office for the term of two years, subject to be removed for cause.

"Sec. 3. It shall be lawful for the said superintendent of the Oneida Indians, upon application made to him for that purpose, by any Indians or Indian owning lands as aforesaid, to sell and convey such lands to the person or persons so applying, provided the price agreed upon between said Indians or Indian and the said person or persons so applying to purchase said lands, shall, in the opinion of the said superintendent, be not less than a fair and reasonable price therefor; and the said superintendent shall receive, at the time of making such sale, not less than one-fourth of the purchase money in hand, and shall secure the residue by bond and mortgage, payable within four years from the date thereof, with annual interest, to the said superintendent and his successors in office, in trust for the said Indians respectively. A deed of an Indian shall be valid to convey the title of himself, his wife and minor children; and every deed executed by virtue of this act, shall be acknowledged by the grantor before the first judge of Madison county, and the consent of the superintendent shall be indorsed thereon; and, when so executed and acknowledged and certified, shall be recorded in the county in which said land shall lie, with the same effect as other deeds.

"Sec. 4. The said superintendent shall keep a book, in which he shall open and keep a full account of debt and credit with each Indian for whom he acts and for whom he shall receive any money by virtue of this act, which book shall at all times be open for inspection to all persons; and he shall pay over all money as it shall, from time to time, come to his hands, to the Indian or Indians to whom it may rightfully belong, on demand, deducting therefrom his reasonable charges.

"Sec. 5. The said superintendent shall, with the consent of a majority of the chiefs and head men of the said Indians, sell and convey the above mentioned lots of land, held according to Indian usages, and sanctioned by treaties with them on the part of this state, as the common property of all the Oneidas who did not cede their lands to the people of this state previous to the treaty made with them, March 8, 1841, for a fair price, unto any purchaser or purchasers, by requiring from them cash payments; and the conveyances shall be made, executed and acknowledged by the said superintendent; and the consent of the chiefs and head men in council shall also be acknowledged in

the presence of an officer duly qualified to take acknowledgments of deeds: and such acknowledgments shall be endorsed on such deeds, in the like manner and to the same effect as conveyances mentioned in the third section of this act; and the money arising from the sale of said common lands, after deducting the reasonable expenses incurred in the survey, description and the partition of all lands which are the subject of this act, and of all the expenses in the negotiation and conclusion of the administration of their public affairs, shall be paid by him to the said chiefs and head men.

"Sec. 6. The deeds and conveyances made as aforesaid, shall convey all the right, title and interest of the said Indians, or Indian, whose lands shall have been conveyed as aforesaid, of, in and to the same, and shall vest in the purchaser or purchasers, his or their heirs or assigns forever, an absolute estate of inheritance in fee simple."

This law was repealed by section 113, chapter 679, Laws 1892, and section 125, chapter 31, Laws of 1909 (Consol. Laws, c. 26).

Section 4 of chapter 87, Laws of New York of 1843, reads as follows:

"Any native Indian may, after the passage of this act, purchase, take, hold and convey lands and real estate in this state, in the same manner as a citizen; and whenever he shall have become a freeholder, to the value of one hundred dollars, he shall be liable on contracts, and subject to taxation and to the civil jurisdiction of the courts of law and equity of this state, in the same manner and to the same extent as a citizen thereof."

It seems clear that chapter 185, Laws of New York of 1843, in force until 1892, pointed out the mode and manner by which these Oneida Indians could convey their interest in the lands therein referred to, and which included lot 17, and therefore the lands in question here.

[2] The United States does not claim that it ever owned the fee to this Oneida reservation, of which the lands in question formed a part; but the United States does contend that it had jurisdiction over these Indians; that they were and are "wards of the nation," that is, of the United States; and that it is its right and duty and within its power to protect them in and secure to them their rights, thereby protecting its own rights and interests as guardian of such wards. These Indians were living on their own reservation, and were not living with the whites, nor were the whites living with them. They went abroad to work and earn a living, as they had the right to do, without losing any of their property or tribal rights. They took on no new status. They did not abandon their lands or their status as members of the Oneida Tribe of Indians, one of the Six Nations, with which the United States entered into a treaty November 11, 1794, and by so doing they did not emancipate themselves from the guardianship of state or nation.

It is true that the Oneidas, with the other tribes constituting the Six Nations, except one, the Tuscaroras, were nations of the state of New York, located therein, from the time of the discovery of America, and that the lands occupied by them, and set apart or reserved by them as their reservations, respectively, were within the colony of New York, prior to the Revolutionary War, and that the state of New York was one of the original 13 colonies or states entering into and constituting the United States of America on the recognition of our independence. But these tribes were recognized as independent nations in our Con-

stitution, and have been treated as such, and with them the United States has made treaties under the power conferred by that instrument.

In the "Extra Census Bulletin, Indians—The Six Nations of New York, Cayugas, Mohawks (Saint Regis), Oneidas, Onondagas, Senecas, Tuscaroras," by Thomas Donaldson, expert special agent, and by Henry R. Carrington, which is full of information, and some misinformation, we have a good history of the Six Nations as they were in 1900.

This volume contains portraits of Solomon George, one of the George family, Oneida chief, Henry Powliss, Joshua Jones, and Abram Hill, all Oneidas, and gives their Indian names. This volume states (page 4):

"The conclusion is irresistible that the Six Nations are nations by treaty and law, and have long since been recognized as such by the United States and the state of New York, and an enlightened public will surely hesitate before proceeding to divest these people of long-established rights without their consent—rights recognized and confirmed in some cases by the immortal Washington and by more than a hundred years of precedents and legislation."

In 1890, 106 of the Oneidas remained in Madison and Oneida counties (adjoining), and these retained 350 acres of the reservation; the balance having been sold by treaties of June 28, 1785, September, 1788, September, 1795, June 1, 1798, March 5, 1802, and others later, including the one hereinbefore mentioned. All this may reduce the area of a reservation, and the population may be reduced by death and emigration; but this does not annihilate the reservation, or make independent citizens of those remaining thereon, or deprive them of the character of "wards of the nation." Nor does mere authority granted by the legislation of the state to hold their lands "in severalty" have that effect. In this case we have seen that to convey their interests in these lands by authority of the state it was necessary that the deeds be executed by acknowledging the execution thereof before the first judge of the county and have indorsed thereon the approval of the commissioner whose appointment was provided for, and that this law was in full force when the deeds of these lands were made. Clearly there was no compliance with the statute. If that statute was of any force or validity whatever, up to the time it was repealed in 1892, it was only operative when obeyed, or when its essential terms were complied with. Evidently the state of New York recognized that it was unsafe and unwise to give to these improvident Indians the power to dispose of their lands by sale or mortgage as they saw fit, and when they saw fit, and for such price as they saw fit, or might have imposed upon them.

Can such a statute be ignored by the courts? Was obedience to its mandates merely directory and immaterial? A statute of the state or of the United States is to be read and interpreted as one whole, in so far as the one part has any relation to the other, and if I am capable of understanding the act of April 18, 1843, to make a conveyance of land by one of these Oneida Indians valid, or entitled to be recorded, even, it was necessary for the would-be purchaser to have the consent of the "superintendent of the Oneida Indians" and to have that con-

sent indorsed on the deed, and that the deed should be acknowledged before the first judge of the county. It is apparent these things were to be done for the protection of the Indians from imposition and the results of their own providence and ignorance, and were conditions precedent to the transfer of title. I am of opinion Judge Lyon was right in his construction of the statutes, and the results demonstrate the wisdom and necessity of the law for the protection of Indians, as the interests of Mary George, Henry George, William Honyst, and Chapman Schenandoah in these 32 acres of land were eaten up by that partition suit, and they found themselves in debt to the plaintiff, while she became the owner of the property for \$675, and shortly sold it for \$1,250.

The United States has steadily and uniformly asserted its jurisdiction over the Indians of the "Six Nations," which, as stated, included the Oneida Indians and other New York tribes. The New York Indians, 5 Wall. 761, 770, 8 L. Ed. 708; *Fellows v. Blacksmith*, 19 How. 366, 370, 371, 15 L. Ed. 684. Georgia was also one of the colonies of Great Britain, and one of the 13 original states. In *Worcester v. State of Georgia*, 6 Pet. 515, 8 L. Ed. 483, after a careful and exhaustive examination of the relations between the Indian tribes and the United States (not especially the tribes removed beyond the Mississippi to reservations provided for and ceded to them by the United States, but those of the tribes of the original states), it was held that the Indians of these tribes in the original states were wards of the nation, and—

"The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth; they are applied to all in the same sense. * * *

"The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States. * * *

"A reference has been made to the policy of the United States on the subject of Indian affairs, before the adoption of the Constitution, with the view of ascertaining in what light the Indians have been considered by the first official acts, in relation to them, by the United States. * * *

"In this view, perhaps, our ancestors, when they first migrated to this country, might have taken possession of a limited extent of the domain, had they been sufficiently powerful, without negotiation or purchase from the native

Indians. But this course is believed to have been nowhere taken. A more conciliatory mode was preferred, and one which was better calculated to impress the Indians, who were then powerful, with a sense of the justice of their white neighbors. The occupancy of their lands was never assumed, except upon the basis of contract, and on the payment of a valuable consideration.

"This policy has obtained from the earliest white settlements in this country down to the present time. Some cessions of territory may have been made by the Indians, in compliance with the terms on which peace was offered by the whites; but the soil, thus taken, was taken by the laws of conquest, and always as an indemnity for the expenses of the war, commenced by the Indians.

"At no time has the sovereignty of the country been recognized as existing in the Indians, but they have been always admitted to possess many of the attributes of sovereignty. All the rights which belong to self-government have been recognized as vested in them. Their right of occupancy has never been questioned, but the fee in the soil has been considered in the government. This may be called the right to the ultimate domain, but the Indians have a present right of possession.

"In some of the old states, Massachusetts, Connecticut, Rhode Island, and others, where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the power of self-government, the laws of the state have been extended over them, for the protection of their persons and property."

This case frequently has been cited and approved. In *United States v. Kagama*, 118 U. S. 375, 382, 6 Sup. Ct. 1109, 1113 (30 L. Ed. 228), the court cited *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. Ed. 25, and *Worcester v. State of Georgia*, *supra*, and then said:

"In the first of the above cases it was held that these tribes were neither states nor nations, had only some of the attributes of sovereignty, and could not be so far recognized in that capacity as to sustain a suit in the Supreme Court of the United States. In the second case it was said that they were not subject to the jurisdiction asserted over them by the state of Georgia, which, because they were within its limits, where they had been for ages, had attempted to extend her laws and the jurisdiction of her courts over them.

"In the opinions in these cases they are spoken of as 'wards of the nation,' 'pupils,' as local dependent communities. In this spirit the United States has conducted its relations to them from its organization to this time. But, after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern them by acts of Congress. This is seen in the Act of March 3, 1871, embodied in section 2079 of the Revised Statutes [Comp. St. § 4034]:

"No Indian nation or tribe, within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired." * * *

"In the case of *Worcester v. State of Georgia*, above cited, it was held that, though the Indians had by treaty sold their land within that state, and agreed to remove away, which they had failed to do, the state could not, while they remained on those lands, extend its laws, criminal and civil, over the tribes; that the duty and power to compel their removal was in the United States, and the tribe was under their protection, and could not be subjected to the laws of the state and the process of its courts.

"The same thing was decided in the case of *Fellows v. Blacksmith and others*, 19 How. 366 [15 L. Ed. 684]. In this case, also, the Indians had sold their lands under supervision of the states of Massachusetts and of New York, and had agreed to remove within a given time. When the time came a suit to recover some of the land was brought in the Supreme Court of New York, which gave judgment for the plaintiff. But this court held, on writ of error, that the state could not enforce this removal, but the duty and the power to do

so was in the United States. See also the Case of the Kansas Indians, 5 Wall. 737 [18 L. Ed. 667]; New York Indians, 5 Wall. 761 [18 L. Ed. 708].

"The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

These cases have not been shaken or overruled as authority.

In 1906, when the partition action was commenced, the Oneida reservation still existed, although reduced in area, and what remained was peopled by Indians, quite a number of whom made their home on the premises in question; most of them coming and going, it is true, but this was their home. The title had descended to them from those who occupied the lands when Columbus discovered America, and had never gone out of them. These were not lands conveyed to them, or set apart for them, by the state of New York, from its own possessions. When the "emigrating party" went to Wisconsin, all (both emigrating and home parties) released and ceded certain lots, designated on the map referred to, to the state, and those who emigrated ceded all of the lots not ceded to the state to those Indians who remained, and who had the right to remain, and who lost no rights by remaining. The state recognized this by entering into that compact.

But it is urged that by such treaty or compact those who remained were given the right to hold their lands in severalty, and that thereafter they did. But there was no division amongst themselves; no partition by consent or otherwise. But assume there was an understanding that certain Indians owned the lands they occupied; how could those Indians convey by deed or mortgage in the face of the provisions of the statute quoted? Conditions as to and restrictions on alienation were imposed by the state for their protection, and if not complied with the conveyances were invalid. The question is settled in *Tiger v. Western Investment Co.*, 221 U. S. 286, 316, 31 Sup. Ct. 578, 55 L. Ed. 738, and *Heckman v. United States*, 224 U. S. 413, 436, 32 Sup. Ct. 424, 56 L. Ed. 820, in both of which cases allotments had been made to individual members of the Cherokee Tribe of Indians "in severalty," but with restrictions on the power of alienation. In the one case, *Tiger v. Western Investment Co.*, supra, the consent of the Secretary of the Interior was required to conveyances by Indians, and it was held that the restriction on alienation applied, notwithstanding the fact the Indians had become citizens and held in severalty, and conveyances without such consent were held void. The same was held in *Rainbow v. Young*, 161 Fed. 835, 88 C. C. A. 653. In this case the opinion was by Circuit Judge Van Devanter, now of the United States Supreme Court, and was approved in the opinion of the court in *United States v. Sutton*, 215 U. S. 291, 296, 30 Sup. Ct. 116, 54 L. Ed. 200. Judge Van Devanter said:

"In short, they are regarded as being in some respects still in a state of dependency and tutelage, which entitled them to the care and protection of the national government, and when they shall be let out of that state is for Congress alone to determine."

In the *Tiger Case*, *supra*, the court, approving this, and after citing and approving cases holding the like doctrines, said:

"Taking these decisions together, it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage.

"The privileges and immunities of federal citizenship have never been held to prevent governmental authority from placing such restraints upon the conduct or property of citizens as is necessary for the general good. Incompetent persons, though citizens, may not have the full right to control their persons and property."

[3] In the instant case the restriction on alienation by these Oneida Indians of their lands was not imposed by act of Congress, but neither was the right to hold in severalty given by act of Congress. If we assume the state of New York had no authority in the premises, and that the authority was in Congress solely, then there was no right to hold in severalty, and no right of alienation to private individuals whatever. If the state of New York did have jurisdiction and power to make the compact or treaty of May 23, 1842, then it had the right and power to enact chapter 185, Laws of New York of 1843, and the restrictions and conditions imposed on the right of alienation were valid and binding, as we have seen. The authorized grantor of the right to hold in severalty has the right to impose restriction on alienation. The fact these Indians had become citizens, if they had, in no way impairs the force or effect of these restrictions on the power of alienation. *Tiger v. Western Investment Co.*, *supra*, and *Heckman v. United States*, 224 U. S. 413, 436, 437, 32 Sup. Ct. 424, 56 L. Ed. 820.

[4] What was the effect of the partition action, and of the final judgment of the Supreme Court of the state of New York directing a sale of these premises, and of the sale made under and pursuant thereto?

If it be true, as said in the decided cases as to other Indians and the Six Nations, that these Oneida Indians were and are the wards of the nation, and that their tribal lands were not subject to the control of the courts of the state, but of Congress, then such judgment and sale had no effect or validity whatever. The court was acting without jurisdiction of the subject-matter of the suit. Jurisdiction of the persons of these Indians gave no jurisdiction of the subject-matter. The statutes of the state of New York had imposed valid restrictions on the sale of these lands by these Oneida Indians, and the conditions imposed were not complied with in any respect and the conveyances to the plaintiff in the partition suit were made while that statute was in force and in utter disregard of its provisions. She took no title, as we have seen, by virtue of those conveyances, and was not a joint owner, or a tenant in common, and had no right of possession in *præ-senti* or in *futuro*. The same defects are present in the alleged title obtained under the statutory foreclosure by advertisement. If these Indians, after 1843, actually partitioned these lands by agreement, and

this partition by parol was followed by actual possession under it, such partition might be valid, assuming they had been authorized to hold as tenants in common or in severalty. But that is not the question here. The question here is: Did the defendant, Julia Boylan, obtain title to these lands in question through the sale decreed and made and confirmed by the court in that suit?

As already stated, neither the state of New York, nor the United States, nor any of their officers, were made parties to the action of partition and sale, and no guardian ad litem of these Indians, who were made defendants, and whose lands were directed to be sold and were sold, was appointed. If these Indians, who were made defendants, were incompetents prior to the compact or treaty of May, 1842, it seems to me they were incompetents thereafter. When and by what act of the state of New York, or of the United States, or of their own, did they cease to be incompetents, and "wards of the nation" or of the state, and without their consent, as to their ancestral lands and reservation, become subject and liable to be deprived of same by a decree of court to which their guardian, the United States, was not a party, and as to the making of which such guardian was not consulted? Is everything that has been said and decided on this subject since the formation of our government a mockery and a sham? Did the act of the state of New York in procuring a portion of these Indians to emigrate to Wisconsin, procuring those who did emigrate and those who remained to cede to the state certain well-defined parts of their reservation, and those who did emigrate to cede or transfer their interest in the lands not ceded to the state of New York to those who did not emigrate, but remained on the remnant of the Oneida reservation, accompanied by permission of the state to hold same in severalty, make those Indians who did not emigrate—that is, the home party—competent, and change their status from that of wards of the nation to that of citizens of the state of New York, with all the rights of citizens, and subject to all its laws as to their real property so held? Where is the act of Congress or of the Legislature of the state of New York that so declares, even by implication?

For two good reasons that sale of these lands in question made in the partition suit was not and is not valid: First, the plaintiff was not a tenant in common, or joint tenant, and had no interest in such lands; and, second, the suit could not be maintained against these Indians, wards of the nation, and a decree of sale made, as neither the state nor the United States was a party to the suit. That final judgment of sale is in no sense *res adjudicata* as the parties are not the same.

[5] Thus far we have dealt with this case almost exclusively on the theory that the Indians are wards of the nation, and that the United States has full jurisdiction over them and the disposition of their lands, notwithstanding such lands were a part of the domain of one of the original states of the Union.

We will now look to and consider the action of the state of New York in regard to Indian lands belonging to any nation, tribe, or band of such Indians. Article 1, § 16, of the Constitution of 1846 of the state of New York, provided as follows:

"No purchase or contract for the sale of lands in this state, made since the fourteenth day of October, one thousand seven hundred and seventy-five, or which may hereafter be made, of, or with the Indians, shall be valid, unless made under the authority and with the consent of the Legislature."

This was carried into the Constitution when amended, and will be found in volume 1 of the "Revised Statutes and General Laws of New York," by Birdseye, published in 1896. Section 384a of the Penal Code of the state of New York, and made a part thereof by chapter 692, Laws of 1893, provides as follows:

"A person who without the authority and consent of the Legislature, in any manner or for [or] on any terms, purchases any lands within this state of any Indian residing therein, or makes any contract with any Indian for or concerning the sale of any lands within this state, or gives, sells, demises, conveys or otherwise disposes of any such lands, or any interest therein, or offers so to do, or enters upon or takes possession of or settles upon any such lands, by pretext or color of any right or interest in the same, in consequence of any such purchase, or contract made or to be made, since October 14, 1775, is guilty of a misdemeanor."

Chapter 420, passed April 11, 1849, of the Laws of New York, being an act entitled "An act for the benefit of Indians," provided as follows:

"All nations, tribes or bands of Indians who own and occupy Indian reservations within this state, and hold lands therein as the common property of such nations, tribes or bands, may by the acts of their respective Indian governments, divide such common lands into tracts or lots, and distribute and partition the same, or parts thereof, quantity and quality relatively considered, to and amongst the individuals or families of such nations, tribes and bands respectively, so that the same may be held in severalty and in fee simple, according to the laws of this state; but no lands occupied and improved by any Indian, according to the laws, usages or customs of the nation, shall be set off to any person other than the occupant, or his or her family.

"Sec. 8. In case such distribution or partition be made, the deeds to be made to effect the same shall be made by such officers, agents or commissioners as said governments shall appoint, and the commissioners of the land office shall approve, but before any such deeds be executed, the proceedings and acts authorizing such execution and appointing the parties so to do, shall be authenticated and proved before and to the satisfaction of the county judge of the county in which the lands to be conveyed shall lie, and recorded in the clerk's office of the county.

"Sec. 9. Every deed which shall be executed under and in pursuance of such authority, shall be acknowledged before such county judge by the parties who shall execute it, and said judge shall examine such deeds, and see that they be in due form, and in pursuance of the authority under which they be executed, and indorse on each deed his certificate of such examination and acknowledgment, and such certificate shall authorize the county clerk to record such deeds in the records of deeds for his county.

"Sec. 10. No lands thus distributed and partitioned, shall be alienable by the grantee thereof or the heirs of such grantee for twenty years after the day of the recording of the said deed thereof; but they may be partitioned amongst the heirs of any grantee who shall die. They shall not be subject to any lien in incumbrance by way of mortgage, judgment or otherwise."

This provides a mode and manner of partitioning Indian lands, and there are safeguards around such partitions, and it will be noted that in section 10 it is expressly provided that such lands, when so divided, "shall not be subject to any lien in incumbrance by way of mortgage, judgment or otherwise." These provisions in substance were carried into the Indian Law, and may be found in Birdseye's "Revised Stat-

utes," volume 2, published in 1896, at pages 1488 and 1489. As carried into the Revised Statutes, such lands, when partitioned in the mode and manner provided, were made inalienable by the grantee named in the deed of partition for 20 years after the recording of the deed effecting the partition, but provided that same might be partitioned among the heirs of a grantee who dies. These provisions of the statutes were never complied with, nor was there any pretense of complying therewith.

In 1802 the Congress of the United States enacted what is known as the "Indian Intercourse Act," which invalidates any purchase of lands from Indians unless "made by treaty or convention, entered into pursuant to the Constitution." Act March 30, 1802, c. 13, § 12, 2 Stat. 143.

In the case of the Seneca Nation of Indians v. Christie, 126 N. Y. 122, 27 N. E. 275, the Court of Appeals of this state held that on the declaration of independence the colonies became sovereign states, and as such succeeded to the title of the crown of England to all the ungranted lands within their respective boundaries, with the exclusive right to extinguish by purchase the Indian titles, and to regulate dealings in regard thereto with the Indian tribes, and that the colonies retained this power after the adoption of the federal Constitution. The court also held that the United States could not impair their title, or authorize any purchase of lands within a state, without the consent of the state, and that the provisions of the Constitution of the United States, prohibiting any state from entering into any treaty, etc., does not apply to negotiations or dealings between a state and Indian tribes therein for the extinguishment of the Indian title to land in the state, and that such a treaty is not a treaty in a constitutional sense, and is not inconsistent with the exercise by the United States of its general jurisdiction for the protection of the Indians in their right of occupancy of their lands. It is seen that this case recognizes the general jurisdiction of the United States to protect the Indians in the occupancy of their lands and thereby recognizes the guardianship of the general government over the Indians in the original 13 states.

There is a proviso in the law of Congress referred to, referring to and providing for the presence of a commissioner or commissioners of the United States to propose and adjust with the Indians the compensation to be made for their claims to lands within such state which are to be extinguished by treaty. The Court of Appeals held that this does not require that the treaty should be one between the United States and the tribe from whom the purchase was proposed to be made, and that it is sufficient if the purchase is made at a treaty held under the authority of the United States and in the presence and with the approbation of its commissioner. The court therefore held that the state or its agent was authorized to enter into a treaty or convention with the Indian tribe within its borders for the extinguishment of the Indian title, provided it was entered into in the presence and with the approval of a commissioner of the United States appointed to attend the same. The court also held that the policy of the state of New York has been in full accord with that of the United States in prohibiting all private dealings with and purchases from Indians, ex-

cept under the supervision of public officials and with the consent of the Legislature. See, also, 22 Cyc. 127. See, also, Const. N. Y. 1777, art. 37; Const. 1821, art. 7, § 12; Const. N. Y. 1846, art. 1, § 16.

It is needless to say that the deeds of these Indian lands, made by Indians and which purported to convey the title to the 32 acres of land in question, were made, executed, and delivered in violation and defiance, not only of the act providing for the disposition of lands by the Oneida Indians to which attention has already been called, but of the Constitution of the state of New York and of the act providing for the partition of tribal lands among the members of the tribe. The purchasers of these lands from the Indian occupants were bound to take notice of the fact that such lands constituted a part of the Indian reservation, and were owned by Indians who were members of that tribe, and also of the provisions of the Constitution of the state and the various laws relating to the disposition of lands by Indians and the restrictions thereon. Those conveyances, except the first three, which do not affect this case in the slightest, were not made under the supervision of public officials as provided by law, or with the consent of the Legislature of the state, but in violation of the statute to which attention has been called, and which provided how and when and in whose presence and with whose approval such a conveyance could be made.

The case in the Court of Appeals to which I have called attention does not presume to deny, but in fact recognizes, the general jurisdiction of the Congress of the United States over all the Indians in all the states of the Union, who have not abandoned and surrendered their tribal relations and affiliations, and their reservations, and have become a part of the general citizenship of the state where they reside.

In the instant case the evidence conclusively shows that the Indians who made these conveyances had not abandoned their tribal relations and customs, except as all Indians do who approach more or less towards civilization. They were residing on the remaining part of the reservation and making it their home. Their interests therein came by descent from the original proprietors of the soil, who owned and occupied it long before the discovery of America by Christopher Columbus. Neither the state of New York nor the United States had extinguished their title, or attempted so to do. In my judgment, it is of no moment how these Indians dressed. It would be expected that, as they advanced towards civilization, they would adopt more or less some of the customs and the dress of the people of the United States who surrounded them. I cannot conceive how or why their dressing themselves like civilized men and women should in any way affect their rights to and interest in their lands, or in any way tend to validate a deed given by them of their lands. The validity of their deeds of land is made to depend on compliance with certain statutory and constitutional provisions, and not on their mode of dress or means of obtaining a livelihood.

This brings us to the consideration of the all-important question in this case, whether or not the United States can maintain this action for the protection of these Indians. It must be conceded that the

United States is not the owner of the fee to these lands, and never was. It should appear here that the United States government, under a treaty with the Oneida Indians, is paying to the remnants of that tribe each year several thousand dollars worth of goods. It is claimed that this is not done by way of guardianship and protection of these Indians, but as compensation for the loyalty of their ancestors during the Revolutionary War to the cause of the colonies. Whether these goods are paid each year for the one reason or the other, the fact remains that the United States government has and shows an interest in these Indians and aids in their support and maintenance. The United States has an interest in their protection. The interest referred to is not a pecuniary one, as was said by Mr. Justice Hughes in giving the opinion in *Heckman v. United States*, supra, at page 437 of 224 U. S., at page 431 of 32 Sup. Ct. (56 L. Ed. 820):

"During the continuance of this guardianship, the right and duty of the nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid. While relating to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States. A review of its dealings with the tribes permits no other conclusion. Out of its peculiar relation to these dependent peoples sprang obligations to the fulfillment of which the national honor has been committed. 'From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by Congress, and by this court, whenever the question has arisen.' *United States v. Kagama*, 118 U. S. 375, 384 [6 Sup. Ct. 1109, 30 L. Ed. 228].

"This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust. When, in 1838, patent was issued to the Cherokees, providing that it was subject to the condition that the granted lands should revert to the United States, if the Cherokee Nation became extinct or abandoned them, neither the rights nor the duties of the United States were confined to the reversionary interest thus secured. And its relinquishment made it no less a matter of national concern that the restrictions designed to protect the Indian allottees should be enforced. But this object could not be accomplished if the enforcement were left to the Indians themselves. It is no answer to say that conveyances obtained in violation of restrictions would be void. That, of course, is true, and yet, by means of the conveyances and the consequent assertion of rights of ownership by the grantees, the Indians might be deprived of the practical benefits of their allotments. It was the intent of Congress that, for their sustenance and as a fitting aid to their progress, they should be secure in their possession during the period specified and should actually hold and enjoy the allotted lands. As was well said by the court below: 'If they are unable to resist the allurements by which they are enticed into making the conveyances, will they be expected to undertake the difficult and protracted litigation necessary to set aside their own acts? To ask these questions is to answer them. Congress intended that both the Indians and the members of the white race should obey its limitations. A transfer of the allotments is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States. If these Indians may be divested of their lands, they will be thrown back upon the nation a pauperized, discontented and, possibly, belligerent people.' The authority to enforce restrictions of this character is the necessary complement of the power to impose them."

I think these observations of Mr. Justice Hughes are applicable here. The conditions are somewhat different, but all the same the guardian-

ship recognized by the Court of Appeals of the state of New York still continues, and I cannot see why it is not the duty of the nation to enforce the restrictions designed for the security of the Indians. It is immaterial, in my judgment, whether those restrictions on alienation of their lands was imposed by the state or by the nation. They exist and the conditions have been violated. Mr. Justice Hughes said, to repeat:

"From their weakness and helplessness * * * there arises the duty of protection and with it the power."

If it be true, as it was, that the Oneida Nation of Indians stood as a bulwark to the best of its ability during the Revolutionary War between those tribes who adhered to the crown and the infant colonies, and which fidelity to the cause of the colonies aided to bring about the recognition of the independence of the United States, all the greater is the duty of the United States to now see to it that the remnants of this tribe, whether few or many, have the protection of this government. I cannot understand the argument that this right of protection at the hands of the United States is any the less for the reason those entitled to it are now few in numbers. If the right to protection exists at all, it ought to survive so long as a single Indian entitled thereto invokes it and remains on the reservation, and in my judgment it is entirely immaterial whether that reservation has been reduced from thousands of acres to one or one hundred acres.

It is error to assume that the annual gift made by the United States of cloth, etc., to the Oneida Indians in New York, is in recognition of or payment for their fidelity and services during the Revolutionary War, as we shall see by a reference to the several treaties. In 1846 was published volume 7 of United States Statutes at Large, Indian Treaties, and this volume contains the various Indian treaties made by the United States up to that time. The first treaty was made between the United States and the Delaware Nation September 17, 1778 (7 Stat. 13). This treaty is interesting, but not important here.

The second treaty was made October 22, 1784 (7 Stat. 15), at Ft. Stanwix, on the Mohawk river, in New York, and was between the United States in Congress assembled and the "sachems and warriors of the Six Nations"—Senecas, Mohawks, Onondagas, Cayugas, Oneidas, and Tuscaroras—all named in the treaty. By article I of that treaty six hostages were to be delivered up by the Senecas, Mohawks, Onondagas, and Cayugas, who had been hostile to the United States until the prisoners taken by these nations during the war were delivered up. By article II it was provided:

"The Oneida * * * shall be secured in the possession of the lands on which they are settled."

Article III gives certain boundaries, and defines the western boundaries, and concludes:

"So that the Six Nations shall and do yield to the United States all claims to the country west of said boundary [which boundary was west of Buffalo], and then they shall be secured in the peaceful possession of the lands they inhabit east and north of the same, reserving only six miles square round the fort of Oswego, to the United States, for the support of the same."

The Six Nations then occupied substantially all the lands west of Ft. Stanwix.

January 9, 1789, peace having been declared and the independence of the United States fully recognized, another and a confirmatory treaty (7 Stat. 33) was made between the same parties (except the Mohawks, none of whom attended), which referred to the treaty of Ft. Stanwix, renewed the engagements, confirmed the old boundaries, and confirmed in the Six Nations all their lands, and article 3 said:

"The Oneida and Tuscarora Nations are also again secured and confirmed in the possession of their respective lands."

This treaty, in article 4, also expressly confirmed and perpetuated the said treaty of Ft. Stanwix. By a separate article, if a crime was committed by an Indian or Indians of the Six Nations, he or they were to be surrendered at the nearest United States post or to the authorities of the state.

November 11, 1794 (confirmed November 17, 1794), another treaty was made between the United States and the Six Nations (7 Stat. 44), all of them, by which, in article I peace and friendship was to be perpetual between them. By article II it is provided:

"The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase."

By article IV, the Six Nations were not to claim other lands in the United States; by article V, the Six Nations ceded the right to the United States to make and maintain a wagon road on their lands; and by article VI, it was provided as follows:

"In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations, and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established, strong and perpetual, the United States now deliver to the Six Nations, and the Indians of the other nations residing among and united with them, a quantity of goods of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred dollars, heretofore allowed them by an article ratified by the President, on the 23d day of April, 1792, making in the whole \$4,500, which shall be expended yearly forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils suited to their circumstances, and in compensating useful artificers, who shall reside with or near them, and be employed for their benefit. The immediate application of the whole annual allowance now stipulated, to be made by the superintendent appointed by the President for the affairs of the Six Nations, and their Indian friends aforesaid."

By a note it was provided that this annual allowance was to be expended for such members of the Six Nations as should reside within the limits of the United States. In the above is found the provision for

the annual allowance of goods and the consideration and reason therefor.

On December 2, 1794, another treaty (7 Stat. 47) was made between the "Oneida, Tuscarora, and Stockbridge Indians, dwelling in the country of the Oneidas," reciting that during the war these Indians—"adhered faithfully to the United States, * * * and in consequence" they, "at an unfortunate period of the war, were driven from their homes, and their houses were burned and their property destroyed, and as the United States in the time of their distress, acknowledged their obligations to these faithful friends, and promised to reward them, and the United States being now in a condition to fulfill the promises then made, the following articles are stipulated by the respective parties for that purpose to be in force when ratified by the President and senate:

"Article I. The United States will pay the sum of five thousand dollars, to be distributed among individuals of the Oneida and Tuscarora Nations, as a compensation for their individual losses and services during the late war between Great Britain and the United States."

Articles II, III, and IV then provided for the erection of grist and saw mills and the erection of a church on the lands at Oneida and the employment and payment of men to manage such mills. In consideration thereof, in article V, the Indians acknowledged themselves satisfied and—

"now acknowledge themselves satisfied, and relinquish all other claims of compensation and rewards for their losses and services in the late war."

These treaties or compacts make it perfectly plain that the annual gifts or payments of cloth, etc., made heretofore and still being made by the United States to this remnant of the once powerful tribe of Oneida Indians, and which remnant remains in the state of New York, has nothing whatever to do with compensation for loyalty or services or losses during the Revolutionary War. That was a present payment in full.

Under the treaties certain of the Indians of the Six Nations, prior to 1838, including certain of the Oneidas and Onondagas, had removed to Wisconsin, in the vicinity of Green Bay; but certain of them had remained in New York on their respective reservations—the Onondagas on the Onondaga reservation, which is south of the city of Syracuse, and the Oneidas on the Oneida reservation, south of Oneida, and partly in Madison county (including the lands in question). The Oneidas had divided into three parties, known as "the Orchard party" and the "First" and "Second Christian parties." Hence the reference in certain treaties to these parties.

January 15, 1838 (7 Stat. 550), a treaty or compact was entered into between the United States and "the chiefs, head men and warriors of the several tribes of New York Indians assembled in council," known as "the New York Indians." This was amended and ratified by the United States Senate June 11, 1838. This treaty provided for the ceding of certain lands in Wisconsin by the Indians to the United States, and in consideration thereof for the setting apart of certain lands west of Missouri by the United States to the Indians, viz.:

"Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees and Brothertowns residing in the state of New York."

This treaty made special provision for the Oneidas residing in the state of New York, viz.:

"The United States will pay the sum of \$4,000, to be paid to Baptista Powlis, and the chiefs of the First Christian party residing at Oneida, and the sum of \$2,000 shall be paid to William Day, and the chiefs of the Orchard party residing" at Green Bay, "for expenses incurred and services rendered in securing the Green Bay country, and the settlement of a portion thereof; and they hereby agree to remove to their new homes in the Indian Territory, as soon as they can make satisfactory arrangements with the Governor of the state of New York for the purchase of their lands at Oneida." Article 13.

February 3, 1838 (7 Stat. 566), a treaty or compact was made between the United States and the First Christian and Orchard parties of the Oneidas then residing at Green Bay, Wis., which in no way related to lands or Indians in the state of New York. These various treaties and compacts show the continued guardianship and jurisdiction exercised by the United States over the Oneida Indians—those who had removed to Wisconsin and those who remained in New York at Oneida prior to the treaty of 1842.

March 3, 1871 (see section 2079, R. S. U. S.), Congress provided that "no Indian nation or tribe within the territory of the United States" should be recognized as an independent nation, tribe, or power with whom the United States might contract by treaty, but at the same time it provided that all existing treaties, etc., should be recognized and should in no wise be impaired by the act. This left the treaties referred to in full force. See *Lone Wolf v. Hitchcock*, 187 U. S. 553, 566, 23 Sup. Ct. 216, 47 L. Ed. 299.

By chapter 3 of the Revised Statutes of the United States, sections 2111 to 2126 (Comp. St. §§ 4095-4118), provision was made generally for the "government and protection of Indians." Section 2116 (section 4100) relates to sales by Indians of their lands, and says:

"No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

In *Franklin v. Lynch*, 233 U. S. 269, 271, 34 Sup. Ct. 505, 506, 58 L. Ed. 954, as in *Gritts v. Fisher*, 224 U. S. 640, 32 Sup. Ct. 580, 56 L. Ed. 928, this provision came under consideration and it was held:

"As the tribe could not sell, neither could the individual members, for they had neither an undivided interest in the tribal land nor vendible interest in any particular tract."

Here, even if under the treaty these Oneida Indians held as tenants in common, they were subject to the restrictions as to mode and manner of making conveyances, and such conditions were not complied with. Section 2103 (section 4087) related to contracts with Indians, and this section is applied and enforced in *Green v. Menominee Tribe*, 233 U. S. 559, 34 Sup. Ct. 706, 58 L. Ed. 1093. The United States still exercises and enforces its jurisdiction over the Indians in the state of New York on reservations as to trafficking in intoxicating liquors and in other respects; and see Act Cong. March 3, 1885, c. 341, § 9, 23 Stat. 362, 385 (Comp. St. § 10502).

[6] I cannot find that the United States has ever conferred on these Oneida Indians the right to hold the lands of that reservation in severalty, or to mortgage or incumber same, or that the state has conferred any such power, unless it be under and subject to the restrictions named and hereinbefore pointed out. I am unable to find any authority which would enable one member of such tribe to sell and convey his interest in the reservation to an outsider, and confer in such purchaser the right to partition and sell in partition, or have sold in such an action, these Indian lands held by several of the tribe in common. I find no law which will sanction a sale of such lands, so owned and held, in a partition action brought by any person. Neither the laws of the United States nor the laws of the state of New York recognize such a mode of extinguishing the rights and title of the Indians in such reservation.

It appears that the attempted sales of their interests in these lands made by the Indians, as above stated, were contrary to and in violation of the policy of both the United States and the state of New York, and also contrary to and in violation of the statutes of both these sovereignties. The Indians did not own the ultimate fee, which is probably in the state of New York. *Clark et al. v. Smith*, 13 Pet. 195, 201, 10 L. Ed. 123; *Fletcher v. Peck*, 10 U. S. (6 Cranch) 87, 141, 3 L. Ed. 162.

I am of the opinion, and conclude, that while the United States does not own the fee to the lands in question, and never did, the United States has such an interest as enables it to maintain this action and restore to these wards of the nation, for whose benefit this action is brought, the possession of the lands from which they were wrongfully ejected and removed in violation of the laws of both the state of New York and of the United States. *Heckman v. United States*, 224 U. S. 413, 438, 32 Sup. Ct. 424, 56 L. Ed. 820; *United States v. Kagama*, 118 U. S. 375, 384, 6 Sup. Ct. 1109, 30 L. Ed. 228; *United States v. Rickert*, 188 U. S. 432, 437, 444, 23 Sup. Ct. 478, 47 L. Ed. 532; *United States v. Noble*, 237 U. S. 74, 79, 35 Sup. Ct. 532, 59 L. Ed. 844; *United States v. Nice*, 241 U. S. 591, 597, 36 Sup. Ct. 696, 60 L. Ed. 1192; *United States v. Gray*, 201 Fed. 291, 293, 119 C. C. A. 529; *United States v. Fitzgerald*, 201 Fed. 295, 296, 119 C. C. A. 533; *United States v. Debell et al.*, 227 Fed. 760, 764, 142 C. C. A. 284; *Bowling v. United States*, 233 U. S. 528, 534, 34 Sup. Ct. 659, 58 L. Ed. 1080; *United States v. Waller*, 243 U. S. 452, 462, 37 Sup. Ct. 430, 61 L. Ed. 843.

In the case last cited, *United States v. Waller*, while it was held that in that case the action could not be maintained by the United States, it was expressly stated at pages 462 and 463 of 243 U. S., at page 433 of 37 Sup. Ct. (61 L. Ed. 843) that—

“In *Heckman v. United States*, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820, it was held that the United States could maintain a bill to cancel conveyances made by members of the Cherokee Nation in violation of restrictions imposed by acts of Congress.”

This recognized the authority of that case. The court then went on to say in the *Waller Case* that with respect to the lands in question the United States had no interest in or control over them, having granted

to the Indians, under what is known as the Clapp Amendment (Act March 1, 1907, c. 2285, 34 Stat. 1015), found on page 461 of the case (37 Sup. Ct. 432, 433), full and specific power to alienate such lands and gives good title. Having expressly given to the individual Indians, to whom such lands had been allotted in severalty, full power to alienate and convey them, no restrictions or conditions whatever being imposed, and such power to convey having been exercised, it would seem almost impossible to contend that the United States could question the validity of the conveyances so authorized.

In *Bowling v. United States*, supra, the holdings were:

"The guardianship of the United States over allottee Indians does not cease upon the making of the allotment and the allottee becoming a citizen of the United States. *Tiger v. Western Investment Co.*, 221 U. S. 286 [31 Sup. Ct. 578, 55 L. Ed. 738].

"The United States has capacity to sue for the purpose of setting aside conveyances of lands allotted to Indians under its care, where restrictions upon alienation have been transgressed. *Heckman v. United States*, 224 U. S. 413 [32 Sup. Ct. 424, 56 L. Ed. 820].

"A transfer of allotted lands contrary to the inhibition of Congress is a violation of governmental rights of the United States arising from its obligation to a dependent people, and no stipulations, contracts, or judgments in suits to which the United States is a stranger can affect its interest.

"The authority of the United States to enforce a restraint lawfully created by it cannot be impaired by any action without its consent."

In the *Bowling Case* the act of Congress (Act March 2, 1889, c. 422, 25 Stat. 1013) allowing the allotment and providing for the issuance of patents to the individual Indians provided that "the land so allotted shall not be subject to alienation for twenty-five years from the date of the issuance of the patent therefor," and the land was exempted from taxation, and the patent was to recite the restrictions, etc. The alienation was made by the heirs of the Indian to whom the allotment was made, he having died. It was held that the restrictions on alienation ran with the land, and bound the heirs as well as the allottee; that it was not a mere personal restriction operative only on the allottee. However, in the opinion Mr. Justice Hughes, giving same, said:

"It is contended by the appellants that when the allotment was made, and the allottee became a citizen of the United States, the guardianship of the government ceased. But this contention is plainly untenable. *Tiger v. Western Investment Co.*, 221 U. S. 286 [31 Sup. Ct. 578, 55 L. Ed. 738]. And it is no longer open to question that the United States has capacity to sue for the purpose of setting aside conveyances of lands allotted to Indians under its care, where restrictions upon alienation have been transgressed. Since the decision below [in the *Bowling Case*], the precise question has been determined by this court in *Heckman v. United States*, 224 U. S. 413 [32 Sup. Ct. 424, 56 L. Ed. 820], and it was there held that the authority to enforce restrictions of this character is the necessary complement of the power to impose them."

If, then, the Congress of the United States had the power to impose restrictions on the alienation by the Oneida Indians of their lands, it has the power to enforce them. The right of the United States to enforce restrictions on the alienation of their lands by Indians does not depend on ownership by the United States of an interest in such lands, or on

the fact it once did own an interest therein and imposed a restriction on alienation when it made the grant or allotment to the Indians. When the United States sets apart a portion of its domain for occupancy by the Indians, that right of occupancy and its duration depend on the terms of the treaty. When Congress authorizes such lands to be held in severalty by such Indians, and directs that patents issue, it has the right to impose such restrictions on alienation by the patentees as it sees fit. By virtue of such fact, and of the relation of guardian and ward, the United States in its own name may enforce such restrictions, and protect such Indians from the consequences of their own incapacity and also from imposition. Such is the right of the United States and such is its duty as we have seen. It is not necessary that the Indians or Indians concerned be made parties. It has repeatedly been decided that the Constitution of the United States conferred jurisdiction over the Indian tribes and their property in the several states of the Union, and this jurisdiction was exercised as we have seen. It was never successfully denied.

The state of New York, in dealing with the tribes remaining wholly or partly in the state, has recognized and still recognizes this right of the general government, and the state has also imposed restrictions on alienation of lands by such Indians. By whom are such restrictions to be enforced, if not by the guardian of such Indians, the United States? This is but the exercise of a governmental right of the United States to enforce a restriction made for the benefit and protection of wards of the nation, and it matters not by whom the restriction or provision for their benefit was made provided it was lawfully done. The guardian of an incompetent is the one to enforce the right and protect him or her in the enjoyment of his or her rights, no matter by whom such rights were conferred. Neither the United States nor the state of New York was a party to the partition suit, and same is of no force or effect. *Bowling v. United States*, supra.

United States v. Nice, 241 U. S. 591, 601, 36 Sup. Ct. 696, 60 L. Ed. 1192, expressly overrules *Matter of Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848, and holds:

(1) That the allotment of lands to Indians to hold and own in severalty does not dissolve the tribal relation or release the Indians from the control of the Congress of the United States.

(2) That it is for Congress, and not the courts, to say when the tribal existence shall be deemed to have terminated.

(3) That when Congress terminates the tribal relation it does so in express terms, and not by implication.

(4) The grant of citizenship does not terminate the tribal status, and he remains an Indian and an Indian ward as well.

Applying these principles to the instant case, we must conclude that Congress has not terminated the tribal relation of these Oneida Indians, has not conferred on them citizenship, has not authorized them to hold their lands in severalty, but, if it has, the tribal relation continues; that the United States has not authorized or empowered them to sell and convey their lands except under restrictions; that the state

of New York had no power to do these things; and that such Oneida Indians remain Indians and wards of the United States.

In the act of March 3, 1885 (chapter 341). Congress not only continues and provides for the payment of the New York Indian agency, but recognizes the existence and obligations of the treaty of November 17, 1794, and provides for the payment of the annuity therein and thereby agreed to be paid to the Six Nations of New York, and then in section 9 of such act provides for the trial of all Indians committing any of the crimes enumerated in such section within any territory of the United States, and then says:

"And all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

In *Choctaw Nation v. United States*, 119 U. S. 1, 27, 7 Sup. Ct. 75, 90 (30 L. Ed. 306) the court reiterates and approves what was said in *United States v. Kagama*, 118 U. S. 375, 383, 6 Sup. Ct. 1109, 1114 (30 L. Ed. 228):

"These Indian tribes are the wards of the nation. They are communities dependent on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection."

Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. Ed. 643, cited by the defendants, has nothing whatever to do with the Oneida Indians, or their ownership of or right to alienate their lands, but does show that the Indians in question here are not citizens. It is true that Mr. Justice Gray cites a revenue case decided by Judge Wallace some years ago and some of the remarks made by him in that case. The statute of the state of New York (Laws of 1843, chapter 87) referred to by Mr. Justice Gray never had any application to the Oneida Indians, as the mode and manner in which and the restrictions under which they were to convey their lands were specified in another act of the Legislature enacted at the same session, and these restrictions on alienation have been pointed out and both statutes quoted. So one of the many errors of the legislative committee appointed to investigate Indian affairs and report thereon has been pointed out. I am not convinced that the several treaties, between the Oneida Indians, one of the Six Nations, and the United States, were and are mere scraps of waste paper and have no validity; so of the statutes relating to the government of Indians both in the original 13 states and the territories owned exclusively by the government.

The defendants have not claimed that the conveyances made by these Indians complied with the statutes of the state of New York as to their execution, etc. The state of New York never removed those restrictions and limitations, or validated the conveyances. For that reason Julia Boylan never had any title or interest in the lands which would enable her to maintain partition. The United States was not a party

to the partition suit, and is not bound thereby, and hence, within the numerous cases, if the United States retains its guardianship over these Indians, it may maintain this action. I fail to find any evidence that the United States has ever surrendered such guardianship. On the other hand, it is still engaged in carrying out its treaty obligations with those remaining in New York and those who removed to the West.

I am of the opinion, and hold, that the United States and the remnants of these Oneida Indians still maintain and occupy towards each other the relation of guardian and ward, and that the United States may maintain this action; also that the partition action and judgment and decree of sale made therein, and above mentioned, was and is void so far as the United States and the ejected Indians are concerned, and that such Indians were wrongfully ejected and removed from the lands described therein and in the complaint in this action. It is not doubted that the state of New York could obtain title to these lands; that is, obtain and extinguish the right of occupancy which belongs to the Indians, the ultimate fee being in the state, but it has never done so. And the state has never conferred the absolute and unrestricted right on these Indians to convey these lands. The restrictions on alienation were valid, and have not been complied with.

There will be a decree declaring such conveyances of these lands and the judgment of sale in the partition action null and void, and directing the restoration of the ejected Indians to the possession thereof. Under all the circumstances, no costs will be imposed.

EASTERN S. S. CORPORATION v. GREAT LAKES DREDGE & DOCK CO.
GREAT LAKES DREDGE & DOCK CO. v. EASTERN S. S. CORPORATION.

(Circuit Court of Appeals, First Circuit. March 7, 1919.)

Nos. 1354, 1355.

1. SHIPPING ⇨204—LIMITED LIABILITY—"VESSEL."

A temporarily sunken drillboat, used for removing ledges, *held* a "vessel," within Rev. St. §§ 4283-4289 (Comp. St. §§ 8021-8027), limiting the liability of vessel owners for collisions occurring without their privity or knowledge.

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

2. SHIPPING ⇨208—LIMITED LIABILITY—AGENT'S KNOWLEDGE.

The privity or knowledge of a vessel owner's superintendent having general control and direction of its business at Boston *held* the owner's knowledge or privity, within Rev. St. §§ 4283-4289 (Comp. St. §§ 8021-8027), limiting the vessel owner's liability for damages incurred without his privity or knowledge.

3. SHIPPING ⇨209(3)—LIMITED LIABILITY—EVIDENCE.

Evidence that owner of a drillboat was notified of its sinking some three-fourths of an hour before a steamship collided with it, that he was then some three miles from the wreck, etc., does not sustain a finding that he had sufficient opportunity to mark the wreck after receiving news of the sinking and before the collision.

4. NAVIGABLE WATERS ⇨24—WRECK—DUTY TO MARK—KNOWLEDGE OF OWNER.

Act March 3, 1899, § 15 (Comp. St. § 9920), requiring owners of craft sunken in navigable channels to mark their location, is a criminal statute, and the duty imposed does not arise until the owner receives knowledge that his vessel has been sunk.

5. SHIPPING ⇨208—NEGLIGENCE—MARKING WRECK.

A dredge company, locating its drillboat on a ledge in a Boston harbor channel, is charged with knowledge that accidents were liable to occur if it sank and was not marked in a suitable manner, and it was negligent if it failed to man the drillboat with men instructed and reasonably competent to perform the marking.

6. SHIPPING ⇨209(3)—NEGLIGENCE—EVIDENCE.

Evidence that foreman of a drillboat had some 25 years' experience and knew what should be done in case the boat sank, although he was negligent in failing to mark the wreck, *held* not to show that he was incompetent, or that his employer should reasonably have known that he was.

7. SHIPPING ⇨209(3)—NEGLIGENCE—EVIDENCE.

Evidence that engineer on a drillboat had never been instructed to mark the boat in case it sank, and did not know this was required, did not establish the owner's personal negligence.

8. SHIPPING ⇨207—LIMITATION OF LIABILITY—NEGLIGENCE.

A dredge company *held* chargeable personally for damages resulting from a collision with its sunken drillboat, where it failed to instruct a watchman to mark the boat in case it sank.

9. SHIPPING ⇨209(3)—LIMITED LIABILITY—BURDEN OF PROOF.

A vessel owner, seeking to limit its liability for damages resulting from a collision, has the burden of showing that it exercised reasonable care and diligence in manning its boat with competent men.

10. COLLISION ⇨130—DAMAGES—INTEREST.

Awarding a vessel injured by collision interest on damages for loss of property from date of collision, on sums paid for repairs from dates of

payment, and on demurrage from time when damages were liquidated, is within court's discretion.

11. ADMIRALTY ⚓124—Costs—MILEAGE.

Mileage of witness in a maritime collision case *held* taxable from the place from which he was summoned, although his domicile was at a nearer point.

Anderson, Circuit Judge, dissenting in part.

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

Petition to limit liability by the Great Lakes Dredge & Dock Company, to which the Eastern Steamship Corporation, as damage claimant, filed an answer. From a decree (250 Fed. 916), both parties appeal. Affirmed upon appeal of Great Lakes Dredge & Dock Company, and appeal of the Eastern Steamship Company dismissed, without costs.

Charles E. Kremer, of Chicago, Ill., and Fitz-Henry Smith, Jr., of Boston, Mass., for Great Lakes Dredge & Dock Co.

Edward S. Dodge, of Boston, Mass., and Benjamin Thompson, of Portland, Me., for Eastern S. S. Corporation.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. No. 1355 is an appeal from a decree of the District Court for Massachusetts, dismissing the petition of the Great Lakes Dredge & Dock Company, brought under sections 4283-4289 of the Revised Statutes (Comp. St. §§ 8021-8027), to have its liability to the Eastern Steamship Corporation for a collision between the corporation's steamship, the Massachusetts, and the dredge company's drillboat No. 4 determined, and, if liable, the damages limited.

Appeal No. 1354 arises out of the subject-matter of the appeal in No. 1355 and involves certain questions that become material only in case the dredge company is held liable for the collision, but is entitled to have its damages limited.

The collision occurred July 5, 1913, at about 8:18 a. m., at which time the drillboat lay submerged in the channel of Boston Harbor on what is known as the Spectacle Island upper ledge. Under the direction of the court the drillboat was appraised as she lay on the bottom at \$13,568, and a stipulation for that amount was filed by the dredge company.

In the District Court the dredge company was held personally and solely at fault, and damages were assessed at \$70,499.65, with costs of \$617.92.

We fully agree with the findings and rulings of the court below that the dredge company was at fault in that its subordinate agents and servants failed to exercise reasonable care to mark the drillboat after it was sunk, and that the Massachusetts was not at fault in failing to discover the wreck in season to avoid the collision. The dredge company, however, contends that it was not personally at fault; that, on a fair consideration of the evidence contained in the record, it was with-

out that privity or knowledge essential to charge it with personal responsibility.

The evidence discloses that drillboat No. 4 was about 132 feet long, 33 feet beam, and about 8 feet deep; that it was divided into five water-tight compartments, and carried a boiler, drilling machinery, four two-cylinder engines, and other apparatus used in connection with its work. It was built of steel, and, when at work on a ledge, was held in place by four spuds or iron legs 65½ feet long, about 23½ inches square, and weighing 12½ tons each. The spuds were moved up and down in casings about 13 feet long. The casings at their lower ends were flush with the bottom of the boat and extended above the deck about 6 feet. The spuds were located near the corners of the boat, and their lower ends, which were tapered to about 6 or 8 inches square, rested on the ledge or bottom. They were raised or lowered by steam engines operating geared pinions engaged in a rack on each spud. There was a valve on the engines, which, on being turned in a given direction, would permit the engines automatically to aid in moving the spuds up or down according as the tide rose or fell. When the spuds stood perpendicularly, the boat would work up and down automatically with the tide; but sometimes they would jam, and to provide for such cases steam was kept on the engines. The drillboat was towed from the Great Lakes around through the St. Lawrence to Boston Harbor. When being towed, the spuds are raised and held by pawls fastened to the deck.

In the summer of 1913 the dredge company had a contract with the United States government for the removal of ledges in Boston Harbor. Under this contract drillboat No. 4 had been at work for about two weeks before the accident on a ledge almost in the center of the deep channel, which at that point was something over a quarter of a mile wide. There was some twenty-six feet of water over the ledge, so that only vessels of very deep draft paid any attention to it. It was the plan of the government to make a 35-foot channel which would be safe for ships of the deepest draft. No work was done by the drillboat during the day and night of July 4. About 6 o'clock on the evening of July 4, the night crew, when the drill was not working, consisting of Folz and Murphy, went aboard. Folz acted as watchman and mechanic; Murphy acted as fireman. High water occurred about midnight. In the neighborhood of 1 o'clock Folz, who had been working in the pump room, noticed that the drillboat had taken a pronounced list. He went on deck and found that the two front spuds had jammed, so that that side was not lowering with the tide, but was then from a foot to 15 inches higher than the back side of the boat. He tried to start the spuds with the engines, but was unsuccessful. He then called Murphy, and they worked at the spuds with bars, but with no better success. As the tide continued to ebb, the boat tilted more and more. Attached to the drillboat were two scows carrying dynamite, a yawlboat, and a rowboat. About 1:45 a. m., finding that the drillboat was sliding and about to tip over, they jumped upon one of the dynamite scows. One of the two ropes which held the scows to the drillboat, being entangled with the fenders

hanging over the side of the drillboat and it being dark, they cut, and the other parted when the drillboat tipped over.

There were plenty of oars for the yawlboat and the rowboat on the deck of the drillboat, but they were washed overboard before the men took to the scows, and there was only one oar in the yawlboat. The scows and yawlboat with the men drifted on the outgoing tide towards the lower harbor until about 3:30 a. m., when they were picked up by the tug Sadie Ross and were slowly hauled up past the sunken drillboat No. 4 to drillboat No. 8, belonging to the dredge company, and which was located about 6,400 feet further up the harbor. As they came past drillboat No. 4, it would have been entirely feasible for them to have stopped and anchored the yawlboat to the sunken drillboat, whose sand pipes were then extending out of the water some 3 and 6 feet, respectively, and thus have marked it as a warning. This, however, was not done. They reached drillboat No. 8 at about 5:30 a. m. About 6 a. m. a Boston police boat called at drillboat No. 8 and inquired if the men who had been adrift were there, and on receiving an affirmative answer left, without being told of the wreck or asked to mark it. About 6:15 or 6:20 the day crew of No. 4 arrived at drillboat No. 8, with Hancock, the foreman of No. 4, and after making observations of the wreck, and seeing that the sand pipes were projecting out of the water, as he thought some 2½ and 5 or 6 feet, Hancock went ashore with the men, including Folz, to find Superintendent Williams. While they were ashore looking for Mr. Williams, the steamship Massachusetts came in from New York and at about 8:18 ran into the wreck, which was then submerged.

[1] In considering the right of the dredge company to a limitation of its liability under section 4283, it is necessary to determine whether its drillboat No. 4 was a vessel, as defined in section 4289, as amended by Act June 19, 1886, c. 421, § 4, 24 Stat. 80 (Comp. St. § 8027).

The word "vessel," as there defined, applies "to all seagoing vessels, and also to all vessels used on lakes or rivers in inland navigation, including canal boats, barges and lighters," and has been held to include a barge without motive power used for transporting excursion parties (*In re Myers Excursion & Navigation Co.* [D. C.] 57 Fed. 240; *The Republic*, 61 Fed. 109, 9 C. C. A. 386); a mud scow used in Boston Harbor for moving mud (*In re Eastern Dredging Co.* [D. C.] 138 Fed. 942); a scow originally constructed and used for carrying stone, and later provided with a derrick and used for raising stone (*The Sunbeam*, 195 Fed. 468, 115 C. C. A. 370); and a scow carrying a pile driver permanently attached thereto (*In re Sanford Ross* [D. C.] 196 Fed. 921, *Id.*, 204 Fed. 248, 122 C. C. A. 516).

Revised Statutes, § 3 (Comp. St. § 3), defines what craft are vessels for the purposes of the maritime law, and in *In re Eastern Dredging Co.* (D. C.) 138 Fed. 942, 944, it was held that "all craft which are vessels for the purposes of the maritime law are vessels within the intent of the act as it now stands," meaning within the intent of the act of 1851 (sections 4283-4289) as amended in 1886. In the case of *Charles Barnes Co. v. One Dredgeboat* (D. C.) 169 Fed. 895, Judge Cochran, after an extended review of the cases in an endeavor to as-

certain what was a vessel within the meaning of section 3, held that a navigable structure, intended for the transportation of a permanent cargo, and that had to be towed in order to navigate was a vessel. The vessel there in question was a pumpboat. It consisted of a floating structure, equipped with an engine, boiler, pumps, pipes, and capstans, which were permanently attached, and it was used for pumping out coal barges.

Drillboat No. 4 was a navigable structure having a permanent cargo, viz. its engines, boiler, drilling machinery, etc., which it transported from place to place for the purpose of removing ledges in navigable waters and as an aid to commerce and navigation. It was not a floating dry dock intended to be permanently moored, as was the case in *Cope v. Vallette Dry Dock Co.*, 119 U. S. 625, 7 Sup. Ct. 336, 30 L. Ed. 501; but was intended and used for the transportation of a cargo which it carried from place to place to remove ledges. We are therefore of the opinion that it was a vessel, within the meaning of sections 4283-4289, as construed in the cases above cited.

We also think that the drillboat, by being temporarily sunk, did not cease to be a vessel, and that the dredge company is not to be deprived of the benefit of the provisions of section 4283, provided the fault that caused the collision was without its privity or knowledge, or that of its general manager, Williams. In the *Sanford Ross* (D. C.) 196 Fed. 921, 926, an accident occurred on a scow fitted out as a pile driver while it was resting upon the bottom at low tide, and it was held that the scow did not lose its character of a vessel by being grounded temporarily, as it was the intention that it should be towed before proceeding to the next position for driving piles.

In the District Court the dredge company's claim for a limitation of liability was denied upon the grounds: (1) That the drillboat, at the time it was sunk, was improperly manned, in that neither Folz nor Murphy were men fitted to exercise, under conditions which might reasonably be foreseen, prudent and careful seamanship, and was therefore unseaworthy; that this fault was attributable to the petitioner personally, and was the cause of the accident, as Folz and Murphy, whose duty it was to take steps, after the sinking, to warn other vessels of the wreck, failed to do so because of their incompetency; and (2) that Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 (Comp. St. § 9920), as construed in the *Anna M. Fahy*, 153 Fed. 866, 83 C. C. A. 48, in *The Macy*, 170 Fed. 930, 96 C. C. A. 146, in *Weisshaar v. Kimball S. S. Co.*, 128 Fed. 397, 402, 63 C. C. A. 139, 65 L. R. A. 84, and in *J. Smith & Sons, Inc.*, 193 Fed. 395, 113 C. C. A. 391, made it the personal duty of "the owner of such sunken craft to immediately mark it," and that this duty could not be delegated, so as to relieve the owner from responsibility. In holding the dredge company liable on this ground, the court evidently assumed that, inasmuch as Williams was the general superintendent of the petitioner's operations around Boston and the petitioner was a corporation, the privity or knowledge of Williams was the privity or knowledge of the petitioner, for it found "that Williams was informed that the drillboat had sunk early enough so that, if he had sharply set about marking the

wreck, he could have done so before the collision," and that his negligent and unexcused failure to do so was a disregard of the statutory duty and attributable to the petitioner personally.

[2, 3] We agree with the court below that, inasmuch as Williams had the general control and direction of the company's business at Boston, his privity or knowledge was the privity or knowledge of the corporation. *Craig v. Continental Ins. Co.*, 141 U. S. 638, 646, 12 Sup. Ct. 97, 35 L. Ed. 886; *Oregon Round Lumber Co. v. Portland & Asiatic S. S. Co.* (D. C.) 162 Fed. 912; *The Erie Lighter* (D. C.) 250 Fed. 490, 494. But we do not think that the evidence warrants the finding that he was informed of the sinking of the drillboat sufficiently early, so that he could reasonably have been expected to have marked the wreck before the collision occurred. The collision occurred July 5, 1913, not later than 8:18 a. m., and the evidence was that Mr. Williams was not informed of the sinking of the drillboat until 7:30 that morning, when he was found by Hancock at the Atlantic works, some three miles or more distant from the wreck, and that, upon procuring a launch, he and Hancock started for the wreck, and while on their way passed the Massachusetts going to her dock in Boston Harbor. The collision had then taken place, and we do not think it could reasonably be found that he had a sufficient opportunity to mark the wreck after he knew that the drillboat was sunk and before the accident occurred.

[4] The statute of 1899 is a criminal statute, and the failure of duty on the part of the owner of a vessel sunk in navigable waters there penalized is failure to mark the wreck after knowledge of the fact necessitating the performance of the duty; and the duty there imposed upon the owner as a basis for civil liability cannot be greater and will not arise until after knowledge that the vessel is a wreck. This is the construction placed upon the statute in *The Fahy* and other cases above cited. The act of 1899, therefore, is not, as has been suggested, in conflict with section 4283, but in harmony with its provisions, for the duty imposed on the owner is a personal one.

[5] Was it the duty of the petitioner to see that the drillboat was manned with men fitted to exercise, under conditions which might reasonably be foreseen, prudent and careful seamanship, and does the evidence disclose that Folz and Murphy, by previous training and experience, were incompetent, or that Hancock, the foreman, was likewise incompetent and that this was known, or ought to have been known to Williams?

If there was a duty cast upon the owner to see that the drillboat was properly manned, it did not arise out of a contract relation, for there was no contract between the dredge company and the steamship company. The duty therefore arose, if at all, out of some other relationship of the parties, and was one imposed by law due to that relationship. The law governing actions for negligence has for its foundation the rule of reasonable conduct. That rule has to do with one's acts with reference to the person, property, or rights of another. It is a rule of relation. If there be no relation, there is nothing upon which the rule can operate. But when one knows or has reason to

believe his conduct may affect injuriously the person or property of another, then a duty arises requiring him to exercise reasonable care to see that his acts do not result injuriously to the person or property of that other. So, when the dredge company located its drillboat on the ledge in the channel in Boston Harbor, knowing, as it must, that ships would be navigating in that locality and that accidents were liable to occur, in case it sank, if it was not marked in a suitable manner, the law imposed upon it the duty of manning the drillboat with men charged with the duty of marking the wreck and reasonably competent to perform that duty.

In the District Court it was found that Folz, Murphy, and Hancock were all thoroughly competent men for the operation of drillboats, but that none of them appeared to have been competent seamen, or to have had any general knowledge of vessels or the proper management of them. The evidence shows that Hancock, at the time of the accident, had been engaged for 25 or 28 years in the handling of drillboats; that he helped to build drillboat No. 4 in 1907 or 1908, and "bring her out"—probably meaning bring her from the Great Lakes to Boston—and that he had been the foreman of her most of the time since; that he knew that the act of 1899 required the owner of sunken wrecks to mark them; and that he would have done so at the time he observed the wreck, had he not thought that the two sand pipes, which were about 6 inches in diameter and protruded out of the water 2½ and 5 or 6 feet, respectively, at the time he observed them, sufficiently marked it. Hancock had worked in Boston Harbor on this drillboat since October, 1911, a period of nearly 2 years. He knew that the mean rise of the tide in that locality was then about 9½ feet, and, if his testimony is to be believed, his judgment was, on observing the wreck, that it would not rise sufficiently to cover and obscure the protruding sand pipes. He no doubt was wrong in entertaining this idea, and was negligent in acting upon it without marking the wreck; but it is difficult to believe that the petitioner should be held personally at fault for putting him in charge of the drillboat, in view of his long experience and his knowledge of what it was necessary to do in case the drillboat sank, and we think that it cannot fairly be said that he was incompetent, or that the petitioner or Williams ought reasonably to have known that he was.

[6-8] As to Folz and Murphy, the evidence was that Murphy's duty was to run the boiler to keep up steam for the engines; that he was a marine fireman with 11½ years' experience, and had a license; that he had been employed on drillboat No. 4 for 8 months, and that he had had much experience the past 11 years in going to sea, during which time he acted as fireman. He had never been instructed to mark the drillboat in case it sank, and he did not know that the owner of a sunken vessel was required to mark it, and it would seem that it was not reasonably necessary that he should have known or been so instructed, as his work was that of an engineer. The duty of placing warning signals, to the extent at least of hanging out lights, devolved upon Folz, who was required, when he came on duty at night, to light all the lights and hang them out at both ends of the drillboat and look after the

spuds. Folz had worked on drillboats for 5 or 6 years, and on this boat since some time in 1911. When the drillboat was in operation, he had to do with the blasting of the holes that were drilled, and when it was not in operation he worked as a watchman. He testified that he knew the owners of vessels sunk in navigable waters were required to mark them, but that he had never been instructed by the foreman or any one representing the dredge company to mark the drillboat in case she sank, and Williams testified that he had never instructed his men, in the event of the drillboat sinking, to mark it, although that duty would devolve upon him, if any instructions were necessary. Folz's testimony also shows that from about 5:30 to 6:30 on the morning of the accident he had ample opportunity to mark the wreck and means at hand with which to do it. He then knew that the tide was rising, or was about to rise, but what he knew as to the mean rise of the tide did not appear. It is as probable that he did not know what the mean rise of the tide was as that he did, and that he had no means of judging whether it would rise and obscure the sand pipes or not. He made no effort to mark the wreck or to have any one else mark it. He could have asked the police boat at 6 a. m. to do so if he had understood it was his duty to have it done, but he did not. In view of his conduct at the time, and of the fact that no one representing the company had told him that it was his duty to mark the boat in case she sank, or how to do it, we think it is more probable than otherwise that he did not regard it as his duty, and for this reason omitted marking her. As due care on the part of the dredge company or its general manager, Williams, required that it should have directed Folz to see that the boat was marked in case she sank, and it failed to do so, its failure in this respect was the cause of the collision, and was a fault for which it was chargeable personally.

It is contended that the dredge company had no reason to anticipate that the drillboat might sink, and therefore it was not called upon to instruct Folz what to do in such a contingency; but, as it was generally known that vessels in encountering the perils of the sea were liable to be sunk, and also known that drillboats and dredges, supported by spuds, when subjected to like perils, had sunk, we think it was bound to have foreseen that such a situation might arise, and that it should have instructed Folz with reference thereto.

[9] The burden was upon the dredge company to show that it exercised reasonable care and diligence to see that the drillboat was manned with competent men. *The Carib Prince*, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1183; *The Wildcroft*, 201 U. S. 378, 388, 26 Sup. Ct. 467, 50 L. Ed. 794; *International Navigation Co. v. Farr, etc., Mfg. Co.*, 181 U. S. 218, 225, 226, 21 Sup. Ct. 591, 45 L. Ed. 830. In recognition of this, the dredge company, in its petition, alleged as follows:

"At the time of the sinking of the said drillboat No. 4, the same was in every way seaworthy and fit and proper for the uses for which it was built and used, and that its appliances were in good condition, it had on board a sufficient number of competent men, and that the said sinking of the said drillboat No. 4 and the collision with the same by the said steamer Massachu-

sets, were occasioned or incurred without the privity or knowledge of this petitioner."

It failed to sustain the burden of this allegation.

[10] The dredge company also complains that the District Court erred in its allowance of interest on the damages awarded for loss of property from the date of the collision, on the sums paid for repairs from the dates of payment, and on demurrage from the time when the damages were liquidated. The allowance of interest in cases of this kind rests in the discretion of the court. *The Albert Dumois*, 177 U. S. 240, 255, 20 Sup. Ct. 595, 44 L. Ed. 751; *The Scotland*, 118 U. S. 507, 518, 6 Sup. Ct. 1174, 30 L. Ed. 153; *Straker v. Hartland*, 2 H. & M. 570, 575; *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126, 4 N. E. 620; *The Rabboni* (D. C.) 53 Fed. 948, 952. Complete restoration required the payment of interest. Judge Hazel, in discussing the question of the allowance of interest in collision cases in *The Gilchrist* (D. C.) 173 Fed. 666, at page 672, said:

"On the settlement of final decree the question arose whether interest on demurrage should properly be allowed from the date of loss, as specified in the stipulation filed herein, or from the entry of decree. Heretofore this court apparently held in *The Sitka* [D. C.] 156 Fed. 427, on the authority of *The Eloina* [D. C.] 4 Fed. 573, that interest on demurrage was only recoverable from the date of decree, and not from the date of loss or injury. But this broad holding is not sustained by the weight of prior decisions. Collision cases are now called to my attention by which it is clearly shown that, not only is demurrage a proper element of damage, but that interest should be allowed from the time of collision, unless in the discretion of the court there are special reasons for its disallowance."

[11] The dredge company further contends that the court below erred in allowing taxation of mileage for one Colbath, a witness for the steamship company, from New York City to the place of trial, although his domicile or home was in Melrose, Mass. The taxation was in accordance with the previous rulings of this court. *City of Augusta*, 80 Fed. 297, 304, 25 C. C. A. 430; *United States v. Sanborn* (C. C.) 28 Fed. 299; *The Governor Ames*, 187 Fed. 40, 50, 109 C. C. A. 94.

In view of the conclusion here reached, the questions sought to be raised in No. 1354 become immaterial and are not considered.

In No. 1355 the decree of the District Court is affirmed, with interest and costs to the appellee; in No. 1354, the appeal is dismissed without costs.

ANDERSON, Circuit Judge (dissenting in part). In the conclusion that the dredge company is not entitled to limit its liability I concur. From the reasoning of the foregoing opinion I am constrained to dissent; I think it lays down propositions unsound and fraught with serious danger.

(1) I do not think this drillboat was a vessel within the meaning of the limited liability acts. I think the weight of authority and of sound argument is that it was not a vessel.

R. S. § 3, defines a vessel as follows:

"The word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

Was this drillboat a "means of transportation" within the fair meaning of those words? Its essential character was that of a marine machine shop. When at work it rested on the earth. Its work was not carriage; it was drilling. True, its legs could be drawn up, and it could then be towed by a tug from place to place. It was somewhat like a pontoon or dry dock. But the Supreme Court held in *Cope v. Vallette Dry Dock Co.*, 119 U. S. 625, 7 Sup. Ct. 336, 30-L. Ed. 501, that a dry dock, consisting of a large oblong box with flat bottom and perpendicular sides, with no means of propulsion either by wind, steam, or otherwise, and not destined for navigation, but only as a floating dry dock permanently moored, was not a vessel. Mr. Justice Bradley said:

"The fact that it floats on the water does not make it a ship or vessel, and no structure that is not a ship or vessel is a subject of salvage. A ferry bridge is generally a floating structure, hinged or chained to a wharf. This might be the subject of salvage as well as a dry dock. A sailor's floating bethel, or meetinghouse, moored to a wharf, and kept in place by a paling of surrounding piles, is in the same category. It can hardly be contended that such a structure is susceptible of salvage service."

I regard the reasoning in that case as practically concluding the point.

Undoubtedly, as pointed out by Judge Dodge in the case of *The Scow No. 34* (see *In re Eastern Dredging Co.* [D. C.] 138 Fed. 942, 945), the amendment of 1886 extended the scope of the limited liability act of 1851. That act originally provided in express terms that it should not apply to owners of canal boats, barges, or lighters. Compare *Simpson v. Story*, 145 Mass. 497, 14 N. E. 641, 1 Am. St. Rep. 480. But barges and lighters, now included, are to some extent commercial carriers. They may fairly be called a part of our merchant marine. Clearly, the original purpose of Congress was to encourage investments in ships and to promote commerce upon the high seas. When the act was extended to cover barges and lighters, the basic notion of promoting commerce and navigation by increasing carrier service was not, in my view, abandoned. Congress did not, as it seems to me, intend to limit the doctrine of respondeat superior for the benefit of every owner of anything which could be floated and which might, as an incident of its use, occasionally be floated. A dry dock was floated from the United States to the Philippines. The facts that it was floated and (to use the language of the majority opinion) was "an aid to commerce and navigation" did not make it a vessel within the meaning of the limited liability acts. A bell buoy floats and is an aid to navigation; is it a vessel? Piers and lighthouses are great "aids to navigation." So is every means of improvement of navigable waters. But something more is necessary in order to make the "aid" a "vessel," within the meaning of the limited liability acts.

It is true that in the *P. Sanford Ross Case* (D. C.) 196 Fed. 921, it

was held that a barge on which was mounted a pile driver, described as "a permanent cargo," was a vessel within the limited liability acts. But this pile driver might have been removed and the barge used for ordinary transportation work. Drillboat No. 4 was much more like the dry dock than like the barge with the attached pile driver.

Judge Cochran's able and exhaustive review of the cases in 169 Fed. 895, shows that the courts have hitherto extended the statute to the very verge. I think this decision, holding this long-legged steel box or marine machine shop to be a vessel, goes beyond any decision hitherto made, and extends the statute to the point of perverting the congressional intent.

To hold that this drillboat was a vessel is nearly, if not quite, to change the statutory definition so as to read: "The word 'vessel' includes every artificial contrivance capable of being floated." It eliminates the idea that the thing floated shall be "a means of transportation"—that is, that it shall perform some carrier function.

The determination of this case does not, in my opinion, require us to hold that this drillboat was a vessel. To extend the doctrine of limited liability to everything floated and floatable is, in my view, to menace, and not to promote, commerce and navigation.

(2) This drillboat, whether vessel or not, was negligently sunk in a navigable channel. There was no vis major to account for the sinking. There was something wrong with the construction, the state of repair, the manning, or the operation, else it would not have sunk in a smooth summer sea. *Res ipsa loquitur*. 29 Cyc. 590. But, even if the original sinking had not been negligent, I agree with my Brethren in holding that there was negligence both of owner and employé in failure promptly to mark the submerged obstruction, so as to warn those rightly using the navigable channel of its presence. The negligent creation and maintenance of this obstruction, in this navigable channel, a great public highway, constituted a public nuisance. The unlawful obstruction of a public highway has always been a public nuisance. *Joyce on Nuisances*, § 214; *Woodman v. Pitman*, 79 Me. 456, 462, 10 Atl. 321, 1 Am. St. Rep. 342. Any individual suffering special and material damage from a public nuisance can recover therefor from the one causing such nuisance. *Joyce on Nuisances*, §§ 218, 219, 220; *Staples v. Dickson*, 88 Me. 362, 34 Atl. 168.

The case ought, in my view, to be determined on the simple and elementary principles laid down by the Massachusetts Supreme Judicial Court in *Boston & Hingham Steamboat Co. v. Munson*, 117 Mass. 34. That was a case to recover for injuries to the plaintiff's steamboat caused by running upon a sunken scow belonging to the defendant. The defendant, while trying to raise the scow, left the public unwarned of the obstruction caused by it. The court said:

"If a person negligently places an obstruction in a highway, he is liable for any injury caused thereby to a traveler using due care. So if a person negligently obstructs navigable waters, he is liable for injuries caused to vessels in the proper use of such waters. * * * When a vessel is sunk by unavoidable accident, in navigable waters, whether in the usual track of navigation or not, the owner, until he abandons, must use due care to prevent injury to other vessels"—citing *White v. Crisp*, 10 Exc. 312; *Brown v. Mallett*, 5 C. B. 599.

To my mind this statement covers everything that needs to be said about the case at bar.

The same principle was asserted in the case of *The Snark*, [1900] P. D. 105; also in the case of *The Utopia*, [1893] App. Cas. 492.

A sunken vessel in navigable waters, even if abandoned, may, and ordinarily does, constitute a public nuisance. *Detroit Water Commissioners v. Detroit*, 117 Mich. 458, 76 N. W. 70. Apart from statute, the owner of a sunken vessel had the right to abandon it, and after abandonment would apparently not be liable for maintaining a public nuisance. *Rex v. Watts*, 2 Esp. 675; *Winpenny v. Philadelphia*, 65 Pa. 135; *Ball v. Berwind* (D. C.) 29 Fed. 541.

So far as I have been able to discover, it has never hitherto been even contended that liability for creating or maintaining a public nuisance in navigable waters is subject to the limited liability acts. England has had a limited liability act since 1734. Stat. 7 Geo. II, c. 15. Rev. Stats. § 4283, taken from the act of 1851, was grounded mainly upon the English statutes of 26 Geo. III, passed in 1783, and 53 Geo. III, passed in 1813. But I have not been able to find that in England it has ever been claimed that these English acts limited liability for the negligent obstruction of navigable waters.

Our own limited liability act was passed nearly 70 years ago. It would be extraordinary if this be the first instance in which a negligently sunken barge or vessel has as a wreck caused damage in excess of its own salvage value. But I can find no case in this country in which it has been claimed that liability for wrecks, negligently caused or maintained in navigable waters, is limited by the acts passed to encourage shipowners and to promote navigation.

Navigation will not be promoted by lessening liability for the creation or maintenance of public nuisances in navigable waters. Congress has appropriated hundreds of millions of dollars for the improvement of navigable waters. It is to my mind inconceivable that responsibility, arising under elementary principles, for obstructing navigable waters, was intended by Congress to be held subject to the limited liability acts. If there is any field in which the doctrine of respondeat superior should be held in full force and effect, it is in the field of the creation or the maintenance of public nuisances in the sea highways.

The history and policy of the limited liability acts are dealt with elaborately in *Walker v. Transportation Co.*, 3 Wall. 150, 18 L. Ed. 172; *Moore v. Amer. Transportation Co.*, 24 How. 1, 16 L. Ed. 674, a decision in 1861; *New York Transportation Co. v. Wright*, 13 Wall. 104, 20 L. Ed. 585; *La Bourgogne*, 210 U. S. 95, 120, 28 Sup. Ct. 664, 52 L. Ed. 973; *Providence Steamship Co. v. Hill*, 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038; *Butler v. Boston & Savannah Steamship Co.*, 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017; *The City of Norwich*, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134; *Walker v. Boston Insurance Co.*, 14 Gray (Mass.) 288; *Hill v. Prov. S. S. Co.*, 113 Mass. 495, 18 Am. Rep. 527; same case, 125 Mass. 292. See, also, *The Main v. Williams*, 152 U. S. 122, 14 Sup. Ct. 486, 38 L. Ed. 381; *Richardson v. Harmon*, 222 U. S. 96, 32 Sup. Ct. 27, 56 L. Ed. 110.

In none of these cases do I find any countenance or support for the doctrine of holding these acts applicable to cases of negligence in obstructing navigable waters.

Under the doctrine asserted by the majority opinion in this case, the financially responsible owner of a barge or scow, negligently sunk or negligently left unmarked in a navigable channel, might with practical impunity do hundreds of thousands of dollars of damage to great ships, perhaps destroying lives. Such a doctrine is, it seems to me, unwise and an unnecessary shield for negligence in selecting and instructing and training employes. There is a great practical difference between holding the owner of an obstruction in navigable waters, negligently caused or maintained, responsible for all acts of negligence of all his employes, and the doctrine laid down by the majority, which throws the burden upon the victim of the negligent injury of showing specific negligence in the selection or instruction of the particular employe guilty of the default causing the damage.

Of course, if Congress has passed laws leading to such undesirable results, it is our duty to enforce them; but I am unable to believe that the national Legislature intended to ground any such sea highway policy.

Certainly the limited liability acts do not, in terms, destroy the common-law right of the victim of negligence in obstructing a public highway to recover damages suffered. As stated by Justice White in *Texas, etc., Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 437, 27 Sup. Ct. 350, 354 (51 L. Ed. 553, 9 Ann. Cas. 1075):

"We must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common-law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

Full efficacy will be given to the limited liability statutes without extending them to cover negligence of shipowners' servants in causing or maintaining hidden traps for other vessels in navigable waters. The statutory right and the original common-law right are not only not repugnant, but they both make for the same end, to wit, the safety of property invested in vessels.

I think a sunken wreck, left unmarked either temporarily or permanently, is a menace to navigation, differing not only in degree, but in kind, from the danger to other vessels arising from the careless navigation of a vessel still afloat, just as a moving automobile is an entirely different sort of peril from the unmarked wreck of an automobile in the dark. As long as a vessel is afloat, however careless the navigators, regard for their own safety impels them to some degree of care to avoid collision with other vessels. So long as a vessel is afloat and visible, however badly handled, other vessels have a chance, by using extraordinary care and skill, to avoid the results of the negligence of their fellow traveler in the common highway. But after a vessel is sunk, and left unmarked and unmanned, it ceases, in my

view, to be a "vessel" within the meaning of the limited liability acts. It is a trap, a nuisance; its victims have no chance for life and safety. I cannot believe that Congress ever intended to limit the doctrine of respondeat superior for the benefit of the owners of a nuisance in navigable waters.

Nor am I able to agree with my brethren in the interpretation put by them upon the statute of March 3, 1899, and the decisions made by other courts under that statute.

In the majority opinion it is stated as follows:

"The statute of 1899 is a criminal statute, and the failure of duty on the part of the owner of a vessel sunk in navigable waters there penalized is failure to mark the wreck after knowledge of the facts necessitating the performance of the duty; and the duty there imposed upon the owner as a basis for civil liability cannot be greater and will not arise until after knowledge that the vessel is a wreck. This is the construction placed upon the statute in *The Fahy* and other cases above cited. The act of 1899, therefore, is not, as has been suggested, in conflict with section 4283, but in harmony with its provisions, for the duty imposed on the owner is a personal one."

Apparently this means that the owner of a vessel negligently sunk or negligently left unmarked in navigable waters is not liable under the ordinary doctrine of respondeat superior for the negligent acts of his servants, but is only liable after the owner himself has knowledge of the situation.

Such has not been the interpretation put upon the act by other courts. In *The Anna M. Fahy*, 153 Fed. 866, 83 C. C. A. 48, the court said:

"The law places the duty of marking the wreck upon him [the owner] and he cannot escape responsibility by delegating it to others."

In *The Macy*, 170 Fed. 930, 96 C. C. A. 146, the court said:

"This statute was before us in *The Anna M. Fahy*, 153 Fed. 866, 83 C. C. A. 48, where it was held that the duty of marking the location of a wreck was placed by the statute on the owner, and no one else, and that there is no divided responsibility."

In *Lehigh & Wilkesbarre Coal Co. v. Hartford & New York Transportation Co.* (D. C.) 220 Fed. 348, 351, Mayer, District Judge, said:

"The importance of this legislation is obvious, and the tendency of the courts has been to hold owners strictly to the requirement of the statute."

While it may be true that in each of these cases the owner himself had knowledge or opportunity of knowledge of the wreck, yet the language used by the courts indicates their view that owners are responsible under the ordinary doctrine of respondeat superior for every act of negligence of their employés. To hold, as the majority apparently do in the above quotation, that this statute asserts failure of duty only "after knowledge of the facts necessitating the performance of duty" by the owner himself, is to extend the limited liability acts into the field of negligence in obstructing navigable waters. It reads into this statute of 1899 the "privity or knowledge" of the act of 1851. This amounts to saying that the owner of any vessel negligently sunk, or negligently left unmarked in a navigable channel, shall not be liable

for the acts of his agents in causing or maintaining such nuisance, unless the negligence was "with the knowledge or privity of the owner." I cannot agree with that interpretation of the statute.

As I have already indicated, even before the passage of the act of March 3, 1899, I do not think the limited liability acts had any application to the creation and maintenance of nuisances in navigable waters. So far as private liability is concerned, the act of March 3, 1899, seems to me but declaratory of previously existing maritime law. Compare *The Caldý* (D. C.) 123 Fed. 802, 804; *The Plymouth*, 225 Fed. 483, 140 C. C. A. 1.

That statute is a part of the Rivers and Harbors Act of the Fifty-Fifth Congress. See 30 Stat. c. 425, U. S. Comp. Sts. Ann. 1916, §§ 9918-9924. A large part of it is a compilation of police regulations concerning the improvement, maintenance, preservation, and protection of navigable waters and of property of the United States in and adjacent to such waters. As there is no common law of the United States prohibiting the obstruction of and creation of nuisances in navigable waters, such legislation was necessary in order to equip the national government with criminal penalties analogous to the power of indictment for public nuisances which the sovereign of England and the states have always exercised. *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8, 8 Sup. Ct. 811, 31 L. Ed. 629.

Clearly there is nothing in this legislation which can be fairly construed as cutting down previously existing civil liability for negligent obstruction of navigable waters. On the contrary, this act emphasizes the congressional purpose of holding all persons fully responsible, criminally as well as civilly, for such negligent obstruction.

Moreover, section 20 of the act expressly "repeals all laws or parts of laws inconsistent" therewith. There is no saving clause making the liability created or recognized by the act of 1899 subject to the limited liability acts, as there is in the Harter Act of February 13, 1893, c. 105, 27 Stat. 445, Comp. Sts. Ann. 1916, §§ 8029-8035.

If Congress had intended the owners of wrecks negligently caused or negligently left unmarked in navigable waters to have the benefit of the limited liability acts, cutting down the common-law liability arising under the doctrine of respondeat superior, we might fairly have expected the insertion of a saving clause to that effect, such as we find in the Harter Act.

I cannot, therefore, agree that the act of March 3, 1899, can be held merely a criminal statute. I think it clear that it ought not to be so narrowly limited, unless previous civil liability for negligent obstruction of navigable waters is held as broadly applicable as I have argued. Section 15 of the act of 1899 provides in express terms that—

"It shall not be lawful * * * to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels. * * * And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful." 10 U. S. Comp. Sts. Ann. 1916, § 9920.

The opinion of the District Judge does not, it seems to me, warrant the interpretation put upon it by my brethren. That court did not hold the statute of 1899 applicable merely on the ground that "Williams was informed that the drillboat had sunk early enough so that, if he had sharply set about marking the wreck, he could have done so before the collision." The District Court held that the statute of 1899 created, or recognized, a civil liability for negligence in obstructing navigable channels enforceable against the owner under the ordinary principles of common law, including therein respondeat superior. I concur in that view.

PELL et al. v. McCABE et al.

(Circuit Court of Appeals, Second Circuit. January 30, 1919.)

No. 136.

1. COURTS \Leftrightarrow 264(1)—FEDERAL COURTS—ANCILLARY JURISDICTION.

If a federal court has jurisdiction of the principal suit, it also has jurisdiction of any ancillary proceeding in that suit, without regard to the citizenship of the parties, the amount in controversy, or any other factor that would ordinarily determine jurisdiction.

2. COURTS \Leftrightarrow 264(4)—ANCILLARY JURISDICTION.

An ancillary suit may be maintained, inter alia, to prevent the relitigation in other courts of the issues heard and adjudged by that court in the original suit, and to protect the titles and rights acquired under its judgment or decree from attack based on the theory that the adjudication in the original suit was illegal or ineffective.

3. COURTS \Leftrightarrow 264(4)—JURISDICTION OF FEDERAL COURT—ANCILLARY SUIT.

An order confirming a composition by a bankrupt partnership, which provided that creditors who assented should be deemed to have released a third person, not adjudicated a bankrupt, and whose relation to the firm was not determined, from liability on any claim against the bankrupts, was not an adjudication that such third person was not liable for such claims, and a suit to enjoin an action against him, based on fraud and charging him as a partner, brought in another jurisdiction by persons who filed no claim and did not assent to the composition, is not ancillary to the bankruptcy proceeding.

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

Suit in equity by Stephen H. P. Pell and others against W. Gordon McCabe, Jr., and another. Decree for defendants, and complainants appeal. Modified and affirmed.

For opinion below, see 254 Fed. 356.

This suit is brought by plaintiffs for the purpose of enjoining the defendants from proceeding in an action now pending in the United States District Court for the Eastern District of South Carolina, so far as it proceeds against Robert M. Thompson as a general partner of S. H. P. Pell & Co. upon any claim which was provable in bankruptcy. It also seeks to enjoin the defendants from continuing that action in South Carolina, or instituting any other action upon transactions between defendants and plaintiffs, or upon the plaintiffs' fraud in said dealings, which was not at

the time known to defendants, and it further seeks to enjoin defendants from attacking, questioning, or challenging the power and jurisdiction of the United States District Court for the Southern District of New York to make certain orders to which reference is hereinafter made.

The South Carolina suit is for the recovery of moneys said to have been obtained from the plaintiffs by the defendants by fraud and deceit. Neither plaintiffs nor defendants reside within the Southern district of New York.

The plaintiffs were members of the firm of S. H. P. Pell & Co., cotton brokers on the New York Cotton Exchange. The defendants are residents of South Carolina, who prior to December 23, 1912, employed the brokers mentioned to buy and sell cotton on their behalf on the New York Cotton Exchange.

The plaintiffs contend that by reason of certain proceedings had in the United States District Court for the Southern District of New York in the bankruptcy proceedings of S. H. P. Pell & Co. these defendants cannot maintain an action, in South Carolina or anywhere, against these plaintiffs, and that they should be enjoined from doing so. The facts with reference to those bankruptcy proceedings are as follows:

On July 31, 1914, S. H. P. Pell & Co., New York Cotton Exchange brokers made a general assignment for the benefit of creditors.

On August 3, 1914, an involuntary petition in bankruptcy was filed by three creditors having provable claims exceeding \$500 in the District Court for the Southern District of New York to have the firm of S. H. P. Pell & Co., and Charles A. Kittle and Howland H. Pell, individually, composing the said firm, adjudicated involuntary bankrupts. Robert M. Thompson was not made a party by that petition. S. H. P. Pell & Co. was, however, a limited partnership formed under the laws of the state of New York. The firm consisted of the two Pells above named and Kittle as general partners, and Robert M. Thompson as a special partner.

Receivers in bankruptcy were appointed, who immediately qualified. When they took possession of the assets of the firm, they found among them a large amount of securities and stocks which were claimed to be the individual property of Robert M. Thompson.

On October 2, 1914, the alleged bankrupts filed schedules, in which was set forth the indebtedness of S. H. P. Pell & Co. to Robert M. Thompson in the sum of \$3,373,082.30, and that defendants were debtors in the sum of \$261.52.

On October 19th of the same year the receivers of S. H. P. Pell & Co. notified the defendants that they were scheduled as debtors in the schedules filed in the bankruptcy court for the sum of \$261.52, and on the same day further demanded payment from the defendants of a claim for \$91,467.57 in favor of the bankrupts. Pell & Co. had, prior to December, 1913, acted as cotton brokers on the New York Cotton Exchange, and claimed that the defendants owed them \$91,467.57 and \$261.52.

On November 21st of the year aforesaid the defendants remitted to the receivers the sum of \$261.52, being the amount previously demanded; and on November 23d and 28th of that year petitions were filed in the bankruptcy proceedings, which prayed that Robert M. Thompson be made a party to those proceedings and adjudicated a general partner and a bankrupt.

Negotiations were had at this time between the bankruptcy receivers, the New York Cotton Exchange, Robert M. Thompson, and the bankrupts (firm and individuals) for:

"(1) The adjustment and settlement of the claims of the New York Cotton Exchange creditors, aggregating over \$2,000,000.

"(2) The threatened sale of certain securities loaned by Robert M. Thompson to the bankrupt firm, and large deficiency, and the assumption by Robert M. Thompson of certain firm liabilities aggregating \$2,100,000, and his agreement to hold the bankrupt estate harmless.

"(3) The withdrawal of the scheduled claim of Robert M. Thompson against the bankrupt estate for \$3,373,082.50, and the release of the bankrupt estate therefrom.

"(4) The settlement of all questions and disputes with release and discharge of Robert M. Thompson and the dismissal of the intervening petitions against Robert M. Thompson."

The result was a plan of settlement in pursuance of which the bankrupts made an offer of compromise and composition which contained the following provisions concerning Robert M. Thompson:

"First. This offer is made in consideration of the discharge of the bankrupts, Stephen H. P. Pell, Charles A. Kittle, and Howland H. Pell, from their debts, both individual and partnership, and of the release of Robert M. Thompson from any and all liability to said S. H. P. Pell & Co., and from any and all liability to any creditor of S. H. P. Pell & Co."

"Ninth. Each and every creditor of S. H. P. Pell & Co. who shall assent to this offer of composition shall, upon the final confirmation of such composition by the court, be deemed conclusively by his said assent thereto to have released Robert M. Thompson of and from any and all liability to such creditor on account of any connection of said Robert M. Thompson with S. H. P. Pell & Co. or any transaction of said Robert M. Thompson by or through S. H. P. Pell & Co."

"Twelfth. It shall be adjudged herein * * * there shall be no liability to said Thompson on the part of the estate of S. H. P. Pell & Co. by reason of any rights or claims of any person. * * *

"Fourteenth. The intervening petitions herein of Logan and Bryan and of Heineken and Vogelsang et al. shall be dismissed, without costs."

The intervening petitions above referred to, which were to be dismissed, were those asking to have Thompson declared a general partner of S. H. P. Pell & Co. and adjudicated a bankrupt.

The bankruptcy court, by formal order on January 25, 1915, confirmed the proposed compromise and offer of composition which had previously received the consent in writing of more than a majority in number and 90 per cent. in amount of the creditors.

It is not denied that Robert M. Thompson duly carried out and performed all the terms of the agreement of compromise and the order of confirmation of January 25, 1915, and thereafter, and in accordance with the order of confirmation aforesaid, the bankrupts and the bankruptcy receivers conveyed all the bankrupt estate to John W. Jay, who thereafter duly transferred it to the Guaranty Trust Company as substituted trustee for the bankrupt estate.

On June 16, 1916, the Guaranty Trust Company began an action in the United States District Court for the Southern District of New York against the defendants herein to recover the sum of \$91,467.57, alleged to be due from defendants to the firm of S. H. P. Pell & Co. on account of transactions conducted by that firm on the New York Cotton Exchange as the defendants' brokers.

On March 29, 1918, the defendants began an action in the court of common pleas for the county of Charleston, in the state of South Carolina, wherein the defendants resided, against the firm of S. H. P. Pell & Co., alleged to be formed of Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell, and Robert M. Thompson, to recover \$1,500,000 damages for fraud perpetrated in and arising out of transactions had by the defendants with S. H. P. Pell & Co., while that firm was acting as their brokers in transactions on the New York Cotton Exchange. The liability of Robert M. Thompson in said action is placed on the ground of his being a general partner.

Robert M. Thompson, one of the plaintiffs herein, and who was the only defendant served with process in the South Carolina action, caused the action to be removed from the state court into the United States District Court, wherein it was understood to be pending when this case was argued in this court, and wherein, so far as we are informed, it is still pending.

In the suit, now under review in this court, the court below dismissed the bill.

Myers & Goldsmith, of New York City (Emanuel J. Myers and Gordon S. P. Kleeberg, both of New York City, of counsel), for appellants.

William St. John Tozer, of New York City (William St. John Tozer, of New York City, of counsel), for appellees.

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

ROGERS, Circuit Judge (after stating the facts as above). [1] Inasmuch as it appears that neither the plaintiffs nor the defendants reside within the Southern district of New York, the court below clearly was without jurisdiction of the suit, now under review, as an original action. But it is said that this suit is not brought as an original suit, but as a dependent and ancillary suit, which has direct reference to a matter already litigated in the bankruptcy proceedings in the District Court for the Southern District of New York relating to the firm of S. H. P. Pell & Co. and the several persons alleged to constitute that firm. In Street's Federal Equity Practice, vol. 2, § 1229, that writer says:

"It is a rule, subject to but one exception, that jurisdiction in an ancillary proceeding is supported by the jurisdiction of the court in the main, or principal cause. Hence the ordinary jurisdictional averments may be dispensed with in such a proceeding. If a court has jurisdiction of the principal suit, it also has jurisdiction of any ancillary proceeding in that suit. Neither the citizenship of the parties, nor the amount in controversy, nor any other factor that would ordinarily determine jurisdiction, has any bearing on the right of the court to entertain that proceeding."

The one exception above referred to relates to an ancillary receivership, and with that we are not now concerned. The right of a federal court to sustain jurisdiction of an ancillary suit, without reference to the citizenship of the parties, was fully considered in *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145, which reviewed the authorities. And see *Pacific Railroad of Missouri v. Missouri Pacific Railway Co.*, 111 U. S. 505, 4 Sup. Ct. 583, 28 L. Ed. 498; *Johnson v. Christian*, 125 U. S. 642, 645, 8 Sup. Ct. 989, 31 L. Ed. 820; *Carey v. Houston & Texas Central Ry. Co.*, 161 U. S. 115, 16 Sup. Ct. 537, 40 L. Ed. 638; *Eichel v. United States Fidelity & Guaranty Co.*, 245 U. S. 102, 104, 38 Sup. Ct. 47, 62 L. Ed. 177.

The jurisdiction of a court over a particular subject-matter and that court's power to apply a remedy no doubt are co-extensive; so that demands which are ancillary to the main action may be taken cognizance of by the court and determined in aid of its authority over the principal matter, and a court may entertain proceedings ancillary to its judgment or decree, for the jurisdiction it originally acquired is not exhausted by the entry of the judgment, and the power is still in the court to issue all proper process and take all proper proceedings for the enforcement of its judgment. All this is familiar doctrine and well-established law.

[2] An ancillary suit may be maintained: (1) To aid, enjoin, or regulate the original suit. (2) To restrain, avoid, explain, or enforce the judgment or decree entered in the original suit. (3) To enforce or adjudicate liens or claims to property in the custody of the court in the original suit. (4) To prevent the relitigation in other courts of the issues heard and adjudged in the original suit, and to protect the titles and rights acquired under its judgment or decree from attack based on the theory that the adjudication in the original suit was illegal or in-

effective. *Riverdale Cotton Mills v. Alabama & Georgia Manuf. Co.*, 198 U. S. 188, 25 Sup. Ct. 629, 49 L. Ed. 1008; *Julian v. Central Trust Co.*, 193 U. S. 93, 112, 113, 24 Sup. Ct. 399, 48 L. Ed. 629; *Carey v. Houston & Texas Ry. Co.*, 161 U. S. 115, 126, 127, 16 Sup. Ct. 537, 40 L. Ed. 638; *St. Louis & San Francisco Ry. Co. v. McElvain (D. C.)* 253 Fed. 123, 128.

In *Bates on Federal Equity Procedure*, vol. 1, § 97, the doctrine is summarized as follows:

"A bill filed to continue a former litigation in the same court, or which relates to some matter already partly litigated in the same court, or which is an addition to a former litigation in the same court, by the same parties or their representatives standing in the same interest, or to obtain and secure the fruits, benefits, and advantages of the proceedings and judgment in a former suit in the same court by the same or additional parties, standing in the same interest, or to prevent a party from using the proceedings and judgment of the same court for fraudulent purposes or to restrain a party from using a judgment to perpetrate an injustice, or obtain an inequitable advantage over other parties to the former judgment or proceeding, or to obtain any equitable relief in regard to, or connected with, or growing out of, any judgment or proceeding at law rendered in the same court, or to assert any claim, right or title to property in the custody of the court, or for the defense of any property rights, or the collection of assets of any estate being administered by the court, is an ancillary suit."

[3] We do not question but that the District Court for the Southern District of New York may enforce and protect its jurisdiction as a court of bankruptcy, when appealed to by a supplementary or ancillary bill to enforce its orders, sustain its jurisdiction, and protect parties in the enjoyment of rights secured to them under its orders. This is so, not only where jurisdiction is reserved or still retained, but even afterwards, where the result would be a relitigation of the same subject-matter between the same parties. In *re Swofford (D. C.)* 180 Fed. 549.

But the difficulty with the maintenance of this suit is that it cannot be regarded as in any proper sense an ancillary suit. It was instituted upon the theory that the proceedings in the District Court for the Southern District of New York in the bankruptcy matter of *S. H. P. Pell & Co.* discharged *Stephen H. P. Pell & Co.*, as a firm, and *Stephen H. Pell*, *Charles A. Kittle*, and *Howland H. Pell*, individually, from all claims against the firm of *S. H. P. Pell & Co.*, and that it also discharged therefrom *Robert M. Thompson*. But this is to lose sight of the terms of the composition, which provided for the release of *Thompson*—

"from any and all liability to any creditor of *S. H. P. Pell & Co.* who shall assent hereto, on account of any connection of said *Robert M. Thompson* with said firm, or any transaction of said *Robert M. Thompson* by or through said firm."

The release of *Thompson* was to apply only to those who specifically assented thereto, and there is no allegation anywhere in the complaint in the present action that the defendants herein assented to the composition. An examination of the record of the former proceedings shows that *Thompson* was not adjudicated a bankrupt, never filed schedules, and never made any offer of composition. The offer of

composition was an offer made by the two Pells and Kittle. Moreover, Thompson could not have offered a composition, as section 12 of the Bankruptcy Act expressly provides that a bankrupt shall not offer terms of composition—

"before he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and lists of his creditors, required to be filed by bankrupts. * * *"

An examination of the offer of composition made by the Pells and Kittle, and of the order confirming the same, discloses that in neither is any reference made to the question whether Thompson was a member of the firm of S. H. P. Pell & Co. as a general or special partner. There was no adjudication of that question in that proceeding. There was no adjudication in that proceeding on the subject-matter involved in the South Carolina action; and if the defendants here had appeared in that proceeding and opposed the composition, which they did not, they could not be enjoined from suing in another court. *Friend v. Talcott*, 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. 718. In the case cited the court holds that a creditor who had unsuccessfully opposed a composition and a discharge in bankruptcy on the ground of fraud in creating the debt, and accepted a dividend, and who then sued for the balance on the ground that the debt was excepted from the discharge, had not waived his right to sue on the tort by accepting the dividend; and the court also held that the granting of the discharge was not *res judicata* of the claim for the balance of the debt.

In the instant case the defendants, who have brought the South Carolina action, deny that they knew of the existence of their claims until long after the bankruptcy proceedings. Their allegation is that they did not know that they had been defrauded by S. H. P. Pell & Co. until some time after July 1, 1916. The order of confirmation of the composition agreement was entered on January 25, 1915. The allegations of fraud contained in the complaint in the South Carolina action may be found in the margin.¹

¹ "That in the course of the employment of defendants by plaintiffs aforesaid, plaintiffs sent to defendants certain orders for the purchase and sale of cotton as aforesaid, which defendants agreed and promised to execute upon the said New York Cotton Exchange. That defendants not only neglected, failed, and omitted so to execute the said orders, but falsely and fraudulently stated, reported, and represented to plaintiffs that the said orders had been duly executed upon the said Exchange, and in accordance with the by-laws, rules, and regulations thereof, and falsely and fraudulently charged plaintiffs' account with such sums as would have been advanced by defendants, and with such sums as would have been earned by defendants, if said orders of plaintiffs had in fact been so executed by defendants as by them falsely and fraudulently stated, reported, and represented to plaintiffs.

"That from time to time during said period said defendants rendered to plaintiffs various statements wherein defendants falsely and fraudulently charged plaintiffs with the purchase price of about one hundred and fifty-seven thousand (157,000) bales of cotton in the amount of approximately ten million one hundred and ninety-three thousand nine hundred and ninety dollars (\$10,193,990), and by said statements falsely and fraudulently represented to plaintiffs such cotton to have been purchased by defendants for plaintiffs' account in accordance with plaintiffs' instructions and with the by-laws, rules, and regulations of the said New York Cotton Exchange, and thereby falsely and

The South Carolina action is based on fraud and deceit, and is of such a nature that the tort claim it asserts was not provable in bankruptcy, even if the plaintiffs in that action had known of the facts of the claim in time to have asserted them in the bankruptcy proceedings. Whether the tort might have been waived and a provable claim in bankruptcy made, based on an implied contract, if the facts had been known, we need not consider, as the allegation is that the facts were not known, and, if not known, no such course could have been adopted. And section 17 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [Comp. St. § 9601]) declares that—

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (4) were created by his fraud * * * while acting * * * in any fiduciary capacity."

And the fraud complained of was committed, it is alleged, while the defendants in the South Carolina action were employed by the plaintiffs in that action as cotton brokers to buy and sell cotton for the account and risk of the plaintiffs, and such fraud was in connection therewith.

The bill of complaint in the present suit is exceedingly complicated, and raises a number of questions which the court below did not find it necessary to determine, and which we do not find it necessary to determine. The court below found in the bill no ground for equitable intervention, even if all the allegations the bill contains be assumed as true. We are in full agreement with that court in believing that the bill is without equity. It was properly dismissed, and, being dismissed for want of jurisdiction, the decree is to be modified to provide that the dismissal is without prejudice.

Decree, as modified, is affirmed.

Judge WARD was present at the argument and participated in the subsequent discussion of the case and concurred in the result. He has not read this opinion, being temporarily absent from the country at the time it was prepared and filed.

fraudulently represented to plaintiffs that the amount of the purchase price thereof had been duly paid, laid out, and expended by defendants for and on account of plaintiffs, and that the amount of defendants' commissions charged to plaintiffs in said statements had been duly earned by defendants in and about the purchase and sale of the cotton so falsely represented to plaintiffs to have been purchased for their account and to be due and owing to defendants."

COPERTINO et al. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. March 27, 1919.)

No. 2431.

1. RECEIVING STOLEN GOODS ⇨2—CHARACTER OF STOLEN PROPERTY.

In a prosecution for receiving copper stolen from interstate train, *held*, the property did not lose its stolen character, where railroad detectives did not take physical possession of it, but merely watched the place where it was hidden, in order to see what would become of it.

2. RECEIVING STOLEN GOODS ⇨9(2)—INSTRUCTION—EVIDENCE.

Instruction that testimony would justify inference that accused had received copper knowing it was stolen is not erroneous, because charging that mere possession imputed knowledge that property had been stolen, where evidence showed defendants proceeded directly to place where copper was hidden in a cemetery and were loading it into an automobile when arrested.

In Error to the District Court of the United States for the District of New Jersey; J. Warren Davis, Judge.

Michael Copertino and Peter Cucorello were convicted of having stolen property in their possession, and bring error. Affirmed.

George E. Cutley, of Jersey City, N. J., for plaintiffs in error.

Charles F. Lynch, U. S. Atty., of Newark, N. J., and J. L. Bodine, Asst. U. S. Atty., of Trenton, N. J.

Before WOOLLEY, Circuit Judge, and HAIGHT and MORRIS, District Judges.

HAIGHT, District Judge. The plaintiffs in error were convicted under an indictment which charged them with having violated an act approved on February 13, 1913 (37 Stat. 670, c. 50 [Comp. St. §§ 8603, 8604]), in that they feloniously had in their possession certain bars of copper which had theretofore been stolen, while constituting a part of an interstate shipment of freight, knowing the same to have been stolen. The government's evidence tended to prove that some time in the late afternoon or early evening of April 17, 1918, a car containing a large number of copper bars, which had been shipped from the state of Montana, destined for New York Harbor, while in transit over the lines and in the possession of the Lehigh Valley Railroad Company, was broken into near South Plainfield, N. J., and four of the bars of copper were stolen. The theft was discovered later in the evening, and two detectives in the employ of the railroad company were detailed on the case. They arrived in the vicinity of the place where it was presumed the robbery had taken place, in the early morning of April 18th, and about 7 o'clock, after having searched for several hours, they discovered two of the stolen bars in a cemetery which was situated immediately adjacent to the railroad tracks and between them and a public highway. One of the detectives then went to South Plainfield to telephone for "relief," and the other one secreted himself in a car, which was standing on the tracks some 200 or 300 feet away

from the cemetery, for the purpose of watching the copper. He had been there about an hour when the defendant Copertino came along the railroad tracks from the direction of South Plainfield, entered the cemetery, and immediately went to the place where the copper was located. Just before, or at about the same time that, Copertino reached the cemetery, the defendant Cucorello arrived there in an automobile. Both of them then began to load the copper in the automobile. In the meanwhile the detective who had gone to telephone returned, and he and his companion immediately proceeded to arrest the defendants. One of the defendants threw one of the bars of copper, which they had already loaded, from the automobile and attempted to drive away. Both were, however, very quickly apprehended and placed under arrest.

[1] The defendants denied having the copper in their possession, or having attempted to take it in their possession. While they admitted being in the cemetery, they sought to explain their presence there by stating that they had driven into the cemetery because the one who was driving the car mistook the entrance to the cemetery for a public highway which they wished to take to reach the place where they intended to go. At the close of the testimony, a motion was made on behalf of the defendants that the court direct a verdict of acquittal. The ground upon which the motion was based was that even though the copper had been stolen, and the defendants had it in their possession, either actual or constructive, at the time of their arrest, as charged, still they could not be convicted of the crime for which they were indicted, because the copper had lost its character of stolen property before it came into their possession. The refusal of the court below to direct a verdict is the principal reason relied upon for a reversal of the judgment. The verdict has, of course, established that the jury accepted the version of the Government's witnesses. It is claimed that the copper had lost its character of stolen property, because the discovery thereof by the detectives and their subsequent actions, as before detailed, had reinvested the Lehigh Valley Railroad Company, which for the purposes of this case may be considered the owner, with possession of it. Hence it is urged that the case falls within the principle of the decisions in *Reg. v. Schmidt*, 1 *Crown L. C.* 15, *Reg. v. Dolan*, 29 *Eng. Law & Eq.* 533, *U. S. v. De Bare* (*D. C. E. D. Wis.*) 25 *Fed. Cas.* 796, No. 14,935, and *People v. Jaffe*, 185 *N. Y.* 497, 78 *N. E.* 169, 9 *L. R. A. (N. S.)* 263, 7 *Ann. Cas.* 348.

As it would unduly burden this opinion to recite the facts in each of those cases, it will suffice to state that in each of them, before the stolen property reached the receiver, it had been recovered by the owner or his agent, and had actually been taken into his physical possession or that of his agent, and afterwards carried to the receiver, by either the original thief or the instrumentality through which the thief originally intended to convey it, at the express direction of the owner or his agent, for the purpose of entrapping the receiver, so that the property was actually delivered to the receiver by the authority of the owner and through his agency. The principle which underlay the decision in each of those cases was that such acts on the part

of the owner or his agent had caused the stolen property to lose its character as such, and consequently that the person in whose possession it afterwards came could not be convicted of having received stolen property, when the property which he actually received was not, in a legal sense, stolen property.

While we may readily concede that the principle invoked is a sound one, yet we are unable to perceive that it is applicable to this case; nor can we conceive how, in reason, it can be extended to cover a set of facts such as has been developed in this case. The detectives did not take or attempt to take the stolen copper in their possession; they did not exercise or attempt to exercise any control or dominion over it. The most that they did was to watch it, presumably to see what would happen to it, if anything, and to prevent its eventually being carried away, until the "relief" for which they had sent could arrive. The copper had not, therefore, come into either the actual or constructive possession of the owner. Indeed, before the detectives attempted to exercise any control over it, the defendants appeared upon the scene and took actual possession of it. Neither did the detectives cause, or attempt to cause, the property to be delivered to the defendants. Hence it did not come into the defendants' possession by authority of the owner or through its agency. There is therefore missing from this case two elements which, manifestly, are necessary to bring the case within the principle of the before-cited cases. Consequently we do not think that the copper had lost its character of stolen property at the time the defendants took it into their actual possession. The remarks of one of the judges in *Reg. v. Schmidt*, supra, are very pertinent to the facts in this case. In discussing the question as to when the goods lost their character of stolen goods, he said:

"Suppose the policeman (who was acting for the owner and was in its employ), instead of opening the bundle, *had simply watched it without saying anything to the porter (also the owner's agent); surely then the goods would not have ceased to be stolen.*"

This is precisely what the detectives did in this case. If their actions in this case could be said to have been a retaking of possession of the stolen property, so as to change its character as such, the difficulties in apprehending criminals in cases such as this would be immeasurably increased, and without reason. We are of opinion, therefore, that the learned trial judge committed no error in declining to direct a verdict.

[2] It is next urged, although no exception was taken to it at the trial, that the jury were instructed that mere possession of the stolen copper was sufficient to impute to the defendants knowledge that it had been stolen, and to cast upon them the burden of explaining their possession. We do not think, however, that any such construction can be placed on the charge. The jury were charged that, under the testimony in the case, an inference or conclusion that the defendants had possession of the copper with knowledge that it had been stolen would be justified. The testimony adduced on the part of the government regarding the defendants' connection with the stolen property, the method by which they acquired actual possession, the place where

they acquired it, and all of the surrounding circumstances, if unexplained, would clearly, if not inevitably, lead to the conclusion that the defendants knew that the property had been stolen.

Finding no error in the record, the judgment below is affirmed.

BECKER-FRANZ CO. v. SHANNON COPPER CO.

(Circuit Court of Appeals, Ninth Circuit. April 7, 1919.)

No. 3256.

1. APPEAL AND ERROR ⇨184—OBJECTIONS IN LOWER COURT—EQUITABLE SUIT—LEGAL TITLE—WAIVER OF OBJECTION.

Where no objection is raised in the trial court to the determination of the legal title to the land in an equitable suit for partition, the objection that such title should be determined at law is waived.

2. MINES AND MINERALS ⇨23(6)—ASSESSMENT WORK—FORFEITURE OF INTEREST—ADVERSE POSSESSION.

The right to forfeit the interest of a cotenant in a mining claim for his failure to do his share of the assessment work, given by Rev. St. § 2324 (Comp. St. § 4620), was properly denied, where the joint tenant was denied permission to enter the claim or to contribute to the assessment work.

3. MINES AND MINERALS ⇨23(6)—ASSESSMENT WORK—RECOVERY FROM CO-TENANT.

One who had performed the assessment work on a mining claim cannot compel a cotenant to contribute therefor, where he claimed the entire claim adversely to the cotenant and refused to allow the latter to enter on the claim or contribute to the work.

Appeal from the District Court of the United States for the District of Arizona; Wm. H. Sawtelle, Judge.

Suit by the Shannon Copper Company against the Becker-Franz Company for partition. Decree for plaintiff, and defendant appeals. Affirmed.

In November, 1908, the appellant entered into an agreement with J. W. Bennie by the terms of which it agreed to convey to Bennie the mining claims here in controversy upon payment of the sum of \$12,500, of which \$100 was to be paid upon the execution of the agreement, and \$6,150 upon the deposit by the appellant of an abstract of title, and the further sum of \$6,250 on or before July 31, 1909. It was further agreed that Bennie might at any time prior to the last-named date reconvey to the appellant a $\frac{49}{100}$ interest in said mining claims in lieu of the last payment, in which event Bennie was given the right to purchase the appellant's $\frac{49}{100}$ at any time before December 1, 1910, for the sum of \$10,000. The first two payments were made, but the \$6,250 payment was not made. The appellant declared a forfeiture and brought suit in the superior court of the state of Arizona to quiet its title and therein obtained a decree quieting its title to the mining claims. Upon appeal to the Supreme Court of Arizona, the decree was reversed (*Bennie v. Becker-Franz Co.*, 14 Ariz. 580, 134 Pac. 280); the court holding that, although time had been made the essence of the agreement, that provision had been waived. A second trial was had in the superior court, and on June 28, 1915, a decree was again rendered in favor of the appellant herein. Upon a second appeal to the Supreme Court, the decree was reversed (*Bennie v. Becker-Franz Co.*, 17 Ariz. 198, 149 Pac. 749); the court ruling that the Becker-Franz Company, while it held the legal title to the property, was

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the owner of but an undivided $\frac{49}{100}$ interest therein, and that Bennie was the equitable owner of the remainder thereof.

Thereafter, on September 4, 1915, a decree was entered in the superior court in accordance with that decision. During the years 1911, 1912, 1913, and 1914, pending the litigation, the annual assessment work was performed by the appellant, and on September 14, 1915, the appellant served upon Bennie a notice of forfeiture under paragraph 2324, Rev. Stats., for failure to pay his proportion of said assessment work. Bennie subsequently conveyed his interest in said property to the appellee herein, and the latter brought the present suit in the court below for partition of the mining claims. The appellant in its answer to the partition suit pleaded its acquisition of title to the appellee's interest by reason of the forfeiture before mentioned, and demanded that in case the appellee should be decreed to be the owner of $\frac{51}{100}$ of the mining claims that the appellant have judgment against the appellee for 51 per cent. of the amounts so expended in assessment work. As against the appellant's claim of forfeiture, the appellee in its reply pleaded as estoppel the judgment of the Supreme Court of Arizona of June 28, 1915, whereby, the appellee alleged, the title of the respective parties in and to their undivided interests in the mining claims was quieted in each as against any and all claims, demands, or pretensions of the other, and the appellee further alleged that Bennie had made due tender to the appellant of his proportion of the cost of the assessment work of the claims for the years 1911 to 1914, inclusive, but that the tenders were refused and rejected by the appellant, and that during said years said J. W. Bennie as cotenant was ready and willing to perform his proportion of the assessment work, but that he was excluded from the possession of the property, and prevented by the appellant from entering upon the same for the purpose of doing the assessment work, and that the work so done was done in hostility to the appellee's title, and that of its predecessor in interest.

The court below denied the appellant's claim of title by forfeiture and its right to recover from the appellee any of the costs of assessment work for the years 1912 to 1914, inclusive.

Frank E. Curley, of Tucson, Ariz., and L. Kearney, of Clifton, Ariz., for appellant.

Thomas Armstrong, Jr., Ernest W. Lewis, and R. Wm. Kramer, all of Phoenix, Ariz., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The decree of the court below made no specific disposition of the appellant's claim of title to the appellee's interests acquired through the forfeiture thereof for nonpayment of annual assessment work in pursuance of a notice of forfeiture given after the decisions of the state courts. It decreed only that the appellee was the owner of $\frac{51}{100}$ of the property, and that the appellant was the owner of the remaining $\frac{49}{100}$, and quieted the title of each, and found that the property could not be partitioned, and decreed that it be sold by a commissioner at public sale and provided for confirmation of the several sales by the court and for a final report by the commissioner, and that the appellant take nothing by its counterclaim.

[1] While the general rule is that equity has no jurisdiction to determine the validity of a legal title set up by the defendant in a partition suit and will suspend partition until the question of the legal title has been determined at law (20 R. C. L. 729; Clark v. Roller, 199 U. S. 541, 545, 26 Sup. Ct. 141, 50 L. Ed. 300; Gay v. Parpart,

106 U. S. 679, 689, 1 Sup. Ct. 456, 27 L. Ed. 256; *Gilbert v. Hopkins* [C. C.] 171 Fed. 704; *Bearden v. Benner* [C. C.] 120 Fed. 690; *West v. East Coast Cedar Co.*, 101 Fed. 613, 41 C. C. A. 528; *American Ass'n v. Eastern Kentucky Land Co.* [C. C.] 68 Fed. 721), and while it is held in some jurisdictions, as in *Litz v. Rowe*, 117 Va. 752, 86 S. E. 155, L. R. A. 1916B, 799, and cases there cited that a controversy over the legal title arising in a partition suit belongs exclusively to a court of law, and no acquiescence or consent can create jurisdiction over it in equity, we think the rule to be followed in the federal courts is that where, as in the present case, no objection is raised in the trial court to the disposition of the question of the legal title by a court of equity, the objection is waived so far as an Appellate Court is concerned (*Elder v. McClaskey*, 70 Fed. 529, 17 C. C. A. 251 [certiorari denied 163 U. S. 685]; *Reynes v. Dumont*, 130 U. S. 354, 395, 9 Sup. Ct. 486, 32 L. Ed. 934).

[2] On the merits the appellant's claim to title by forfeiture under the provision of section 2324, Rev. Stats. (Comp. St. § 4620), was properly denied on the ground that the appellant was holding adverse possession of the mining claims during the period of time when the annual assessment work was done, and Bennie was denied permission to enter upon the claims or to contribute to the assessment work. *Mining Co. v. Mining Co.*, 6 Utah, 183, 21 Pac. 1002, 5 L. R. A. 259; *Mallett v. Uncle Sam Min. Co.*, 1 Nev. 188, 90 Am. Dec. 484; *Field v. Tanner*, 32 Colo. 278, 75 Pac. 916; *Trevaskis v. Peard*, 111 Cal. 599, 44 Pac. 246; *Madison v. Octave Oil Co.*, 154 Cal. 768, 99 Pac. 176; *Garvey v. Elder*, 21 S. D. 77, 109 N. W. 508, 130 Am. St. Rep. 704.

[3] Nor was the appellant entitled to be paid out of the proceeds realized upon the partition sale any portion of the sums paid out by it for the annual assessment work for the years 1911 to 1914, inclusive, as demanded in its counterclaim. That a court of equity has jurisdiction in a partition suit to direct payment by one cotenant to another of his proportionate share of assessment work made necessary to maintain the life of a mining claim is not to be doubted. 30 Cyc. 230; *McClintock v. Fontaine* (C. C.) 119 Fed. 440; *Hayne v. Gould* (C. C.) 54 Fed. 951. But such a right to contribution is lost in a case where the cotenant in possession holds adversely to his cotenant, and denies him permission to enter upon the claim or to contribute his proportion of the expenses of maintaining the same, for in such a case the claim for contribution is inconsistent with the prior acts of the cotenant in possession, of such a character as to estop him to claim contribution. *Victoria Copper Min. Co. v. Rich*, 193 Fed. 314, 113 C. C. A. 238; *Wistar's Appeal*, 125 Pa. 526, 17 Atl. 460, 11 Am. St. Rep. 719; *Van Ormer v. Harley*, 102 Iowa, 150, 71 N. W. 241.

We find no error. The decree is affirmed.

COUTURE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 12, 1919.)

No. 5217.

1. LARCENY ⇨7—STEALING PROPERTY OF UNITED STATES.

One is not guilty of stealing property of the United States, in violation of Penal Code, § 47 (Comp. St. § 10214), where it was the property of and in custody of an Indian, though he was under the guardianship of the United States.

2. CRIMINAL LAW ⇨10—COMMON-LAW OFFENSES.

There are no common-law offenses against the United States.

In Error to the District Court of the United States for the District of North Dakota; Martin J. Wade, Judge.

Joseph Couture was convicted of stealing property of the United States, and brings error. Reversed.

E. T. Burke, of Bismarck, N. D., and Sullivan & Sullivan, of Mandan, N. D., for plaintiff in error.

M. A. Hildreth, U. S. Atty., of Fargo, N. D. (John Carmody, Asst. U. S. Atty., of Fargo, N. D., on the brief), for the United States.

Before HOOK and CARLAND, Circuit Judges.

CARLAND, Circuit Judge. Couture was charged as follows:

"That heretofore, and on or about the 5th day of July, in the year of our Lord 1916, at the Standing Rock Indian reservation, in the county of Sioux, state and district of North Dakota, and within the jurisdiction of this court, one Joseph Couture, late of said county, state, and district aforesaid, then and there being, did willfully, unlawfully, and feloniously take, steal and carry away one bay horse then and there the property of the United States of America, and held in trust for an Indian known as Edward Takes-the-Shield, of the Standing Rock Indian reservation; the said Edward Takes-the-Shield being then and there an Indian under the charge of a superintendent of an Indian reservation, which said property was of the value of five hundred dollars (\$500)."

He demurred to the indictment on the ground that it did not state facts sufficient to constitute a crime against the United States. If the indictment charges the stealing of United States property, it is good; otherwise not. As the same question was raised by motion for a directed verdict, we prefer to consider the matter on that assignment. The bill of exceptions has attached to it a certificate of the trial judge that the bill contains all the evidence taken at the trial. From the bill it appears that evidence was introduced tending to show:

"That on the 5th day of July, 1916, one horse, branded 135, was stolen from land adjoining the town of Cannon Ball, claimed by the government to be a part of the Standing Rock Indian reservation in the state of North Dakota. That Edward Takes-the-Shield, a member of the Sioux Tribe of Indians, was born on the Standing Rock Indian reservation and had lived there all of his

life, and said Edward Takes-the-Shield was an allottee Indian, holding his land under what is called a trust patent issued by the government, and that his home was on said allotment on the 5th day of July, 1916. That he was under the charge of an Indian agent or superintendent. That one of his children, who had held an allotment under a trust patent, had died, leaving said Edward Takes-the-Shield as sole heir. That the allotment of said deceased child had been sold under the direction of the Secretary of the Interior and the proceeds deposited with the Indian agent on the Standing Rock Indian reservation. That the horse in question was purchased by the Indian out of proceeds of the aforesaid allotment, after a consultation with the approval of the Indian agent, from a white man named Beldon, who was not in any way connected with the agency.

"That Edward Takes-the-Shield arranged for the purchase of and selected the horse, the purchase taking place about three years before the alleged larceny. The evidence further showed that in the practice at that agency the horse could not be sold or disposed of in any way by the said Takes-the-Shield, without the consent of the Indian agent or superintendent. That the horse was when stolen, in the custody of Edward Takes-the-Shield, who had taken it with him to a celebration at the town of Cannon Ball, and he had the horse hobbled and feeding on land near where the celebration was held."

[1, 2] As authority for the indictment we are referred to section 47, U. S. Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1097 [Comp. St. § 10214]). This section provides for the punishment of stealing property of the United States.

The trial court had jurisdiction to punish the stealing of property of the United States but it had no general common-law jurisdiction to punish the stealing of the property of any one within its territorial jurisdiction. Before a man can be punished, his case must be plainly and unmistakably within the statute. *United States v. Lacher*, 134 U. S. 624, 10 Sup. Ct. 625, 33 L. Ed. 1080. An offense which may be the subject of criminal procedure is an act committed or omitted in violation of a public law either forbidding or commanding it. *United States v. Eaton*, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591. There are no common-law offenses against the United States. *United States v. Britton*, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698; *United States v. Hudson*, 7 Cranch, 32, 3 L. Ed. 259; *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648; *Benson v. McMahan*, 127 U. S. 457, 8 Sup. Ct. 1240, 32 L. Ed. 234; *United States v. Eaton*, *supra*.

It must be conceded, we think, that the horse stolen from the possession of Takes-the-Shield was not the property of the United States within the meaning of section 47 of the Penal Code. Conceding that larceny may be committed from a trustee in possession of personal property, it does not help the case of the prosecution for two reasons. The horse was not in the possession of the United States if they were trustees when it was stolen, and no statute of the United States punishes the stealing of property from the United States when they simply occupy the position of guardian towards the owner thereof. The civil cases cited by the prosecution, where the courts have maintained suits by the United States to protect the property of Indians, have no application, because in those cases the court having jurisdiction has the whole field of law and equity to which it may resort.

We are therefore of the opinion that, if the indictment charged the

stealing of United States property, the proof failed. If it alleged that the property was held in trust by the United States, then the proof did no show an offense punishable under the laws of the United States.
Judgment reversed.

FIRST NAT. BANK OF SCOTTDALE v. BLACKBURN.

In re KENNEY.

(Circuit Court of Appeals, Third Circuit. March 11, 1919.)

No. 2420.

1. BANKRUPTCY ⇨165(1)—PREFERENCE—INDIRECT PAYMENT.

Where joint maker of a note, after becoming bankrupt, paid its face value to the other maker, who in turn paid payee, the payment may be recovered as a preference, if payee bank had reasonable cause to believe transfer would effect a preference, for the circuitous method of payment does not defeat recovery.

2. BANKRUPTCY ⇨165(1)—PREFERENCE—REQUESTED INSTRUCTION.

A requested instruction, that money paid by bankrupt while insolvent could not be recovered as a preference, unless it was paid to discharge a primary indebtedness of the bankrupt, *held* erroneous.

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action by A. W. Blackburn, trustee in bankruptcy, of the estate of John Franklin Kenney, against the First National Bank of Scottsdale. Judgment for plaintiff, and defendant brings error. Affirmed.

The eighth assignment of error is as follows:

(8) The court erred in refusing to affirm the seventh point of the defendant, to wit:

"7. If the jury believe from the evidence that the \$600 note, which is a part of the \$3,100 paid to the bank on October 30, 1914, was not a primary indebtedness of J. F. Kenney, the bankrupt, the bank, the defendant in this case, cannot be charged with receiving said amount in preference to Kenney's other creditors."

Edmond Englert, of Pittsburgh, Pa., for plaintiff in error.

Lowrie C. Barton, of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and THOMSON, District Judge.

THOMSON, District Judge. The First National Bank of Scottsdale seeks by this appeal to reverse the judgment of the court below, which is based upon an alleged illegal preference obtained by the appellant in the bankrupt estate of John Franklin Kenney. The material facts are these: Kenney, the bankrupt, since 1912, was engaged in the ladies' and gents' furnishing business in Scottsdale, Pa.; the business being managed by one Falk. Kenney borrowed certain mon-

eyes from the appellant bank, on notes which from time to time were renewed, three of which form the basis of the plaintiff's claim. These notes were signed by Kenney and Falk as joint makers, with a responsible indorser on each note. On the stock of goods insurance had been taken out by Kenney in six different companies, in the aggregate amount of \$8,500. On May 24, 1914, a fire occurred; the loss on the goods being adjusted pro rata among the insurance companies. On October 6, 1914, involuntary proceedings in bankruptcy were commenced against Kenney, in which, on July 6, 1915, he was adjudged a bankrupt. At the date of the filing of the petition, Kenney was indebted to the bank on notes, executed in the manner aforesaid, in the sum of \$3,650. One of these, for \$550, having afterwards been paid by the indorser, is eliminated from this case, leaving the indebtedness to the bank material here \$3,100, represented by three notes, of \$1,500, \$1,000, and \$600, respectively.

After the adjustment of the loss, and before the bankruptcy proceedings, the policies were assigned by Kenney to the cashier of the appellant bank; the acceptance of such assignments, however, being denied by the bank. After the date of the bankruptcy proceedings, to wit, on October 26, 1914, two vouchers, each in the sum of \$1,822.23, were drawn for the insurance moneys, one to the order of Charles Louchs, cashier of the bank, assignee of Kenney, and the other to the order of Kenney and Louchs, cashier. These vouchers were sent to Kenney, and after proper indorsement were delivered to the bank, which collected them; the proceeds, on October 30, 1914, being deposited by the bank in the account of Kenney. On the same day Kenney drew his check on the said fund to Falk for \$3,100, who thereupon deposited the check in his own account in the appellant bank, and on the same day drew his check thereon to the bank, paying off in full the three notes, amounting to \$3,100, on which he and Kenney were the joint makers. The trustee of Kenney brought suit against the bank to recover this \$3,100, on the ground that it was an illegal preference, and obtained judgment in the court below.

[1] The payment to the bank was made after the proceedings in bankruptcy were commenced and when Kenney was insolvent. It was made indirectly by Kenney by the hand of Falk, but "circuity of arrangement does not avail to defeat it." It was made out of Kenney's funds, by which his estate was diminished, which fact, under all the circumstances, the bank must have known. The effect of the payment was to enable the bank to receive a greater percentage of its debt than other creditors of the same class. We have present, then, all the elements which, under the act of Congress (Act July 1, 1898, c. 541, § 60, 30 Stat. 562, as amended [Comp. St. § 9644]), constitute a preference. This being true, such preference is voidable at the instance of the trustee, if the bank, at the time it received the money, had reasonable cause to believe that the enforcement of the transfer would effect a preference. This question of fact was submitted to the jury under proper instructions, and was found against the appellant.

Appellant's counsel insist that Falk doubtless received a preference

from Kenney, and that the trustee of Kenney could proceed against him, but that this does not apply to the bank; that the latter received its money when tendered by Falk, as it was compelled to do, and that in the absence of fraud or conspiracy to defraud, there is nothing to fix a preference against the bank. To sustain this contention, the case of National Bank of Newport v. National Herkimer County Bank, 225 U. S. 178, 32 Sup. Ct. 633, 56 L. Ed. 1042, is cited. The case does not sustain appellant's contention. The payment there made did not proceed, either directly or indirectly, from the bankrupt, and the bankrupt's estate was in no manner depleted thereby. The payment was made by a third party out of its own funds, its standing being separate and apart from that of the bankrupt. The very reverse is true in the case at bar. While the payment was made by Falk it was not his money, but the bankrupt's; the payment depleting the bankrupt's estate, and the creditor being benefited thereby.

[2] The fourth, fifth, and sixth assignments of error were withdrawn at the argument. It would have been error to have given the instruction called for in the eighth assignment. In the second, third, and seventh assignments the court was asked to give binding instructions for the defendant. Such instruction would have been wholly unwarranted under the evidence.

Finding no error in the record, the judgment is affirmed.

A. G. SPALDING & BROS. v. JOHN WANAMAKER, NEW YORK.
 SAME v. SUCCESSORS OF SAMUEL BUCKLEY & CO. OF LONDON AND
 NEW YORK.

(Circuit Court of Appeals, Second Circuit. February 13, 1919.)

Nos. 163, 164.

1. PATENTS \Leftrightarrow 328—INFRINGEMENT—GOLF BALLS.

The Taylor patent, No. 878,254, for a golf ball pitted with substantially circular cavities, with steep sides at the peripheries only of said cavities, is not infringed by a golf ball having cavities similar in shape and size, but whose sides make angles of 35 degrees with the surface.

2. PATENTS \Leftrightarrow 168(2)—CONSTRUCTION—REJECTION OF CLAIM.

Where a claim broad enough to include defendant's article was several times rejected by the Patent Office, the patentee is thereby precluded from asserting that the claims allowed should be given the same meaning as the rejected claim.

3. PATENTS \Leftrightarrow 160—CONSTRUCTION—EXAMINATION OF FILE WRAPPER.

The court examines the file wrapper of a patent only to determine the question of estoppel through rejected claims, and cannot consider the arguments of the applicant and the examiner.

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

Separate suits by A. G. Spalding & Bros. against John Wanamaker, New York, and against the Successors of Samuel Buckley & Co. of London and New York, for infringement of patent. Decrees for the defendant in each suit, and plaintiffs appeal. Affirmed.

These are appeals from decrees of the District Court for the Southern District of New York (Hough, J., presiding), dismissing the bills, with costs. The suits were based upon claims 1, 2, 4, and 5 of Patent No. 878,254, issued on February 4, 1908, to William Taylor of Leicester, England. In each case the plaintiff sues as assignee of Taylor, and some question was made upon the hearing of the sufficiency of the evidence of assignment; but this matter is not considered in the following opinion.

The patent recites that the invention relates to golf balls, and has for its principal object to improve the flight of the ball by giving it "a sustained hanging flight" with "a flat trajectory with a slight rising tendency particularly towards the end of the flight" (page 1, lines 12-15). It acknowledges that in the past it was common to mark the surface of golf balls with grooves of even width, intersecting each other and leaving between them isolated polygonal portions; that another common marking consisted of separate prominences upon the surface, resembling the surface of a blackberry, and named for this reason the "bramble" pattern. The patent then proceeds as follows (page 1, lines 30-47):

"The character of the marking which constitutes the present invention may be described in general terms as an inverted bramble pattern, and consists of isolated cavities the essential features of which are that they must be substantially circular in plan and substantially evenly distributed. They must be shallow, and their sides, particularly at the lip of the cavity, must be steep. Steepness of the cavity walls is essential to the hanging flight, but excessive depth besides promoting the collection of dirt, is detrimental to length of flight by offering great resistance to the passage of the air. Consequently the cavity

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

must be shallow and the steepness of its walls confined to the immediate neighborhood of the lip."

Detailed drawings set forth sections of the proposed pits, and the specification states the limits of their proper diameter and that in no case should the depth exceed one-eighth of that diameter. Several forms of section are shown, all with steep sides at the lips of the cavity; the pits differ in section, in some cases being flat at the bottom, in some elliptical, and in some the spherical surface of the ball proper, adjacent to the lip, slopes inwardly toward the lip. This last feature is not in issue in the suit at bar.

The claims in issue are as follows:

"1. A golf ball with spherical surface pitted with isolated cavities of large surface area relatively to their depth, substantially circular in plan, with steep sides at the peripheries only of said cavities, and a depth not exceeding one-eighth of their diameter.

"2. A golf ball with spherical surface pitted with isolated cavities of large surface area relatively to their depth, substantially circular in plan, with steep sides at the peripheries only of said cavities, and dished or concave bottoms, and of a depth not exceeding one-eighth of their diameter."

"4. A golf ball with spherical surface pitted with isolated cavities of large surface area relatively to their depth, substantially circular in plan, with steep sides at the peripheries only of said cavities, and of a diameter not less than nine-hundredths nor greater than fifteen-hundredths of an inch, and of a depth not exceeding fourteen-thousandths of an inch.

"5. A golf ball with spherical surface pitted with isolated cavities with large surface area relatively to their depth, substantially circular in plan with steep sides at the peripheries only of said cavities, and dished or concave bottoms, and of a diameter not less than nine-hundredths nor greater than fifteen-hundredths of an inch, and of a depth not exceeding fourteen-thousandths of an inch."

The defendants made balls pitted with spherical cavities similar in proportion and size to the plaintiff's. The issue in the case was whether these conformed to the words, "with steep sides at the peripheries only of said cavities," which are contained in all the claims in suit. The section of the defendants' pits was the arc of a circle, and the angle subtended varied between 28 degrees for the defendant Wanamaker's ball, and 35 degrees for the defendant Buckley's. The tangents to the curve of the pit at the lip were therefore, in the first case, of 152 degrees, and, in the second, of 145 degrees. The District Court found that pits of this character did not answer the element of the claims above mentioned and dismissed the bills for noninfringement.

William A. Redding, of New York City, for appellants.

Samuel Owen Edmonds, of New York City, for appellee John Wanamaker, New York.

W. Hastings Swenarton, of New York City, for appellee Successors of Samuel Buckley & Co., of London and New York.

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

LEARNED HAND, District Judge (after stating the facts as above).

[1] We think this case turns upon the question of infringement, as did the District Judge, and we have no disposition to question the validity of the patent giving it any scope which the reasonable intent of the claims can carry. We therefore consider simply the meaning of that language, present in all the claims, "with steep sides at the peripheries only of said cavities." As to this the parties differ—the defendants in-

sisting that it positively requires steep sides; the plaintiff, that it need mean no more than that the relatively steepest part of the sides must be at the lips, or, as the Patent Office phrased it, "peripheries." If the plaintiff's contention be correct, any angle between the tangents at the lips would answer the claims provided it were less than any angle between similar tangents drawn elsewhere. It would follow that the claim only meant that the pit should not be made up of two convex sections. In short, the expression would mean no more than that the pit must be concave in section.

Now it is perfectly clear that the patent did not mean this at all. The patentee supposed that he had discovered an invention dependent upon the two elements: First, that the pit should have steep sides; and, second, that it should be shallow. About the first he is explicit, for he says (page 1, lines 39-41), "Steepness of the cavity walls is essential to the hanging flight," and the hanging flight was one of the objects of his invention. That he meant not merely that the steepest part of the sides should be at the lips, as the plaintiff asserts, is clear from what immediately follows the quotation just given. He had asserted that it was steepness, and not the position of that steepness, which was essential to his patent, and he proceeded to consider the necessary limitation of this element of his invention. If the sides were steep, it followed that the pits must be deep unless their angle changed. But excessive depth would collect dirt and would shorten the flight. How, then, should he accommodate the two requirements? He furnishes the answer, saying, "Consequently the cavity must be shallow and the steepness of its wall confined to the immediate neighborhood of the lip." Now all this was not merely a roundabout way of saying that the pit must be concave. He could have said that much more simply, and it would indeed have necessarily followed from the general description of the patent as an inverted "bramble." And so, when he used the phrase (page 1, lines 38-39), "their sides, particularly at the lip of the cavity, must be steep," he meant what he said; that is, "steep," as distinct from "sloping."

We do not think it necessary to confine the patent to the angle of 90 degrees between the tangents at the lips, as is stated in the specification (page 1, lines 61-62), although it would be a somewhat strained interpretation which treated an angle of more than 90 degrees as "steep." If any one thinks that an angle of more than 90 degrees left the sides steep, it may be so. Certainly angles of 152 and 145 degrees by no reasonable extension of the words fall within the adjective selected. The patent has already been once declared void for indefiniteness, and too much latitude would, under our own law, as well as under the English law, make the disclosure insufficient, because it would be incapable of serving as a guide in manufacture. But the question of indefiniteness we pass, assuming for present purposes that the adjective "steep" is sufficient for practical manufacture. All we need say here is that, however vague may be the contrast between "steep" and "sloping," it is clearly indicated, and that the defendant's balls in any view are only sloping.

The fact is that the patentee misconceived his invention. He supposed that something akin to a ledge was necessary to produce the flight he was after. The proof is to the contrary. A shallow saucer, the sector of a circle of small angle, produces quite as good results as the patented ball. The patentee having misconceived the conditions of what he wished, the plaintiff hopes now to appropriate a broader invention discovered by another and resting upon the elimination of one of the elements which the patentee supposed necessary. Obviously this he cannot do.

We cannot, therefore, agree that there is any ambiguity in the claims of the patent, and we should be content to rest there, if necessary; but an inspection of the file wrapper corroborates the conclusion which we have reached. On October 10, 1906, the applicant proposed a new claim—claim 2 of that date—in the following words:

“A golf ball with spherical surface pitted with isolated cavities of a diameter not less than nine one-hundredths nor greater than fifteen one-hundredths of an inch and of a depth not exceeding fourteen one-thousandths of an inch.”

Now this claim proposed an extension of the patent of precisely the scope which is necessary to cover defendant's balls and without which the claim does not cover them. It eliminated the question of steep sides, and yet it was obviously intended to cover a cavity which was concave in section; that is to say, one in which the steepest part of the section was at the lips. The plaintiff does not assent to this interpretation of the proposed claim. Its reason is that the patent to Fernie, on which this claim was rejected on October 31, 1906, and again on December 17, 1906, and February 19, 1907, covered pits which in section exhibited two convex curves, meeting in a deep point in which mud would gather. It may be that one might follow Fernie's patent and make a ball with such cavities, but it is quite clear that, read on those specifications, the pit must have been concave in section. This follows from that part of the specification (page 1, lines 32-33) which described in general terms the patentee's balls as pitted with inverted “brambles.” Now whatever else “inverted brambles” means, it only covers pits concave in section, and the proposed claim would have been read in that sense. It seems to us necessarily to follow that the proposed claim would have covered only such a pit, and that therefore, while it proposed a claim of greater latitude than those eventually granted, it could not have been construed as covering a pit such as the applicant insisted might follow within Fernie's practice.

[2, 3] Therefore the successive rejections of this claim necessarily involved the rejection of the construction which the plaintiff seeks to put upon the patent at the present time—or at least, so it seems to us—and concludes it by estoppel from the interpretation which it now seeks to put upon those claims which the patentee eventually got. We take this occasion, however, once more to say that in the consideration of a file wrapper we do not look at the arguments of the applicant to the examiner. We wish it to be understood that, as we conceive the purpose for which the file wrapper can be examined, it covers simply the question of estoppels through rejected claims. The whole doctrine is

somewhat anomalous at best, since it involves looking at preliminary negotiations in the interpretation of a formal document intended to be the final memorial of the parties' intentions. The practice, however, is too well settled for us to disturb, and we have no intention of casting any doubt upon it. This court, nevertheless, has twice already disapproved the practice of bringing into that interpretation the arguments of an applicant. *Westinghouse Electric Co. v. Condit Elec. Mfg. Co.*, 194 Fed. 427, 430, 114 C. C. A. 389; *Auto Pneumatic Action Co. v. Kindler & Collins*, 247 Fed. 323, 328, 159 C. C. A. 417. We repeat now that disapproval.

Finally, we agree with the plaintiff that the use by Jack White in England of balls similar to the defendants' is not material to the disposition of this case, in the absence of proof that Taylor, the patentee, knew of the use before his invention. As a prior use it has no relevancy to the validity of an American patent. The issue of whether Taylor was in fact a prior inventor it is not necessary for us to consider.

The decrees are affirmed, with costs, and the bills dismissed for non-infringement.

H. KOPPERS CO. v. OTTO COKING CO., Inc., et al.

(District Court, D. Delaware. January 18, 1919.)

No. 348.

1. PATENTS \Leftrightarrow 328—VALIDITY AND INFRINGEMENT—GAS FURNACE AND COKE OVEN.

The Koppers patent, No. 818,033, claims 1 and 5, for a gas furnace or coke oven, *held* valid as disclosing patentable invention, not anticipated, and infringed.

2. PATENTS \Leftrightarrow 328—INFRINGEMENT—REGENERATIVE COKE OVEN.

The Schniewind patent, No. 673,928, for a regenerative coke oven, *held* not infringed.

In Equity. Suit by the H. Koppers Company against the Otto Coking Company and another for infringement of patent. On final hearing. Decree rendered for plaintiff.

Frederick P. Fish, of New York City, Henry Love Clarke, of Chicago, Ill., and Sylvester D. Townsend, Jr., of Wilmington, Del., for complainant.

Francis T. Chambers, of Philadelphia, Pa., Odin Roberts, of Boston, Mass., John E. Hubbell, of Philadelphia, Pa., and Thomas F. Bayard, of Wilmington, Del., for defendants.

ORR, District Judge (specially presiding). This suit in equity is before the court upon final hearing upon proofs taken out of court. The plaintiff charges the defendants with the infringement of claims 1 and 5 of United States patent No. 818,033, issued April 17, 1906, to Heinrich Koppers for a gas furnace or coke oven. The defenses interposed against the Koppers patent are lack of patentable invention,

anticipation, and noninfringement. In addition to those defenses, the defendant Otto Coking Company has set up a counterclaim against the plaintiff, alleging infringement by the plaintiff of claim 1 of United States patent No. 673,928, issued May 14, 1901, to Frederick William Charles Schniewind for a regenerative coke oven. To the counterclaim aforesaid, the plaintiff has set up as defenses lack of patentable invention, anticipation, and noninfringement.

[1] Both of the patents above mentioned relate to an art which has been developed in a marked degree in recent years. Furnaces for the manufacture of gas from coal have been used for many years; furnaces for the manufacture of coke from coal have been used also for many years. In the distillation of the coal for the production of the gas, coke was necessarily left as a residuum, usually a soft and spongy product known as gashouse, and sometimes as domestic, coke. It was deemed the by-product resulting from the production of gas. In the distillation of coal for the production of coke, known as metallurgical coke (for there can be no such coke produced, except by distilling out from coal, its volatile constituents), the gases were deemed the by-products and were generally permitted to be wasted. To develop a furnace by means of which all volatile constituents of coal could be utilized, and at the same time metallurgical coke would be produced, became the hope of many who directed their studies to that end. Mr. Koppers must have attained that end, for it appears that over 80 per cent. of all the by-product coke ovens built within the last 10 years in the United States have been Koppers ovens and represent an investment of over \$50,000,000. Whether the plaintiff, as owner of the Koppers patent, is entitled to any protection, against competitors who infringe the patent, is the main question in this case.

So far as the record shows, Koppers ovens are built in association with each other; 60 or more being often built side by side. To such group the name "battery" appears to have been given. A battery of ovens is constructed wholly of masonry of heat-resisting bricks, and is about 25 feet high, 40 feet wide, and perhaps several hundred feet long. The whole structure rests upon a cement floor or mat. The coking chambers are in the second story, as it were, of this large structure. Each of these coking chambers is long, high, and narrow, about 40 feet long, or the width of the battery, about 10 feet high and about 20 inches wide. It is charged with about 13 tons of coal from the top. It has end doors, by means of which the coke may be pushed out. In the wall between the coking chambers is a series of heating chambers or vertical flame flues. Within what may be called the first story of the battery are the pillar walls necessary to support the coking chambers. Like the coking chambers, these pillar walls are transverse of the battery. Between these pillar walls are located the regenerators, which directly communicate with the heating chambers or flame flues in the heating walls of the coking chamber. The function of regenerators is to preheat the air or gas before the combustion thereof takes place in the heating chambers. They are built in sets, and the operation is such that the burnt gases resulting from combustion are drawn off through one regenerator for a time, and then

for a like period are drawn off through the other regenerator, with a reversal of the operation at more or less regular intervals. The regenerators are usually filled with fire brick so piled as to leave many interstices of such apparent uniform character as to give the name "checker brick" to the construction. The burnt gases, being drawn off through this checker brick, give it great heat, and when the operation is reversed, the air or gas, as the case may be, admitted to form the combustion in the heating chambers, has been very greatly preheated. In this way, a greater uniformity and intensity of heat is applied to the coal in the coking ovens. To form a pair of regenerators between the pillar walls supporting the coking chambers, a partition wall is provided for, which extends in the same direction as the battery; that is to say, at right angles to the direction of the coking chambers and the supporting pillar walls. In the so-called first story are also pipes for the introduction of the gas, the channels for the introduction of the air, and the channels for withdrawing the waste gases.

The claims of the patent in suit are:

"1. In a coke oven, a series of heating chambers and coking chambers intermediate the heating chambers, combined with a series of regenerators below and parallel to the heating chambers and communicating directly therewith, substantially as specified."

"5. A coke oven provided with coking chambers, two sets of heating chambers intermediate the coking chambers, two sets of regenerators communicating with the heating chambers and arranged below the coking chambers, and a partition between the regenerators, substantially as specified."

This court is unable to find, from the evidence submitted, that the combination of either of said claims is found in the prior art. Heating chambers and coking chambers intermediate the heating chambers, combined with a series of regenerators, are found in the prior art separately and in combination; but regenerators directly communicating and parallel with the series of individual flame flues at the side of each coking chamber in the coke oven battery are not found. Regenerators below and transverse to the heating chambers are old in the coke oven art. The most important creation of Koppers was the "direct, individual flue regeneration," to use a condensed expression of plaintiff's brief.

The Koppers patent, therefore, cannot be held to have been anticipated, or to lack patentable invention. This court is inclined to adopt the language of the Supreme Court in *Diamond Rubber Co. v. Consolidated Tire Co.*, 220 U. S. 428-435, 31 Sup. Ct. 444, 447, 55 L. Ed. 527:

"Knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skillful attention. But the law has other tests of the invention than subtle conjectures of what might have been seen, and yet was not. It regards a change as evidence of novelty, the acceptance and utility of change as a further evidence, even as demonstration."

The acceptance and utility of the Koppers oven seems to be almost a demonstration of its novelty. No other conclusion can be reached than that the Koppers patent is a valid patent.

The question as to whether or not the defendants are infringers needs little consideration. The defendant Otto Coking Company has made, and the defendant Wilputte Coke Oven Corporation intends to make, what they call "Wilputte ovens." The Wilputte oven is so like the Koppers oven that one hesitates to find a difference between them. The defendants have interposed in the regenerators, which are underneath and parallel with the heating chambers, a number of slight brick partitions, with the result that they have a number of small regenerators, which, if the partitions were removed, would together form the larger regenerators of Koppers. When the burnt gases have ceased to flow in the direction of one side of the battery, and by draft are diverted to the other side of the battery, and air or gas is admitted from the side where such flow has been stopped, a number of smaller regenerators operate to do the preheating which the larger regenerator of Koppers would have done. And as the burnt gases are withdrawn by draft from the other side of the battery, they tend to give heat to a large number of small regenerators, instead of the larger regenerator which Koppers has provided. No advantage can be allowed to the defendants by reason of the subdivision of the larger regenerators of Koppers to the smaller regenerators. The defendants' structure has the regenerators directly communicating and parallel with the series of individual flame flues.

The defendants have also taken the position that, because they have devised openings through the pillar walls supporting the coking ovens, and filled such openings with checker brick connected up with the checker brick of their small regenerators, they have constructed their regenerators so that they are not transverse of the battery, but longitudinal thereof. The openings in the pillar walls, after they have been filled with checker brick, are so small that they cannot be deemed of any importance in the defendants' structure. They do not connect the different regenerators, so as to make them one long regenerator running longitudinally of the battery.

A great deal appears in the record with respect to the method used by Wilputte to introduce the air supply, and the method for recovering the waste gas, none of which need be discussed, because they are not really material to the issue. The defendants have not neglected to use the disclosures of Koppers as expressed in his patent. Their ovens, like the Koppers ovens, have regenerators directly communicating and parallel with the series of individual flame flues alongside each coking chamber in the coke oven battery. It should not be urged with seriousness that Koppers did not create that combination and relationship. It appears clearly in the patent. Perhaps it appears even more clearly in the file wrapper of his patent and in the original specification, which, because of its inartificiality, was withdrawn. The conclusion must be reached that the defendants are guilty of infringement of the Koppers patent.

There remains to be considered the counterclaim, which is based upon Schniewind's patent aforesaid. The claim of this patent in controversy is claim 1, which is as follows:

"1. In combination with a series of horizontal externally heated coke ovens having heating flues, as *C*, situated between their walls and partitions, as *D*, *D'*, *D*², etc., dividing said flues into a series of combustion chambers connected at top by flue passages, as *D*³, *d*³, a series of gas burners, as *G'*, *G*², etc., supplying said combustion chambers with gas, a pair of regenerators, as *I*, *I'*, and flues, as *H*, *F* and *H'*, *F'*, connecting each regenerator with a group of the combustion chambers, as specified, and so that heated air is supplied by one regenerator to one group of combustion chambers and the products of combustion drawn through the other group of chambers into and through the other regenerator."

[2] Inasmuch as we have already held that the invention of Koppers was not anticipated in the prior art, it must follow logically that the Schniewind patent has not been infringed by the Koppers oven. The Schniewind construction rests upon metal vertical columns and cross-beams, and has underneath the superstructure two regenerators, which are placed longitudinal of the battery. There is no direct communication with heating chambers intermediate coking chambers. The first point of combustion in the Schniewind patent is below the plane of the bottom of the coking ovens, and not, as in the Koppers patent, in such plane. The Schniewind combination is not the Koppers. During the life of the Schniewind patent (which has expired) it never met with any marked degree of success, in this country, at least; whereas, the adoption of the Koppers invention, has become very widespread. There could not have been in the one the intensity and uniformity of heat which is found in the other, and which is of the utmost importance in procuring the rapid distillation of coal and frequent discharges from the ovens of metallurgical coke.

From the foregoing considerations, the conclusion is reached that the Koppers patent is a valid patent, that claims 1 and 5 have been infringed by the defendants, and that claim 1 of the Schniewind patent has not been infringed by the plaintiff.

The plaintiff is entitled to relief. Let a decree be drawn in accordance with this opinion.

SHIPLEY v. HALL.

(District Court, E. D. Pennsylvania. April 9, 1919.)

No. 1541.

TRADE-MARKS AND TRADE-NAMES ⚡3(4)—NAME SUBJECT TO OWNERSHIP—
GENERAL USE OF ARBITRARY WORD.

Where the name "Bethabara Wood," invented by plaintiff, by general use became the descriptive name for a certain wood many years before he secured a registered trade-mark for it, he acquired no exclusive right to the name, preventing defendant from handling and selling wood under that name.

In Equity. Suit by Malcolm A. Shipley against Fessenden Hall. Decree dismissing bill.

Francis M. Gumbes, of Philadelphia, Pa., for plaintiff.

Hepburn, Dechert & Norris and Charles J. Hepburn, all of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The plaintiff on April 4, 1907, applied for the registration of the trade-mark "Bethabara Wood" for fishing rods. In support of his application he filed a statement setting forth that the trade-mark had been continuously used in his business since on or about March 15, 1882, and that it was applied and affixed to the goods or to the packages containing the same by placing thereon a printed label on which the trade-mark was shown. A certificate of registration, No. 63,747, was duly issued July 9, 1907.

In his bill, the plaintiff avers that on March 15, 1882, he adopted the arbitrarily selected name "Bethabara Wood" as a trade-mark and means of identifying his leading fishing rods and wood for the manufacture of the same, and that since that time he has continued to manufacture, put up, ship, and deliver specially chosen and prepared wood of high grade and quality and marked with the said trade-mark; that he was the first to adopt and use the arbitrary word "Bethabara Wood" as a trade-mark for wood so manufactured, and that he is the sole and exclusive owner of the trade-mark. He avers that he has extensively advertised throughout the United States and foreign countries the said wood by designating it as "Bethabara Wood"; that by means of the use of the trade-mark and the advertisements the wood became known and was referred to, bought, sold, and ordered under the name of "Bethabara Wood," and the word "Bethabara Wood" came to identify the brand of wood so manufactured, put up, sold, and advertised by the plaintiff; that the public, purchasers, and consumers of the wood continued to identify it by the trade-mark "Bethabara Wood," and the title has come to indicate its origin, manufacture, and production to purchasers and consumers. He charges that the defendant is an importer and manufacturer of foreign woods, and is using upon inferior wood not manufactured by the plaintiff the mark "Bethabara Wood," thus infringing the plaintiff's trade-mark.

It appears from the evidence that the plaintiff in 1862 became engaged in business with his father under the name of A. B. Shipley & Son

in the manufacture and sale of fishing rods and tackle; that the business was later conducted in the name of the plaintiff, Malcolm A. Shipley. In 1880, the plaintiff learned that some one in England had used a certain kind of wood to make fishing rods and sent to England and got some of the wood. He then concluded that he would exploit it and gave it the arbitrary name "Bethabara Wood" and started to advertise it. The wood in question is of close texture, hard and resilient, and comes from British Guiana, where it was known as "Washaba" wood. It was described, as early as 1881, in a work by Dr. James A. Henshall on "Black Bass," as having been introduced by A. B. Shipley & Son for making fishing rods. The plaintiff sold some of the wood to F. D. Divine, a rodmaker, of Utica, N. Y., by whom it was advertised for sale as "Bethabara Wood" in 1883 in the "American Angler." It was also imported and used for nearly 25 years prior to 1907 by others for the manufacture of fishing rods for sale, and was sold in square strips to fishermen for making their own rods and to dealers, and was advertised by them, under the name of "Bethabara." Thus "Washaba" wood, long before 1907, came to be known as "Bethabara Wood" to manufacturers, dealers; and fishermen in this country, and finally it came to be known as "Bethabara Wood" in the country from which it was exported.

There is no evidence that the plaintiff, in using the name "Bethabara Wood" for fishing rods for many years after 1880, had the exclusive use of the word arbitrarily selected by him as the name for "Washaba" wood, as indicating its origin in him; but there can be no doubt that the word "Bethabara" had come to indicate "Washaba" wood as a generic or descriptive name, and was so used generally throughout the trade, and by the purchasing public, and that it alone was used as a name for Washaba wood by importers, manufacturers, and dealers. In short, the evidence shows that, although the word "Bethabara" was originally adopted by the plaintiff as a term for Washaba wood, it came, by use, association, and acceptance, to be the descriptive name for Washaba wood, and in the trade and to purchasers it was not distinctively connected with the plaintiff or the plaintiff's manufacture. The evidence to sustain this conclusion is so overwhelming that it is not necessary to review or discuss it.

When the plaintiff obtained his trade-mark, therefore, he was not entitled to the exclusive use of the word "Bethabara," invented by him 27 years before. The plaintiff has not attempted to show the sale by the defendant of fishing rods bearing his trade-mark, but there is evidence of two sales by the defendant of small quantities of Washaba wood in square strips for the purpose of making fishing rods under the name of "Bethabara Wood." There was no mark or brand upon the wood so sold by the defendant in imitation of the plaintiff's registered trade-mark. The defendant, in using the name and selling the wood as "Bethabara Wood," did not invade any right which the plaintiff had.

The plaintiff having failed to establish an exclusive right in the name as a trade-mark, or infringement upon the part of the defendant, the bill must be dismissed.

A decree will be entered accordingly.

In re GOLDBERG.

(District Court, D. Massachusetts. March 21, 1919.)

No. 24525.

1. BANKRUPTCY \Leftrightarrow 407(5)—DISCHARGE—DENIAL—FALSE FINANCIAL STATEMENT.

That discharge of bankrupt may be denied on the ground of substantially false statement on which credit was obtained, there must have been intentional dishonesty, he must have known the statement was false, and intended to deceive by it.

2. BANKRUPTCY \Leftrightarrow 414(1) — PROCEEDING FOR DISCHARGE — PRESUMPTION — KNOWLEDGE AND MEANING.

Relative to refusal of discharge because of false statement of bankrupt on which he obtained credit, that persons know what they sign and mean what they say is a presumption of fact, which, though not conclusive, is, as applied to business men, one of the weightiest known to the law.

3. BANKRUPTCY \Leftrightarrow 415(3)—APPLICATION FOR DISCHARGE—CONCLUSION OF REFEREE—REVIEW BY JUDGE.

Though "assessed value," which bankrupt purported to give in a statement on which he obtained credit from a trust company, is a definite thing, well understood by all business men, conclusion of referee, on application for and objection to discharge of bankrupt, that he did not intend to deceive by his statement, cannot be said to be plainly erroneous, and so must be accepted; his previous statements, similar in character, covering several years, and, so far as appears, not used in a fraudulent way, being in evidence, and he testifying that he had always put in the properties at what they cost him, and that this and their values were known to the treasurer of the company.

In Bankruptcy. In the matter of William Goldberg, bankrupt. On application for a discharge. Discharge granted.

Phipps, Durgin & Cook, of Boston, Mass., for objecting creditor.
M. J. Sawyer, of Boston, Mass., for bankrupt.

MORTON, District Judge. The specifications of objection now relied on are based upon an alleged false statement in writing made by the bankrupt to the objecting creditor, the Liberty Trust Company, for the purpose of obtaining credit. It was on a printed blank furnished by the trust company. The portions alleged to be false relate to real estate only. The language is "real estate (assessed value), as follows." Then follow values for three different parcels, which admittedly greatly exceeded the assessed values.

The evidence is not reported, except the statement in question and certain similar statements which preceded it; and the findings of the learned referee must be accepted, unless, upon the face of his report, when read in connection with the statements referred to, they appear to be plainly wrong.

[1] That the statement was made, as asserted by the objecting creditor, and was substantially false, is beyond question. It is settled that intentional dishonesty is a necessary element in the objection relied on.

In re O'Callaghan (D. C.) 29 Am. Bankr. Rep. 304, 199 Fed. 662; Collier on Bankruptcy (10th Ed.) p. 353 a; Remington on Bankruptcy (2d Ed.) § 2560. The issue is whether the bankrupt knew that the statement was false and intended to deceive by it. The learned referee has found that he did not.

[2] There is a presumption that persons know what they sign and mean what they say. The presumption is one of fact, and, of course, is not conclusive. As applied to business men, it is, however, one of the weightiest presumptions known to the law, and one of the most important. This case turns on whether the learned referee gave due weight to it.

[3] "Assessed value" is a definite thing, well understood by all business men. It seems difficult to believe that a misstatement concerning it can have been innocent and in good faith. The learned referee suggests that the words are in small type; but an inspection of the statement shows that they are in exactly the same type as the rest of it. Aside from the previous statements and the testimony concerning them, I should have no hesitation in saying that the learned referee was plainly wrong in his conclusion and had overvalued protestations of innocence and good faith by the bankrupt.

The previous statements, similar in character, were admissible as bearing upon the alleged fraudulent intent. They covered several years, and, so far as appears, were not used in any fraudulent way. The bankrupt testified, according to the certificate, that the treasurer of the Trust Company knew that the figures as to real estate contained in those statements, although purporting to be assessed values, really represented what the bankrupt had paid for the properties:

"He [the bankrupt] testified that he had always put in these properties at their value, or what they cost him, and that their values were known to Mr. Sturges [the treasurer] or the bank." Report of Referee, p. 2.

In the present state of the record, this testimony must be taken as true. On that assumption it cannot be said that the conclusions of the learned referee were plainly erroneous.

It follows that his report must be confirmed; and the discharge granted.

In re NORMAN.

(District Court, D. Montana. March 18, 1919.)

No. 140.

JUDGMENT \Leftrightarrow 828(1)—RES JUDICATA—DENIAL OF NATURALIZATION.

A state court's denial of leave to file a naturalization petition is *res judicata*, so as to be binding upon a federal court; and if the government continues to oppose the alien's application, his only remedy is to renew the application five years after the occurrence for which the state court denied it.

Motion by George Norman for leave to file a naturalization petition. Denied.

R. E. Hammond, of Havre, Mont., for petitioner.

E. C. Day, U. S. Atty., of Helena, Mont., for the United States.

BOURQUIN, District Judge. Upon notice to the United States attorney, who opposes, Norman moves for leave to file petition for naturalization.

The moving papers, alone before the court, allege that in December, 1918, a state court denied Norman's like petition by order that, "it appearing that petitioner, a single man, without dependents, and a government homesteader, claimed exemption from military service, denied with prejudice"; that the undisputed evidence before said court was that Norman engaged in farming upon leased land, and in accordance with governmental instructions he did claim and receive deferred classification in the draft; that the state court found no objection to Norman's moral character, but denied him admission to citizenship because of said deferred classification alone; that said court denied his application for rehearing, and informed him that his subsequent petition would be denied; that he at no time was a government homesteader. It does not appear whether or not the United States participated in said hearing, nor whether or not formal decree has been entered. If the situation is as Norman alleges, and if he can satisfy the United States thereof, it would seem that in good conscience the United States ought to consent to reapplication for citizenship by him. For the proceedings before the draft board unimpeached, its order of deferred classification is a conclusive adjudication that therein Norman could best serve the United States at war, and that to seek deferred classification was not only his right, but was also his duty. And the judgment of the board was entitled to the like respect in said state court, that the latter's judgment is here.

It is to be noted that, to the end that every person would be employed where most useful to the United States, and not at all to create privileges for a favored few, the Selective Draft Law (Act May 18, 1917, c. 15, 40 Stat. 76 [Comp. St. 1918, §§ 2019a, 2019b, 2044a-2044k]) provided for exemptions, some absolute, some conditional upon the judgment of the boards, some partial by way of deferred classi-

nification and also conditional upon the board's judgment. Judges are of the absolute exemptions. In view thereof, and of Norman's allegations herein, that the judge of the state court determined that partial exemption stamped Norman as unfit for admission to the same citizenship as the judge enjoys, is incomprehensible, unless imputed to that fierce, fiery, and intolerant emotionalism that in religion takes the form of the Inquisition, St. Bartholomew's, and Smithfield, and in citizenship too often finds expression only in anathema upon those who fail to measure up to individual standards of patriotism to which their sponsors do not conform.

Be the truth what it may, however, be the injustice to Norman what it may, settled principles preclude this court from inquiring therein. This his collateral attack upon said court's judgment must fail. To that, the judgment is impregnable; and it is *res judicata* so long as the United States insists upon the benefit of that judgment against a man whose only offense (if he tells the truth here, and which is uncontradicted) is that he served the United States where best he could and where it said he should. For though naturalization proceedings are wholly statutory, final orders therein are so far of the nature of judgments that they ought to be and must be held subject to the law of judgments. Therefore, since it follows that Norman's allegations cannot be considered herein to impeach the state court's order aforesaid, it must be here inferred that, as found by the state court, Norman "claimed exemption from military service" and under circumstances in evidence before it warranting the state court to find, and that it did find, he had not the "good moral character" and the disposition to the "good order and happiness" of the United States, necessary to qualify him for admission to citizenship. Although the naturalization law (Act June 29, 1906, c. 3592, 34 Stat. 596) does not expressly forbid, and even contemplates, repeated petitions for citizenship after petitions denied, such repeated petitions can be only in accordance with the general law of procedure, judgments, and *res judicata*; that is, when changed conditions justify, when (as the naturalization law virtually stipulates) "the cause for such denial has since been cured or removed."

If Norman has been injured by abuse of judicial discretion and by exercise of mere arbitrary power, the present attitude of the United States maintained, his only remedy is to maintain a good moral character, etc., for five years subsequent to the claim of exemption found by the state court, and so cure or remove the cause of the state court's denial as aforesaid. Whereupon he may petition anew for citizenship. See *Guliano's Case* (D. C.) 156 Fed. 420, and *Centi's Case* (D. C.) 217 Fed. 834.

The motion must be, and is, denied.

UNITED STATES, to Use of FRANCINO et al. v. WELLES et al.

(District Court, M. D. Pennsylvania. April 10, 1919.)

No. 600.

UNITED STATES \S 67(3)—BUILDING CONTRACTS—BOND.

Act Aug. 13, 1894, as amended by Act Feb. 24, 1905 (Comp. St. \S 6923), authorizing laborers and materialmen to sue on public contractor's bond, contemplates one trial, in which all claims shall be adjusted, and a claimant failing, without apparent excuse, to participate in trial with other claimants, cannot subsequently sue on bond.

At Law. Action by the United States, to the use of Francino and others, against M. P. Welles, contractor, and the American Bonding Company, as surety. On rule to show cause why the case should not be stricken. Rule made absolute.

R. W. Archbald, of Scranton, Pa., and Jas. G. Glessner, of York, Pa., for C. E. Miller.

Welles & Torrey, of Scranton, Pa., and F. B. Bracken, of Philadelphia, Pa., for Bonding Co.

WITMER, District Judge. This action was brought under Act Aug. 13, 1894, c. 280, 28 Stat. 278, as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. \S 6923), to recover upon the bond given by the contractor for the construction of the post office building, at York, Pa. It was instituted in the name of the United States, by Subcontractor Francino, in which he was joined by seven other persons claiming for material and labor furnished in the construction and completion of the building. Among the intervening claimants was one C. E. Miller, who when the case was called for trial, after issue joined and the usual publication of the list, refused and neglected to submit his claim for adjudication without apparent reason or excuse. The trial proceeded, and after submission of the intervening creditor's claims, excepting Miller, the jury returned a verdict, in favor of the several interveners respectively, aggregating less than the penalty named in such bond. Final judgment was afterwards entered upon the verdict. Almost four years have since elapsed. The intervening creditor, Miller, now comes and insists on submission and trial in respect of his claim.

The defendants contend that he is too late, having failed to present his claim upon the trial his opportunity has passed; that he is not entitled, under the statute, to separate trial after final judgment has been entered in the case. While the several intervening creditors have admittedly respectively and distinctively independent causes of action (Title Guaranty Co. v. Crane, 219 U. S. 35, 31 Sup. Ct. 140, 55 L. Ed. 72), do they have, under the statute, the right to several trials by jury? We think not. The statute in its general scope contemplates one trial or submission for adjudication of all the intervening claims, in order that its provisions may be harmoniously carried into effect. The action provided is on the bond for the recovery of the penalty

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which stands primarily for the protection of the government, and then for distribution among the creditors of the remaining part of the penalty after the satisfaction of the government's demand. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due to the United States, the remainder shall be distributed pro rata among said interveners. It is quite clear that it was intended that the rights of all parties intervening should be determined and adjudicated in one trial and by one judgment; otherwise the rights of the several plaintiffs and defendants could not be determined and adjudicated as provided. *U. S. v. McGee* (C. C.) 171 Fed. 207.

The obligation of the surety as fixed by the bond is enforced in a single proceeding (*Bryant Co. v. N. Y. Steam Fitting Co.*, 235 U. S. 337, 35 Sup. Ct. 108, 59 L. Ed. 253), for the benefit of the several claimants prosecuted to final judgment and execution. Such proceeding, or action, as was said by Mr. Justice Van Devanter, in *United States v. Congress Construction Co.*, 222 U. S. 199, 32 Sup. Ct. 44, 56 L. Ed. 163, "shall be so instituted and conducted, in point of notice and otherwise, that all demands of that class may be adjudicated therein and included in a single recovery." This, I take it, implies a single trial and consequent judgment, and furnishes sufficient authority for the conclusion reached.

When this case was set down for trial and in due time tried, Miller was afforded an opportunity for making out his case against the defendant, contractor, and the bonding company as surety, and having failed to prove his claim, though represented by counsel who was in court on the inception of the trial, he has now no standing to insist on placing a case upon the trial list that has been tried.

The rule to strike off is made absolute.

KELTON v. DU PONT.

(District Court, N. D. New York. April 7, 1919.)

PLEADING ⇨362(3)—**STRIKING OUT MATTER—MATERIALITY—SUBSCRIPTION TO STOCK—FRAUD.**

In a complaint to recover for subscriptions to corporate stock obtained by fraud, allegations that the corporation was never legally organized or authorized to transact business, because the capital, with which it was to begin business, was never paid in, and that the corporation was insolvent, were material to the question of damages, and will not be stricken from the complaint.

At Law. Action by Raymond A. Kelton against T. Coleman Du Pont. On motions by defendant to strike an allegation from the complaint, or, if it be not stricken, to have it set forth as a distinct cause of action, separately stated and numbered. Motions denied.

John A. Stephens, of Albany, N. Y., for plaintiff.
Dunmore, Ferris & Dewey, of Utica, N. Y., for defendant.

RAY, District Judge. The contention of defendant is that the allegation No. 17 is irrelevant and immaterial to the cause of action set forth in the complaint. It reads as follows:

"That said Hudson Hotel Company, after its incorporation, was never legally or properly organized or authorized to transact business according to law, for the reason that the sum of one thousand dollars (\$1,000.00), which was stated in its certificate of incorporation as the amount of capital with which it would begin business, was never paid into said corporation before it commenced to transact business, and said Hudson Hotel Company is now insolvent."

This action is based on the circulation of a certain subscription agreement for subscription to the capital stock of Hudson Hotel Company, which was incorporated under the laws of the state of New York, and which paper it is alleged contained certain materially false and fraudulent representations, and upon which those who subscribed for stock relied. The allegation of the complaint is "that after its incorporation said Hudson Hotel Company and this defendant as one of the directors thereof caused to be circulated a certain subscription agreement and solicited subscriptions to the shares of the capital stock of said Hudson Hotel Company," etc., and that plaintiff's assignees were thereby induced to subscribe for stock in said company and pay in their money. The charge is made against the company as well as against the defendant Du Pont, and if this be true both would be liable.

For a recovery it is necessary to allege facts showing damages and injury, assuming this to be an action to recover damages, and to sustain a recovery it will be necessary to prove damages and injury. If the corporation is solvent, why may it not do business, issue its stock, and perform every obligation to the subscribers for stock. It seems to me that the allegation complained of and sought to have stricken out is a material allegation bearing on the question of damages and injury, and one that may be properly retained in the complaint as showing why suit is against the defendant alone, and not against the company, or against both, and how and why and wherein the plaintiff's assignees sustained damages.

Irrelevant and immaterial matters have no place in a pleading, but I cannot see that this allegation, in view of the nature of the action and facts on which it is based, is either immaterial or irrelevant. This matter has been before the courts of the state of New York in some of its aspects. See *Whalen et al. v. Hudson Hotel Co. et al.*, 183 App. Div. 316, 170 N. Y. Supp. 855. But it is not necessary to quote therefrom here.

Motions denied.

STANDARD IRON WORKS v. SOUTHERN BELL TELEPHONE &
TELEGRAPH CO.

(District Court, W. D. South Carolina. June, 1917.)

1. TELEGRAPHS AND TELEPHONES Ⓒ56—FAILURE TO FURNISH TELEPHONE CONNECTION—LIABILITY—ABSENCE OF CONTRACT.

A third party's failure to secure connection with fire department through defendant's telephone exchange by using a telephone not contracted for by plaintiff does not render defendant liable for fire damage to plaintiff's property.

2. JUDGMENT Ⓒ570(5)—MERGER AND BAR—NONSUIT.

A nonsuit upon insufficient evidence is not an adjudication, but allows plaintiff to sue again.

At Law. Action by the Standard Iron Works against the Southern Bell Telephone & Telegraph Company. On motion for nonsuit. Nonsuit granted.

Cornelius Otts, of Spartanburg, S. C., for plaintiff.

Bomar & Osborne, of Spartanburg, S. C., and Osborne, Lawrence & Abrahams, of Savannah, Ga., for defendant.

JOHNSON, District Judge. [1] At the conclusion of plaintiff's testimony, the defendant moves for a nonsuit on several grounds. It is not necessary to pass upon all the grounds mentioned by the defendant, as in the opinion of the court the motion should be granted. The testimony shows that H. J. Staggs, the party who attempted to secure connection with the fire department through the defendant's telephone exchange, was not an employé of the plaintiff, nor had he any connection whatever with the plaintiff as officer, stockholder, or otherwise. He was not working for or acting for the plaintiff, and, at the time he attempted to secure the connection, neither the plaintiff nor any of its officers, agents, or employés had knowledge of his efforts to secure connection through the defendant's telephone exchange. The telephone over which the said Staggs attempted to secure connection with the fire department was not the telephone for which the plaintiff contracted and which he had in his place of business, but it was the telephone of the Specialty Reed Works, a corporation whose plant was located hard by. There was no privity of contract between Staggs and the plaintiff corporation, and the court feels constrained to grant the motion for that reason, and for the further reason that Staggs did not attempt to use the telephone for which the plaintiff had contracted. Neither the plaintiff's officers, agents, nor employés sought connection, either over its own or any other person's phone, and therefore the question so earnestly argued by plaintiff's counsel that it is the service, and not the particular phone in one's house or on one's place, that is paid for, it seems to me that that question cannot arise.

[2] The court is also of the opinion that the evidence was not such that the jury could have determined what part of the damage accrued before and what part accrued after the fire company ought to have been upon the scene, if prompt connection had been given. The

court so stated, but, upon counsel for plaintiff excepting to the ruling of the court and indicating a desire to appeal, the court stated that it would be perfectly willing to rest its decision upon the legal proposition above set out alone, in order to have the question the more easily determined, because a nonsuit upon insufficient evidence does not adjudicate anything, but the plaintiff may try again as often as he sees fit.

Let the defendant prepare his order of nonsuit, and let these remarks be spread upon the record.

DAHAN v. McADOO, Director General of Railroads, et al.

(District Court, N. D. Iowa, E. D., at Dubuque. April 16, 1919. On Demurrer to Particular Counts of Answer, May 2, 1919.)

No. 167.

1. RAILROADS Ⓒ5½, New, vol. 6A Key-No. Series—FEDERAL CONTROL—ACTIONS.

Under Act Aug. 29, 1916, authorizing President to take over transportation systems, President's proclamation of December 26, 1917, delegating control to Director General of Railroads, Federal Control Act, § 10 (Comp. St. 1918, § 3115¾j), and General Order No. 50 of Director General, a personal injury action commenced subsequent to General Order No. 50 on a cause of action occurring during federal operation may be maintained against Director General of Railroads.

2. MASTER AND SERVANT Ⓒ354—FEDERAL EMPLOYÉS' COMPENSATION—EXCLUSIVENESS OF REMEDY.

The federal Employés' Compensation Act (Comp. St. §§ 8932a-8932uu) does not provide an exclusive remedy, so as to preclude a railway mail clerk from maintaining a personal injury negligence action against the Director General of Railroads.

On Demurrer to Particular Counts of Answer.

3. UNITED STATES Ⓒ125—SUITS AGAINST—FEDERAL CONTROL.

Under Act Aug. 29, 1916, authorizing President to take over transportation systems, President's proclamation of December 26, 1917, delegating control to Director General of Railroads, Federal Control Act, § 10 (Comp. St. 1918, § 3115¾j), and General Order No. 50 of Director General, directing that certain actions be brought against him, a personal injury action against the Director General is not precluded, upon the ground that it is a suit against the United States without its consent.

4. RAILROADS Ⓒ5½—FEDERAL CONTROL—PROCESS.

Under Act Aug. 29, 1916, President's proclamation of December 26, 1917, Federal Control Act, § 10 (Comp. St. 1918, § 3115¾j), and General Order No. 50 of the Director General, regulating federal operation and control of railroads, no process will issue on judgment against Director General which will interfere with his possession of railroad property committed to his control.

At Law. Action by Arthur Dahn against William G. McAdoo, Director General of Railroads, and the Illinois Central Railroad Company. On demurrers by the Director General to the petition and by plaintiff to certain counts of the answer. Demurrer of the Director General overruled, and that of plaintiff sustained.

This action was commenced November 22, 1918, to recover damages for a personal injury sustained by the plaintiff on May 29, 1918, while employed as a United States railway mail clerk upon the Illinois Central Railroad, because of the alleged negligence of the railroad company in the construction and maintenance of its track, bridges, and roadbed, and the employes operating the train upon which the plaintiff was so employed. The defendant railroad company, at the time of such injury, had been taken over by the President under the act of Congress approved August 29, 1916 (39 Stat. p. 645, c. 418), and was being operated by the Director General of Railroads in the prosecution of the war against the Imperial German government.

The action was brought originally in this court against the railroad company and William G. McAdoo then Director General of Railroads, in the manner and as authorized by the statutes of Iowa in suits brought against railroad companies in that state. At the December term, 1918, of this court, the defendants separately appeared, and each moved to dismiss the action against him, respectively, upon the ground that under General Order No. 50, promulgated by the Director General of Railroads on October 28, 1918, the action could not rightly be maintained against either the railroad company or the Director General of Railroads. The motion was sustained as to the defendant Illinois Central Railroad Company because of said General Order No. 50; but the motion as to the Director General was overruled, and orders were duly entered of record accordingly on December 5, 1918.

The Director General was granted leave to file a demurrer to the petition within a time stated, should he be so advised, and on December 16, 1918, filed a demurrer to the petition challenging the right of the plaintiff to maintain the action as against him substantially upon the grounds:

(1) That the action was commenced after the promulgation by Director General McAdoo on October 28, 1918, of General Order No. 50, and cannot therefore be maintained against either defendant.

(2) That the injury to the plaintiff and damages claimed by him occurred after the 28th day of December, 1917 (when the transportation systems of the United States were taken over by the President, and the operation thereof placed under the control of the Director General of Railroads), and the Director General is not liable for any damages suffered by the plaintiff thereafter.

(3) That neither the Director General nor the government is in any event liable for injuries received by the plaintiff (who the petition shows was a railway mail clerk upon the Illinois Central Railroad in the performance of his duties as such clerk), for the act of Congress approved September 7, 1916 (39 Stat. p. 742, c. 458 [Comp. St. §§ 8932a-8932uu]), providing "compensation for employes of the United States suffering injuries while in the performance of their duties," excludes any other recovery or method of recovery by civil employes of the United States for injuries suffered by them in the performance of their duties than in said act provided, and the claim presented by the plaintiff in this action shows no cause of action upon which a recovery may be had against the Director General of Railroads, or against the government.

Hurd, Lenehan, Smith & O'Connor, of Dubuque, Iowa, for plaintiff.

Helsell & Helsell, of Ft. Dodge, Iowa, and Mr. Fletcher, of Chicago, Ill., for defendant Director General.

REED, District Judge (after stating the facts as above). [1] The first ground of the demurrer is substantially a repetition of the motions to dismiss the action against both defendants, and, in view of the ruling heretofore made on those motions, needs but little consideration. By the act of Congress approved August 29, 1916, it is provided:

"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 transpor-

tation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable." 39 Stat. p. 645, c. 418 (Comp. St. § 1974a).

Pursuant to that authority the President on December 26, 1917, issued his proclamation, in which, among other things, it is recited:

"It is hereby 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. Said Director may perform the duties imposed upon him, so long and to such extent as he shall determine, through the boards of directors, receivers, officers and employes of said systems of transportation. Until and except so far as said Director shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers and employes of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers in the names of their respective companies.

"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 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." Comp. St. § 1974a.

By the act of Congress approved March 21, 1918, called the Federal Control Act, it is provided in section 10 thereof:

"Sec. 10. 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. * * * But no process, mean or final, shall be levied against any property under such federal control." 40 Stat. p. 451, c. 25 (Comp. St. 1918, § 3115½j).

On October 28, 1918, pursuant to such act of Congress and the proclamation of the President, the Director General promulgated General Order No. 50, which, so far as deemed material, is as follows:

"Whereas, since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during federal control for which the said carrier corporations are not responsible, and it is right and proper that the actions, suits, and proceedings hereinafter referred to, based on causes of action arising during or out of federal control should be brought directly against the Director General of Railroads and not against said corporations:

"It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad system of transportation by the Director General of Railroads, which action, suit or proceeding but for federal control might have been brought against the carrier com-

pany, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise. * * *

"Subject to the provisions of General Orders numbered 18, 18a, and 26, heretofore issued by the Director General of Railroads, service of process in any such action, suit or proceeding may be made upon operating officials operating for the Director General of Railroads, the railroad or other carrier in respect of which the cause of action arises in the same way as service was heretofore made upon like operating officials for such railroad or other carrier company.

"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."

It seems entirely clear, therefore, that under the acts of Congress referred to the President was fully empowered in time of war to take possession and assume control of the entire system or systems of transportation of the United States through the Secretary of War and place them under the control of a Director General of Railroads to manage and operate the same during the period for which possession of them was taken, and that actions or claims for damages arising out of the operation and control of such systems may be brought and prosecuted to final judgment against the Director General under the orders promulgated by him therefor. Of course the possession and control of the property of the railway systems so placed in the possession, and under the control of, the Director General may not be disturbed or interfered with under judgment or other proceedings against him; but as the judgment, or other process of the court that may be rendered against him, is and will remain under its control, it will not permit its process to interfere with his custody or control of such property.

The reasons assigned in General Order No. 50, that "suits are being brought and judgments and decrees rendered against carrier corporations on causes of action arising during federal control for which the said carriers are not responsible," is a sufficient and very proper precaution for requiring that such actions and proceedings should be brought against the Director General that he may properly defend against such actions and not intrust their defense to the carrier corporations.

This ground of the demurrer is therefore overruled.

[2] It is next urged in support of the demurrer that plaintiff, a railway mail clerk, at the time of his alleged injury, can recover for that injury, if at all, only under the "Federal Employés' Compensation Act" of Congress, approved September 7, 1916, hereinbefore referred to.

The petition alleges that the plaintiff was an employé of the government, in the performance of his duties as a mail clerk upon the Illinois Central Railroad in Iowa, at the time of the accident which resulted in the injuries of which he complains. The Congress, in the act to which reference is above made, has imposed upon the United States a liability for injuries to its employés when in the performance of their

duties, except under the conditions prescribed in the act; and it may be that the Congress might have required the injured employé to seek redress for such disability or injury exclusively from the United States, and in the manner provided in the act. *New York Central R. v. White*, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629, and cases cited; and *New York Central R. v. Winfield*, 244 U. S. 147, 150, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139. But, be this as it may, the Congress has not done so. By section 1 of that act it is provided:

"That the United States shall pay compensation as hereinafter specified for the disability or death of an employé resulting from a personal injury sustained while in the performance of his duty," except under the conditions prescribed in the act. Comp. St. § 8932a.

Other sections of the act provide in detail the method and procedure by which the injured employé may recover from the United States the compensation therein provided for such injury. That a mail clerk employed by the United States upon a mail car used in the carriage of mails upon railroads is an employé of the United States, within the meaning of this act, is not doubted, nor is it disputed, and when such an employé is disabled or killed in the performance of his duties, and seeks to recover from the United States the compensation so provided, it is obvious that he must proceed in the manner provided by this act. But in no part of the act is it directly or by reasonable implication provided that the injured employé or his legal representatives shall be limited to the amount of compensation so provided in this act as against a wrongdoer, who by some negligent or other wrongful act has caused the death or disability of the injured employé, and to so prohibit would be to amend the act, which the court will not do.

This ground of the demurrer is also overruled, and it is accordingly so ordered.

On Demurrer to Particular Counts of Answer.

[3] After the above order of April 16, 1919, overruling the demurrer of the Director General to the petition, that defendant answered the petition in six counts or divisions, in which he sets up in counts 3, 4, 5, and 6 substantially the same grounds set forth in his demurrer to the petition, in which he again urges that under the Federal Control Act of March 21, 1918, suits cannot rightly be maintained against the Director General of Railroads, for the reason that such a suit would in effect be an action against the United States, which is not permissible in any case, unless by the consent of the Government, which consent it is claimed is not given either by the Federal Control Act, or any other act of Congress, or proclamation or order of the President.

This it seems to me is a misconception of the act of Congress approved August 29, 1916 (39 Stat. p. 635, c. 418 [Comp. St. § 1974a]), authorizing the President in time of war to take possession and assume control of the transportation systems of the United States and utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transportation of troops, war materials, equip-

ment, and such other purposes connected with the emergency which brought the United States into the war with the Imperial German government, and the proclamation of the President taking over such transportation systems through the Secretary of War and placing them under the control of the Director General of Railroads to manage and operate the same.

That the Congress in time of war, which then existed, had full power to confer such authority upon the President can hardly be doubted, and by conferring it upon the President the Congress assumed as an obligation of the United States to compensate the owners of such systems for so taking possession and control thereof in defense of the government in the war thrust upon it by the German government, and under the proclamation of the President the Director General is authorized to perform the duties imposed upon him and to such extent as he may determine through the boards of directors and other officers and employes of such railway transportation systems as the Director General shall from time to time by general or special order authorize, and providing that the boards of directors, officers, and employes of the transportation systems shall continue their operation in the usual and ordinary manner of the business of common carriers.

And by the Federal Control Act it is provided in section 10 thereof :

"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. * * *"

On October 28, 1918, pursuant to such act and proclamation of the President, the Director General promulgated General Order No. 50, which among other things provides :

"It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to the person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, * * * shall be brought against the Director General of Railroads alone and not otherwise."

The Director General is therefore authorized by this act of Congress and proclamation of the President to promulgate general and special orders for the control and management of the railroads, which have the force and effect of law and are of paramount authority; and by this declaration of Congress and the General Orders of the Director General the government has taken possession and control of the transportation systems, and has become obligated to them for their rental value or use in the prosecution of the war, and has power to compensate them for such use; and as the Director General by General Order No. 50 directs that actions at law, suits in equity, and other proceedings based on *contract binding upon him*, or claim for death or injury to the person, or for loss and damage to property, shall be brought against him and not otherwise, the Congress through

such officers has assumed complete control of such transportation systems, provided for the manner they shall be compensated and paid for the use of their respective systems, and they shall be liable to suits and other liabilities during federal control, and that suits shall be brought against the Director General alone, and has thus consented that suits may be brought against the Director General of Railroads (if consent is necessary, which it is not intimated that it was or is).

[4] If judgment shall be recovered against the Director General, no process shall be issued upon such judgment that will interfere with the possession of the property under his custody; but he may provide for the payment of such judgment from the income or other funds under his control, or the Congress may otherwise provide for its payment as it may see fit.

The demurrer of the plaintiff to counts 3, 4, 5, and 6 of defendant's answer and each thereof is sustained, to which ruling the defendant excepts.

In re HAWLEY DOWN DRAFT FURNACE CO.
(District Court, E. D. Pennsylvania. April 8, 1919.)

No. 4521.

BANKRUPTCY Ⓒ345—**PAYMENT OF CLAIMS—PRIORITY—EQUITABLE ASSIGNMENT—WAIVER.**

Where a contractor, who had an order from the bankrupt for the payment of the contract price of the building, drawn on a trust company, which was trustee in disbursing proceeds of first mortgage bonds, part of which were to be used to pay for the building, accepted checks drawn by the bankrupt on proceeds of the bonds paid directly to it, instead of to the trust company, the contractor acquiesced in the mingling of the funds, and cannot claim priority in payment on the ground that its order was an equitable assignment.

In Bankruptcy. Proceeding against the Hawley Down Draft Furnace Company. On petition to review a decision of the referee denying the claim of the McClintic Marshall Company for priority in payment from the funds in the hands of the trustee. Petition dismissed, and order of referee confirmed.

Calvin F. Smith, of Easton, Pa., for petitioner.
Edward J. Fox, of Easton, Pa., for trustee.

DICKINSON, District Judge. The points presented by the questions involved in this petition for review are best presented through an outline statement of the facts. The more broadly the substantial facts are stated, the more clearly are these points presented. We therefore ignore the mere details and give the substantial facts, rather than a strictly accurate statement of what they are. The case had one of its beginnings in the purpose of the Easton Board of Trade to promote the industrial growth and development of the Easton district by bringing to that locality manufacturing plants which would

give employment to labor and bring other benefits to the town. To enable the Board of Trade to extend financial aid, if needed, and thereby to attract new enterprises, an arrangement was made with the different financial institutions by which they were to supply the required moneys by the purchase or discount of notes indorsed by a number of financially responsible members of the Board of Trade. This was done through duly constituted attorneys in fact of the members who thus pledged their credit. The ultimate payment of the notes was planned to be met through the sale of bonds secured by a mortgage on the plant of the company or other party to whom the aid was extended.

Another of the beginnings of this cause was in the bringing of the Furnace Company into this Board of Trade plan. The company was established in Chicago. It was proposed to bring their entire plant to Easton. A site for an Easton plant was to be selected, buildings were to be erected thereon and equipped ready for operation, and a mortgage be executed for \$50,000 to secure an issue of bonds. The proceeds of this mortgage were apportioned and appropriated to the expense of removal, to cost of the land and the erection of the buildings, to the cost of machinery and other equipment, etc. Definite sums were stated to be applied to several of these purposes, including the land and the erection of the buildings. It was, of course, part of the plan that the mortgage referred to was to be a first lien, and to assure the carrying out of the plan in its integrity (as well as to protect the purchasers of the bonds) estimates were to be made from time to time of what was due those who were entitled to payment, and a number of bonds corresponding to the aggregate sum thus called for were released for sale. The Easton Trust Company was made the trustee in the mortgage, and was to be the disbursing agent, thus further assuring that the bonds issued would be limited to the value of the work actually done, and that the persons entitled to the money thus raised receive it.

To enable the planned disbursement to be made, it was, of course, necessary that the moneys coming from the sale or discount of the notes be turned over to the disbursing agent. The agreement between the Furnace Company and the Board of Trade embodied the essentials of this plan. Before the plan could be put in operation, however, it developed that the Furnace Company had, by its precipitate action, blocked it. This they did by not only entering into a contract with the McClintic Marshall Company (the present petitioner) for the construction of the building, but by having the actual work of construction begun without any provision against the filing of mechanics' liens. In consequence, the mortgage would not be a first lien.

The difficulties thus created were taken to the McClintic Marshall Company, who finally agreed to the plan which the Board of Trade had devised for removing the difficulty. This took the form of an abrogation of the building contract, an agreed obliteration of all which had been done, the recording of the \$50,000 mortgage, and the making of a subsequent new contract with a stipulation against the filing of

liens. The McClintic Marshall Company exacted terms, however, as the consideration for this agreement. These terms took the form of an order or direction by the Furnace Company to the Easton Trust Company to pay to the McClintic Marshall Company all moneys becoming due under the agreement between the Furnace Company and the Board of Trade, the payment to be made "out of the funds to be provided in accordance with" that agreement. This order the Trust Company accepted, qualifying its acceptance, however, by defining the fund out of which payment was to be made, by making it clear to what fund the order related. This was done by adding to their acceptance the phrase "as the funds are furnished us by the banks of the city." There was also quite a little correspondence by letters between the McClintic Marshall Company and the different persons interested in and concerned with the transaction, from which the fair inference arises that the McClintic Marshall Company felt that every one concerned, including the agents of the Board of Trade, would do all which could be reasonably expected to be done toward the moneys raised through the efforts of the Board of Trade being applied to the intended purposes.

Being satisfied with these assurances, and resting upon the protection of this order and its acceptance, the McClintic Marshall Company waived its right of lien and permitted the mortgage to become a first lien. If it was in the contemplation of the plan (as it doubtless was) that all moneys raised through what we will call the Board of Trade notes or (for it really comes to that), in other words, the mortgage moneys, should be turned over to and disbursed by the Easton Trust Company, there was a departure from the plan. The plan was followed in respect to the raising of the money, but instead of paying it to the Trust Company, the financial institutions which bought or discounted the notes treated them as belonging to the Furnace Company, to whom the moneys were paid directly, or by placing the moneys to its credit. The result was that all the moneys went into the bank account of the Furnace Company and were checked out by it as its moneys. This practice continued throughout the whole time of the transactions, until the trouble arose in consequence of which the Furnace Company went into bankruptcy.

The referee finds as a fact that the McClintic Marshall Company knew of this departure from the plan (if it was a departure), that checks following this changed plan of procedure were drawn to and accepted by them, and that they acquiesced in and consented to this method of disbursement of the Board of Trade moneys. Without going into the causes of what resulted, the result is that there is a balance of about \$2,600 (including interest) due the McClintic Marshall Company remaining unpaid. The latter company then filed in the court of common pleas of Northampton county its bill of complaint, directed principally against the Easton Trust Company, but to which everybody concerned (including the trustee in bankruptcy) was made a party defendant. The cause of action set forth was based upon a statement of the facts above roughly outlined.

The bill was dismissed by the court, and this decree affirmed by the

Supreme Court of the state on appeal. 248 Pa. 584, 94 Atl. 246. We have not been referred to the report of this case, and do not know the precise grounds of the ruling, but it was thus ruled that the plaintiff had no cause of action. The plaintiff in that bill (the present petitioner for a review) then filed with the referee what was in effect a petition in reclamation proceedings, to the end that it might receive preferential payment over the other creditors of the estate, all of whose claims are on a parity with its own, except in the respect of the order given.

The position taken is that the order on the Trust Company operated as an equitable assignment of the Board of Trade fund (or the part thereof which was apportioned to the erection of the building), whereby the McClintic Marshall Company became the owner of the whole fund; that the diversion of this fund to others was in fraud of its rights; that in some way these diverted funds have come into the hands of the trustee in bankruptcy, mixed and commingled with other funds, by which admixture the whole fund belongs to the petitioner; that the ruling of the state court, that the bill of complaint setting up the same title now set up was without equity and gave no cause of action, does not affect the petitioner, because, among other reasons, the state court had no jurisdiction to decree what it was asked to decree.

From this partial and imperfect statement of the claim of the petitioner this much must be admitted: That the ground between it and the successful assertion of its claim bristles with difficulties which are almost innumerable. Counsel for the petitioner is to be commended for the industry and zeal with which he is urging the asserted rights of his client, and the ability with which he has argued its cause. The argument, however, has failed to convince us of any error committed by the referee in rejecting the claim. Any one charged with the duty of opposing this claim upon its merits has no light task in selecting the ground upon which to rely in presenting the defense. It would be an interminable task to urge all which would present themselves.

The learned referee and the experienced counsel for the trustee, in supporting the findings of the referee, have planted the defense upon the proposition (upheld by justified fact findings) that the plan of disbursements which the petitioner now claims to have been in fraud of its rights was a plan adopted, not only without objection on its part, but with its acquiescence and consent, and of which it was a beneficiary. A few of the other defenses may be enumerated.

1. Whatever rights the petitioner has is as assignee of the Furnace Company. Its assignor could not transfer an ownership in more than was owned. What title, legal or equitable, did the Furnace Company have to the \$50,000 mortgage fund? When the mortgaged premises had been brought into completed existence (or pro tanto), it became, it is true, the nominal owner of the proceeds of the mortgage; but the fund was earmarked with the names of the real owners, who were those who had done work and supplied materials (among others) toward the erection of the building and its equipment. Some of them are now claimants upon this very fund in preference to whom the

petitioner is demanding payment. It might with plausibility be urged that the petitioner owned that part of the fund which had been appropriated to the erection of the buildings. Just where this would leave the petitioner we do not know. The case is barren, however, of any fact findings which would avail it.

2. The petitioner's title arises wholly out of the order, or the order and its acceptance. We have stated this in the alternative, because mindful of the differentiation made by counsel between the order operating as an assignment and the acceptance operating as an agreement. View it simply as an assignment, of which the Trust Company was being given notice. The Trust Company had the right to ask—indeed, was compelled to ask: "Of what are you giving us notice?" "You claim to own something by virtue of this assignment. What is it you claim to be yours?" "Is it the whole \$50,000, or, if not, what part of it?" Certainly the petitioner would be held to the answer it made in any proceeding in which it was asserting equitable rights. The answer it made was that it claimed to own only such funds as were turned over by the banks of the city to the Easton Trust Company. This suggests two other grounds of defense, with the statement of which we will content ourselves.

3. No fund came into existence upon which the assignment could operate, as the banks did not pay over any such moneys.

4. This is the very question raised and decided against the petitioner in the state courts. Whether this is controlling, as *res adjudicata*, or as establishing the law of this case, as distinguished from what the law might otherwise be found to be, or is persuasive with us as an adjudication of a question of title arising out of the law of the state by the state judicial tribunals, or whether in any way it concludes the petitioner, we do not feel called upon to inquire.

We dispose of the case before us with the comment that we see no justification for reversing the order made by the referee. This conclusion is undisturbed by any finding of what rights of the petitioner may be asserted upon the doctrine of *Nesmith v. Drum*, 8 Watts & S. (Pa.) 9, 42 Am. Dec. 260, *Lewisburg v. Marsh*, 91 Pa. 96, *Hurley v. Ashbridge*, 35 Pa. Super. Ct. 523, *Collins' Appeal*, 107 Pa. 590, 52 Am. Rep. 479, *In re Wilson*, 23 Am. Bankr. Rep. 814, 168 Fed. 566, *In re Hanna* (D. C.) 105 Fed. 587, *Peters v. Bain*, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696, *Thomas v. Taggart*, 209 U. S. 385, 28 Sup. Ct. 519, 52 L. Ed. 845, *Smith v. Township*, 150 Fed. 257, 80 C. C. A. 145, 9 L. R. A. (N. S.) 876, and the other cases to which we have been referred upon the subject of the rights of an equitable assignee of a fund, and his further right to follow it through all its changes of form. We are not concerned here with the rights of such an assignee when he has them, but with the preliminary questions of whether he has any, and whether he waived them, or is estopped from asserting them.

A like comment is called for upon the question of the right of the petitioner to assert its claim after the year, and whether it is concluded by the decree against it, in support of which counsel cites *Nauman v. Bradshaw*, 193 Fed. 350, 113 C. C. A. 274, *Walker v. Phila.*, 195 Pa.

168, 45 Atl. 657, 78 Am. St. Rep. 801, Pugh v. Loisel, 219 Fed. 417, 135 C. C. A. 221, Goodnow v. Stryker, 62 Iowa, 221, 14 N. W. 345, 17 N. W. 506, Clark v. Kittenplan, 63 Misc. Rep. 122, 118 N. Y. Supp. 404, together with other cases.

As already observed, the discussion of the merits of every answer to this claim which suggests itself would be well-nigh endless. The short method of dealing with it is at the threshold. The petitioner must show an equity. In this it has failed. If, in addition, it has lost all rights which it may have had, and has already had its day in court, and had decided the very question it is now seeking to again raise, we are merely multiplying answers to the claim, any one of which is a good answer.

The petition for review is dismissed, and the findings and order of the referee approved and confirmed.

NEW AMSTERDAM CASUALTY CO. v. CITY OF ASTORIA et al.

(District Court, D. Oregon. March 24, 1919.)

No. 7710.

1. SUBROGATION ⇨28—NECESSITY OF PAYMENT.

A surety on a public contractor's bond to pay materialmen and laborers is not entitled to be subrogated to the contractor's rights to deferred payments due from city before paying the outstanding labor and material claims.

2. MUNICIPAL CORPORATIONS ⇨370—CONTRACT—CONSTRUCTION—PAYMENT FOR WORK.

A public construction contract, making part of the consideration payable within 90 days after completion of the work, operates, not only to secure the municipality against labor and material claims, but also as an indemnity to the contractor's surety.

3. SUBROGATION ⇨7(2)—SUBROGATION TO PRIORITY OF CREDITORS.

The surety on a public contractor's bond conditioned to pay laborers and materialmen, as required by Laws Or. 1913, p. 59, has a right to indemnify itself from deferred payments due the city to the contractor, which is superior to the claims of the contractor's assignees.

4. MUNICIPAL CORPORATIONS ⇨374(1)—CONTRACTS—SURETY ON CONTRACTOR'S BONDS—REMEDY BEFORE PAYMENT.

A surety on a public contractor's bond may, before paying laborers and materialmen, require that enough of the deferred payments due from the city to the contractor to indemnify the surety be held by the city pending adjustment of the surety's liabilities and be not paid to the contractor's assignees.

In Equity. Injunction by the New Amsterdam Casualty Company against the City of Astoria and others. Interlocutory decree granted.

This is a proceeding for injunction to restrain the city of Astoria from issuing certain warrants of the city to certain creditors of the Arenz Construction Company during the pendency of the settlement of the demands of the complainant and such creditors against such construction company. The litigation grows out of the following state of facts:

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

On May 1, 1917, the construction company entered into six separate and distinct contracts with the city for improving six distinct portions of the public streets of the city, and on July 25, 1917, entered into two other contracts with the city for the improvement of two other distinct portions of such streets. Under all these contracts the construction company agrees to furnish all material and perform all labor necessary for the construction of the improvement, and to pay promptly all persons supplying labor, services, or material for the prosecution and completion of the work provided for in the contract. The city agrees to pay to the construction company a sum named in each contract as a consideration for making the improvements, in warrants of the city, or from the proceeds of the sale of its bonds at par, or, in the event the bonds cannot be sold, then in such bonds at par, the payments to be made within 90 days from the time the improvement shall be accepted. The construction company further agrees to furnish a bond in a sum named, conditioned for the faithful performance of the contract, and that the contractor shall pay all persons furnishing labor or material used in the construction of the improvement, and to conform to all the requirements of the ordinances of the city and the laws of the state of Oregon relating to public works; the bond to contain other conditions not necessary to notice here. In each case the bond was to be given in a penal sum less than the agreed consideration for doing the work.

The construction company accordingly furnished a bond under each contract, in accordance with and conditioned as the stipulations required. These bonds were executed by complainant as surety, conditioned as required by the contract. As a consideration for executing the bonds, the construction company gave to complainant indemnity agreements. Besides transferring to the casualty company all tools, implements, materials, etc., that the construction company might have at any time for doing the construction work, the construction company further covenanted with the casualty company as follows: "In further consideration of the execution of said bond, the applicant hereby agrees, as of this date, that the said company shall, as surety on said bond, be subrogated to all its rights, privileges, and properties as principal and otherwise in said contract, and it hereby assigns, transfers and conveys to said company all the deferred payments and retained percentages, and any and all moneys and properties that may be due and payable to the applicant at the time of such breach or default, or that thereafter may become due and payable to it on account of said contract, or on account of extra work or materials supplied in connection therewith, hereby agreeing that such money, and the proceeds of such payments and properties, shall be the sole property of the said company and to be by it credited upon any loan, cost, damage, charge, and expense sustained or incurred by it as above under its bond of suretyship."

The work was entirely completed under six of these contracts, and duly accepted by the city, prior to any controversy having arisen touching payments to be made to the contractor. The work on two of the contracts was not completed as per agreement, and the city, by resolution, called upon the casualty company, not only to complete the work, but to pay the amounts due and unpaid by the contractors to the labor and material claimants. Thereupon the casualty company undertook the completion of the work. About that time this suit was begun.

In the meantime the construction company assigned certain portions of the contract price for completing the improvements to other parties, such as the Astoria Savings Bank, the United States National Bank, and others, to be paid out of the first moneys due or to become due to the construction company under the contracts. These assignees have been made parties defendant in the bill of complaint, and have appeared and contested the proceeding. They claim a priority of right to payment out of the funds or warrants due the construction company. No such payments had been made at the time suit was instituted, but it is alleged that the city of Astoria threatened to, and would, if not restrained by the court from so doing, pay out the funds due the contractor to these assignees. The construction company is hopelessly insolvent.

James L. Conley, of Portland, Or., for complainant.

Olaf Anderson, City Atty., of Astoria, Or., for defendant City of Astoria.

G. C. & A. C. Fulton, of Astoria, Or., for defendant Astoria Savings Bank.

J. H. Kelley, of Portland, Or., for defendant Arenz Const. Co. Anderson & Setters, of Astoria, Or., for defendant Brookfield Quarry & Towage Co.

Leroy Lomax, of Portland, Or., for defendant United States Nat. Bank of Salem.

J. H. Kelley and W. S. Hufford, both of Portland, Or., for defendants Ashley & Rumelin and Miller & Bauer.

WOLVERTON, District Judge (after stating the facts as above). It is insisted on the part of the Astoria Savings Bank, and other assignees of this fund, that the complainant is without cause of suit, because it has not as yet paid the demands that the principal is required under its contracts to pay, and therefore is without the right of subrogation. The rule is well stated by Chancellor Walworth, in *Sandford v. McLean*, 3 Paige (N. Y.) 122, 23 Am. Dec. 773, as follows:

"It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect. In other cases the demand of a creditor, which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished."

The principle is stated to the same effect in the headnote to *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534 (8 Sup. Ct. 625, 31 L. Ed. 537):

"The doctrine of subrogation in equity requires (1) that the person seeking its benefit must have paid a debt due to a third party before he can be substituted to that party's rights; and (2) that in doing this he must not act as a mere volunteer, but on compulsion, to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt, as in cases of sureties, prior mortgagees, etc. The right is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another."

See, to the same purpose, *Prairie State Bank v. United States*, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412; *Henningsen v. U. S. Fidelity & Guaranty Co.*, 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547; *Derby v. United States F. & G. Co.*, 87 Or. 34, 169 Pac. 500; *Wasco County v. New England E. Ins. Co.*, 88 Or. 465, 172 Pac. 126, L. R. A. 1918D, 732, Ann. Cas. 1918E, 656.

[1-4] Counsel for complainant, however, contends that, although the casualty company is not entitled to present subrogation, it is entitled to have the funds due the contractor from the city impounded in the hands of the city until its rights to such portion of the funds as will meet the obligations of the contractor for which it is surety are determined and apportioned, and that the present suit is a proper proceeding for the accomplishment of that purpose. Let us inquire as to this.

These contracts were entered into with a municipality. The municipality is required by a statute of the state, where it enters into a contract for making public improvements, to protect the rights of laborers and materialmen, by causing the contractor to execute a bond conditioned that such contractor shall promptly make payments to all persons supplying him labor or materials for doing the work. Sess. Laws Or. 1913, p. 59. This is a public statute, of which all persons must take notice. The present bonds were given in pursuance of that statute. The whole of the consideration for each of the improvements was made payable within 90 days after the completion of the work. This operated to protect the city against the obligations imposed by law to pay the labor and material claimants, and furthermore it affords the laborer and the materialman a right of action against both the contractor and surety in the name of the state for their respective demands. Now, the retention of the entire payment until 90 days after the contract work had been completed operated as indemnity to the city for insuring full payment to the laborers and materialmen. *Wasco County v. New England E. Ins. Co.*, supra. The court there, speaking through Mr. Justice Harris, says:

"The percentage reserved by the county out of each monthly estimate served to secure the county against any loss it might sustain on account of the nonperformance of the contract, and when Cromer abandoned his contract the county had a right to hold this fund to secure itself against any damages that might have resulted from a nonperformance of the contract by Cromer. * * * The right of the county to retain a specified percentage dates from the time the contract was entered into, and it must be conceded that until the claims for labor and material are paid the county's right to the fund is superior to that of the bank claiming by an equitable assignment from the contractor."

Moreover it operated as much for the indemnity of the surety as for that of the principal. Such is the principle declared by the court in *Prairie State Bank v. United States*, supra. It says:

"That a stipulation in a building contract for the retention, until the completion of the work, of a certain portion of the consideration, is as much for the indemnity of him who may be guarantor of the performance of the work as for him for whom the work is to be performed, that it raises an equity in the surety in the fund to be created, and that a disregard of such stipulation by the voluntary act of the creditor operates to release the sureties, is amply sustained by authority."

As bearing directly upon this question, the court in the *Wasco County Case* further says:

"The reserved fund is as much for the indemnity of the surety as it is for the security of the owner for whom the work is to be performed and an equity in such reserved fund is raised in behalf of the surety."

Such being the rule, and the contracts being for the prosecuting of public work, persons taking assignments from the contractor of funds to be disbursed in final payments are bound to take notice, first, of the terms of the contract; second, that the contract is accompanied by the bond of a surety, and likewise of the undertaking of the surety; and, third, that the reserve fund is for the indemnity of the surety as well as

that of the city. This subordinates the claims of the assignees of parts of the funds to become due to the demands of the surety.

Now it has been made to appear that the city is going to dissipate these funds reserved for the final payment of obligations incurred by the contractor under these contracts, by paying over to the assignees parts of the several sums due and to become due to the contractor under these contracts, and the complainant sues to have the city restrained from doing that until the conflicting interests may be adjusted, so that it can properly discharge its obligations under the bonds, and at the same time have the fund protected for its benefit, namely, that it may be reimbursed for the outlays it will be compelled to make. Equity and good conscience would seem to dictate that the complainant is entitled to have the funds remain where they are until it can ascertain its liabilities and adjust them, or so much thereof as will amply protect it against its liabilities incurred under the several bonds. *Moore v. Topliff et al.*, 107 Ill. 241.

The complainant, in order to ascertain and have determined its liability respecting a large number of demands for labor and materials furnished for the completion of the several improvements, instituted a suit in the state court making all such claimants parties, including Miller & Bauer. This after protracted litigation, resulted in a decree against complainant in the aggregate sum of \$34,517.62, which includes interest on some of the claims to the date of the judgment. The judgment itself bears interest, under the Oregon statute, at 6 per cent. from the date of its entry. In addition to these adjudicated claims, complainant has performed services towards completion of the improvements on Klaskanine and Harrison avenues, amounting in the aggregate to \$4,455.45. Aside from this, the evidence tends to show that it will require an additional \$1,000 to complete the Harrison avenue project.

Complainant appears not to be satisfied with the decree standing against it in the state court, and is unsettled as yet whether it will prosecute an appeal to the Supreme Court. Some questions were presented and determined in the state court which are again urged here, such as whether the complainant is liable beyond the penal sums named in the several bonds, and whether it is liable for the payment of interest in some cases, and certain costs, etc. As that case may go to the Supreme Court, I ought not to determine those questions in advance of what the Supreme Court may do, because its decision when made will be binding upon this court.

Under the terms of the several contracts, the city is not liable for payment until 90 days after completion and acceptance of the work by the common council. Payment is due on six of these contracts, but not so with the contracts for improving Klaskanine and Harrison avenues. It is not proper, therefore, that the city should be required to draw its warrants now for payment upon these two latter improvements. There, however, exists no reason why it should not draw its warrants for payment of the amounts due under the other six contracts, except for the injunction in this case.

Some of the defendants are insisting that a large amount of the money held by the city should be released from the effect of the re-

straining order, as it is not all necessary to meet the exigencies should the complainant prevail in this proceeding. Complainant's counsel has indicated his willingness, in his reply brief, for the release of a part of the funds thus impounded.

Under the evidence, the assignments to Miller & Bauer, or to Ashley & Rumelin for their account, were all, without exception, to cover labor and material claims, and are entitled to be paid in any event. The city, however, cannot be called upon to pay anything for the present upon the contracts for the Klaskanine and Harrison avenue improvements. The assignments to Miller & Bauer, or to Ashley & Rumelin for their account, under five of the other six contracts, amount in the aggregate to \$11,467.05. This sum will be released from the restraining order, and the city will issue to them warrants covering this amount. The complainant will, of course, be entitled to credit for the amount on the decree against it in the state court.

In addition, the court will release \$15,000 in favor of the Astoria Savings Bank and the United States National Bank of Salem, the same to be disbursed from the funds in the hands of the city arising from the six completed contracts. Covering this amount warrants will be issued to the Astoria Savings Bank as follows: On Sixth street contract, \$1,000; on Exchange street contract, \$5,000; on Seventh street contract, \$2,000; on Jerome avenue contract, \$5,100—and to the United States National Bank of Salem as follows: On Commercial street contract, \$900; on Bond street contract \$1,000.

The court is unable to determine this case fully at the present time, because of the fact that the demands against the surety have not been fully adjusted, and further hearing will be continued until such time as the adjustment has been made. The adjustment should be made as promptly as reasonably possible, so that the controversy may be settled at any early date.

An interlocutory decree will be drawn in conformity with this opinion.

RUMELY v. McCARTHY, United States Marshal, et al.
(District Court, S. D. New York. February 3, 1919.)

1. CRIMINAL LAW ⇨242(7)—PROCEEDINGS FOR REMOVAL OF ACCUSED TO ANOTHER DISTRICT FOR TRIAL—EVIDENCE.

In proceedings for the removal of a person charged with crime to another federal district for trial, all evidence which may affect the rights of the accused should be admitted.

2. CRIMINAL LAW ⇨242(1)—FEDERAL OFFENSES—REMOVAL OF ACCUSED TO ANOTHER DISTRICT FOR TRIAL.

It is not ground for denying removal of an accused from one federal district to another for trial that there are prior pending indictments against him in the district from which removal is sought, where, although based to some extent on the same facts, the indictments charge different offenses.

3. CONSTITUTIONAL LAW ⇨46(3)—CONSTITUTIONAL QUESTIONS IN HABEAS CORPUS.

Important questions as to the constitutionality of a statute cannot be raised for first consideration in habeas corpus proceedings to prevent the removal of petitioner to another district for trial.

4. **CRIMINAL LAW** ⇐113—**TRADING WITH THE ENEMY ACT—OFFENSES—VENUE.**
 Under the provision of Trading with the Enemy Act Oct. 6, 1917, § 7a (Comp. St. 1918, § 3115½d), requiring reports of property owned or debts due to any alien enemy to be filed with the Alien Property Custodian within the time prescribed by the President, which expired December 20, 1917, where the custodian had not prior to that time designated any place for the filing of such reports other than his office in Washington, the offense of failing to file such a report was committed there, and the court in the District of Columbia has exclusive jurisdiction of the same.

Habeas corpus by Edward A. Rumely against Thomas D. McCarthy, United States Marshal for the Southern District of New York, and Samuel D. Hitchcock, United States Commissioner. Writ denied.

Powell, Wynne, Lowrie & Ruch, of New York City (Frederick J. Powell, of New York City, of counsel), for petitioner.

Francis G. Caffey, U. S. Atty., Harold Harper, Asst. U. S. Atty., and Bolitha J. Laws, Sp. Asst. U. S. Atty., all of New York City, for respondents.

MAYER, District Judge. Rumely is before this court on a writ of habeas corpus in a removal proceeding; the grand jury of the District of Columbia having returned an indictment (hereinafter called the Washington indictment) against him. Coincidentally there is a writ of certiorari, directed to the United States commissioner, to produce the record of the proceedings before him. A statement of the essential facts is necessary in order to make clear the questions of law presented.

The Washington indictment made a prima facie case (Hyde v. Shine, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. Ed. 90; Haas v. Henkel, 216 U. S. 462, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112), and no testimony bearing upon this issue was introduced. It must therefore, for the purpose of this proceeding, be taken as true that

(1) On October 6, 1917, Rumely had stock of the S. S. McClure Newspaper Corporation which he held for and on behalf of the German government, and during the period from October 6, 1917, to December 20, 1917, the day to which the President extended the time for making reports, Rumely did not report the fact to the Alien Property Custodian; and that

(2) On October 6, 1917, Rumely was indebted to the German government in the sum of \$1,451,700, and during the period aforesaid he did not report that fact to the Alien Property Custodian.

Prior to the finding of the Washington indictment, viz. on July 8, 1918, Rumely had been arrested and arraigned before United States Commissioner Hitchcock, in this district, upon charges which later were embodied, in substance, in two indictments (hereinafter called the New York indictments) returned by the grand jury of the Southern district of New York on August 2, 1918.

[1] These indictments were excluded by the commissioner on the ground that they charge offenses different from what is set forth in the Washington indictment. This was error, for the reason that the

committing magistrate and the court should have before them the entire situation, so as to be able to pass on all the questions which go to the rights of defendant in this proceeding. The New York indictments will therefore be discussed as in evidence.

[2] There is no dispute that (generally speaking) both the New York and Washington indictments grow out of the same transactions; but, as will presently appear, one of these indictments must be essentially different as to the facts and law, and the other, in any event, as to the law. One of the New York indictments, in substance, charges Rumely and one Kaufman with conspiracy to omit to report to the Alien Property Custodian certain facts as to enemy-owned property. The details need not be recited. It is obvious that this conspiracy indictment charges an offense entirely different from that charged in the Washington indictment, and will need proof at least in addition to that required in the Washington indictment.

The other New York indictment charges Rumely alone with perjury. It contains three counts, which, in one form or another, in substance, charge Rumely with making a false report to the Alien Property Custodian. It might be variously argued that the crime alleged was committed in New York or in Washington—I do not pass upon the point—but, in any event, the proof necessary to establish perjury may be different from that necessary to prove failure to report in accordance with the statutory requirement, and the punishment for the respective crimes is different. It cannot be held, therefore, that the New York perjury indictment and the Washington indictment are for the same offense, even though they arise out of substantially the same state of facts.

The first inquiry, therefore, is whether the Supreme Court of the District of Columbia had jurisdiction of the offenses charged in the Washington indictment. The United States attorney contends that that court had exclusive jurisdiction, and this contention is vigorously opposed by defendant.

At the outset, however, defendant insists that the act under which it is asserted he was required to report is unconstitutional, not as such, but as to this defendant, because of the circumstances in which defendant would have been placed if he had reported the facts to the Alien Property Custodian as the statute requires.

The argument is (1) that as defendant, for the purposes of this proceeding, has not controverted the allegations of the Washington indictment, it follows that defendant was guilty of trading with and for the enemy, in violation of section 3 of the Trading with the Enemy Act (Act Oct. 6, 1917, c. 106, 40 Stat. 412 [Comp. St. 1918, § 3115½b]); and (2) that, therefore, the compulsory disclosure of the facts alleged in the indictment would violate the rights of defendant under the Fifth Amendment, as it would compel him to be a witness against himself.

[3] It is clear that, at least since *Henry v. Henkel*, 235 U. S. 219, 35 Sup. Ct. 54, 59 L. Ed. 203, habeas corpus cannot be the medium for preliminarily considering so important a constitutional question, affecting not merely this defendant, but having possible widespread application, unless, as the Supreme Court said, the case was one of "those

rare and extreme cases in which the act was plainly and palpably void." Therefore, under *Henry v. Henkel*, supra, this contention must be laid aside without further consideration.

[4] The Trading with the Enemy Act provides (section 7a [section 3115 $\frac{1}{2}$ d]) in part:

"Any person in the United States who holds or has or shall hold or have custody or control of any property beneficial or otherwise, alone or jointly with others, of, for, or on behalf of an enemy or ally of enemy, or of any person whom he may have reasonable cause to believe to be an enemy or ally of enemy and any person in the United States who is or shall be indebted in any way to an enemy or ally of enemy, or to any person whom he may have reasonable cause to believe to be an enemy or ally of enemy, shall, with such exceptions and under such rules and regulations as the President shall prescribe, and within thirty days after the passage of this act, or within thirty days after such property shall come within his custody or control, or after such debt shall become due, report the fact to the Alien Property Custodian by written statement under oath containing such particulars as said Custodian shall require. The President may also require a similar report of all property so held, of, for, or on behalf of, and of all debts so owed to, any person now defined as an enemy or ally of enemy, on February 3, 1917: Provided, that the name of any person shall be stricken from the said report by the Alien Property Custodian, either temporarily or permanently, when he shall be satisfied that such person is not an enemy or ally of enemy. The President may extend the time for filing the lists or reports required by this section for an additional period not exceeding ninety days."

Assuming, for the purpose of discussion, that Rumely failed "to report the fact to the Alien Property Custodian," the first question is where, on the statute and the facts, such failure took place.

In *United States v. Lombardo*, 241 U. S. 73, 36 Sup. Ct. 508, 60 L. Ed. 897, the statute required that certain persons should "file" a statement in writing with the Commissioner General of Immigration, whose office was in the District of Columbia. It was held, in effect, that the place of filing determined the venue in the case of a failure to file. There was some discussion as to the meaning of the word "file," but that was only on the point as to when a paper is filed; the court observing that "a paper is filed when it is delivered to the proper official and by him received and filed." To the same effect is *New York Central & H. R. R. Co. v. United States*, 166 Fed. 267, 92 C. C. A. 331.

It is plain, therefore, for reasons unnecessary to elaborate, because so clearly stated in the two cases, supra, that it was defendant's duty to report to the Alien Property Custodian wherever his office was.

The act did not confine the locus of the office of the Alien Property Custodian to Washington, and undoubtedly there was authority to designate any place in the United States where the report could be made; but up to December 20, 1917, nothing had been done by the President or the Alien Property Custodian in the way of establishing or designating a place or office outside of Washington, D. C., where reports could be made. This is the finding of fact by the commissioner, supported by competent testimony, which will not be reviewed on habeas corpus; but, even if examined into, it will be found that the commissioner was right.

Up to December 20, 1917, when Rumely's offense was complete, the office of the Alien Property Custodian was at Washington, D. C., and that was clearly the place where the Alien Property Custodian was and had his official being. Therefore the court in the District of Columbia has exclusive jurisdiction, because there, and there only, was the crime committed.

The fact that it is charged in the New York indictments that Rumely reported falsely does not absolve him for failure to "report the fact." If, for the purpose of the argument, it is assumed that one crime (i. e., perjury) was committed because of an affirmative act, obviously the commission of such a crime does not relieve a defendant of his responsibility for an act of omission—i. e., failure to perform a duty laid upon him by statute.

Finally the court is asked to exercise its discretion, to the end, in any event, that Rumely may be detained here until the New York indictments are disposed of. *Ex parte Johnson*, 167 U. S. 120, 17 Sup. Ct. 735, 42 L. Ed. 103; *Beavers v. Haubert*, 198 U. S. 77, 25 Sup. Ct. 573, 49 L. Ed. 950; *Haas v. Henkel*, 216 U. S. 462, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112. In other words, this court is asked not to consent to Rumely's removal, because the New York indictments were found first, and he has retained local counsel, who have been engaged in preparing the New York causes for trial, and removal to the District of Columbia will entail expense, inconvenience, and hardship.

The situation of this defendant is not as strong in some respects as was that of the defendant Haas in *Haas v. Henkel*, *supra*. If the indictments were for the same offense, the address to discretion might appeal strongly to the court, in whose jurisdiction indictments were first found. In the case at bar, however, the indictments are for different offenses. The court, if it has the power (which point need not be decided), would not, in such circumstances, require the prosecuting officers to elect to proceed on the Washington indictment and abandon the New York indictments, or vice versa.

The questions of jurisdiction require careful consideration, and, if one or more crimes have been committed, the court will not require that prosecution must be abandoned in one jurisdiction as a condition of removal to another. It is but fair, however, in view of the necessary preparation and the possible employment of new or additional counsel in another jurisdiction, that the prosecuting officers should give defendant reasonable notice as to which indictment or indictments they intend to move first for trial.

To that end some appropriate provision should be inserted in an order dismissing the writ, as a condition of removal. Of course, the prosecuting officers should not be asked to determine which indictment to move first, until after defendant shall have finally pleaded to the Washington indictment.

The writ will be dismissed, as here indicated. Submit order on one day's notice.

BARAN v. GOODYEAR TIRE & RUBBER CO. et al.

(District Court, S. D. New York. July 29, 1918.)

PLEADING \Leftrightarrow 52(2).—COMPLAINT—SEPARATE STATEMENT OF CAUSES OF ACTION.

Where a complaint sets forth in one cause of action facts which might be regarded as violations of the Sherman Anti-Trust Act (Comp. St. §§ 8820-8823, 8827-8830) and the Clayton Act, *held*, that defendants were entitled to have the commingled causes of action separately stated; the alleged violation of the Sherman Anti-Trust Act being different from the alleged violation of the Clayton Act.

At Law. Action by Harold P. Baran against the Goodyear Tire & Rubber Company and the Goodyear Tire & Rubber Company, Incorporated, of New York. On motion to compel separate statement of commingled causes of action, respectively based on the Sherman Anti-Trust Act and on the Clayton Act. Motion granted.

See, also, 256 Fed. 571.

House, Grossman & Vorhaus, of New York City, for plaintiff.
Lewis & Kelsey, of New York City, for defendants.

AUGUSTUS N. HAND, District Judge. The complaint sets out in one cause of action facts which may be regarded as violations of the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. §§ 8820-8823, 8827-8830]) and the Clayton Act (Act Oct. 15, 1914, c. 323, 38 Stat. 730). Some of them apparently violate one of these acts, and some may violate both. These are separate acts, and remain so in spite of certain clauses of the Clayton Act which relate to both. I think the defendants are entitled to have these commingled causes of action separately stated, so that they may better prepare for trial and have the advantage by demurrer of eliminating one from consideration if a demurrer should be sustained.

The illegality complained of which would violate the Sherman Act is apparently an attempt to monopolize the trade in certain automobile accessories. This almost necessarily depends on the defendants' whole plan, and I can see no reason why it should not be pleaded as a whole, and given the legal effect that the transactions call for. In this I agree with the decision of Judge Colt in *Cilley v. United States Machinery Co.* (D. C.) 202 Fed. 598. I do not think the legal questions there under consideration were disposed of in any different way by the Circuit Court of Appeals of the Third Circuit in *Buckeye Powder Co. v. E. I. Du Pont, etc., Co.*, 223 Fed. 881, 139 C. C. A. 119. Matters discussed in Judge Lanning's opinion in *Rice v. Standard Oil Co.* (C. C.) 134 Fed. 464, did not really arise for consideration in that case, because the Circuit Court of Appeals thought the gravamen of the action was an attempt to create a monopoly forbidden by the second clause of the Sherman Act, and not a conspiracy to restrain trade denounced by the first clause. Such seems to be the situation here so far as the Sherman Act is concerned.

Irrespective, however, of whether a pleader should state violations

of the two sections of the Sherman Act in separate counts, I think violations of the Clayton Act which may occur without any combination to restrain trade or any attempt to monopolize within the meaning of the Sherman Act, but by reason of price discrimination or contracts that a purchaser shall not deal in the goods of a competitor, should be set forth in a separate count.

The motion is therefore granted, and the plaintiff is directed to file an amended complaint, stating violations of the Sherman Act in one count, and of the Clayton Act in a second count.

BARAN v. GOODYEAR TIRE & RUBBER CO. et al.

(District Court, S. D. New York. January 17, 1919.)

1. MONOPOLIES ⇌17(1)—VIOLATIONS—SHERMAN ANTI-TRUST ACT.

The appointment by a manufacturing corporation of another corporation as its exclusive selling agent is not a violation of any right of third persons, under the common law or the Sherman Anti-Trust Act (Comp. St. §§ 8820-8823, 8827-8830).

2. MONOPOLIES ⇌17(2)—SHERMAN ANTI-TRUST ACT—VIOLATIONS.

The refusal of a manufacturer of automobile tires and accessories, who did not have a monopoly, to sell to dealers who would not maintain suggested prices, and sold to other dealers, and not merely to consumers, is not a violation of the Sherman Anti-Trust Act (Comp. St. §§ 8820-8823, 8827-8830).

3. MONOPOLIES ⇌17(1)—VIOLATIONS—CLAYTON ACT.

For a manufacturer of automobile tires and accessories to sell its products to manufacturers of automobiles at a less price than it sold to dealers is not a violation of Clayton Act, § 2 (Comp. St. § 8835b), forbidding discrimination in price between different purchasers, where such discrimination may tend to lessen competition, or to create a monopoly; there apparently being no competition between the manufacturer and dealers.

At Law. Action by Harold P. Baran against the Goodyear Tire & Rubber Company and the Goodyear Tire & Rubber Company, Incorporated, of New York. On demurrer to the complaint. Demurrer sustained, with leave to plead over.

See, also, 256 Fed. 570.

House, Grossman & Vorhaus, of New York City, for plaintiff.

Lewis & Kelsey, of New York City, for defendants.

AUGUSTUS N. HAND, District Judge. The plaintiff has filed his complaint seeking to recover treble damages upon two causes of action (1) under the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. §§ 8820-8823, 8827-8830]); and (2) under the Clayton Act (Act Oct. 15, 1914, c. 323, 38 Stat. 730). The defendants question the sufficiency of each cause of action by demurrer.

The material allegations in the first cause of action are that the first-named defendant is a large Ohio manufacturer of automobile tires and accessories, and the second defendant is engaged in selling these Goodyear tires and accessories among the several states as agent of the

Ohio company; that these defendants conspired to monopolize and to restrain trade and commerce in respect to these tires and accessories in the following way:

(1) They selected the dealers to whom they would sell the tires and accessories.

(2) Forbade these dealers so selected to sell to any other dealers, but only directly to consumers, "at the prices and upon the terms from time to time maintained, fixed and suggested by the defendants."

(3) "Did threaten, warn and notify" the dealers to whom they sold that "in the event of any violation of any of the prohibitions and requirements aforesaid they * * * would thereupon cease and refuse to sell to any such person. * * *"

(4) "Did establish a system of espionage and blacklisting in order to preclude the sale to any person * * * violating any of the prohibitions or requirements aforesaid."

(5) "Did refuse to make adjustments by way of replacements or repairs or allowances upon Goodyear automobile casings * * * through the agency of any dealers other than the persons * * * so designated, * * * thereby discriminating against and tending to eliminate the competition of dealers other than those so designated."

In pursuance of the foregoing scheme, the defendants refused to sell Goodyear automobile merchandise to the plaintiff, because he had not maintained prices as fixed and suggested, and threatened other dealers not to sell to them if they sold to plaintiff and ceased to sell to dealers who did so sell.

[1] The appointment by the Ohio company of the New York company as its exclusive selling agent is not a violation of any right under the common law or the Sherman Act. *Virtue v. Creamery Package Co.*, 227 U. S. 8, 33 Sup. Ct. 202, 57 L. Ed. 393; *American Sea Green Slate Co. v. O'Halloran*, 229 Fed. 77, 143 C. C. A. 353; *Locker v. American Tobacco Co.*, 218 Fed. 447, 134 C. C. A. 247.

[2] It is to be noticed at the outset that there is no allegation that either defendant had a monopoly in automobile tires and accessories, or even did a large percentage of the business in such goods within any part of the United States. The alleged combination or conspiracy between principal and agent, if obnoxious at law, must be so because what they have together done would have been illegal, if done by the principal alone. The real question which remains is therefore whether: A refusal of a manufacturer to sell to dealers (a) who will not maintain suggested prices, or (b) will sell to other dealers and not merely to the consumer, is a violation of the Sherman Act.

There is no restriction upon title alleged. The selected dealers who got the merchandise could do as they pleased with it. No agreement among the dealers to fix prices or restrict sales to the consumer is set forth. The sole gravamen of the action is the attempt of the defendants to prevent price cutting by refusing to sell to dealers who did not maintain the suggested price.

The enforcement of the Sherman Act, if that act were read literally, would reach nearly every commercial enterprise. To understand the act at all, we must view it in the light of the decisions. There is no

decision of an appellate court construing the Sherman Act, to which I have been referred, that prevents a single trader from rejecting a customer because he did not like the prices at which the customer resold, or otherwise disapproved of his mode of conduct. Nor does the fact that a single trader extends his policy of refusing to sell to any one of many customers who may cut prices impose any additional legal liability. It is impossible to see how a single person may choose one customer or reject one customer with impropriety, and not separately select or reject a number of customers with equal freedom.

The Circuit Court of Appeals for this circuit seems to have held that this may be done, in the case of *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46, 141 C. C. A. 594. Judge Waddill has recently passed upon this precise point on demurrer to an indictment under the Sherman Act in the decision of *United States v. Colgate & Co.* (D. C.) 253 Fed. 522. He there held that the Sherman Act did not reach cases where a manufacturer sold to dealers upon an agreement by each dealer to maintain a price and refused to resell to those dealers who had failed to live up to the arrangement. The first cause of action presents no facts showing a violation of the Sherman Act, and the demurrer to it must be sustained. *Dueber Watch Case Co. v. Howard Watch Co.*, 66 Fed. 646, 14 C. C. A. 14; *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689; *Union Pacific Coal Co. v. United States*, 173 Fed. 737, 97 C. C. A. 578.

The principal case relied upon by the plaintiff is *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502. But there sales by one company to various purchasers accompanied by contracts fixing prices of resales were held unlawful restraints of trade. The vigorous dissent by Mr. Justice Holmes calls attention to the fact that if the arrangement "should make the retail dealers also agents in law as well as in name, and retain the title until the goods left their hands" it would not be denied that "the owner was acting within his rights." Here the arrangement only affected the unquestionable general right of the defendants to make future sales to such dealers as they chose. The prevailing opinion of Mr. Justice Hughes does not reach such a case as this, and to impose the restriction contended for upon a producer would inhibit his actions in choosing his customers in a way that only the clearest public policy can justify. Such a rule would make the motive of declining customers the test of legality.

It is true that Judge Hough rested his decision in *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.* (D. C.) 224 Fed. 566, upon the Clayton Act, and not the Sherman Act, because the relief sought was only possible under the former statute; but his reasoning seems applicable to the Sherman Act, and the Circuit Court of Appeals, in affirming the decree, said:

"Before the Sherman Act, it was the law that a trader might reject the offer of a proposing buyer, for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern. 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. * * *"

[3] The second cause of action, brought under the Clayton Act, is based solely upon the allegation that the defendants discriminated in the price of Goodyear supplies "between dealers (including this plaintiff) and manufacturers of automobiles, and in favor of such manufacturers." Section 2 of the Clayton Act (Comp. St. § 8835b) forbids discrimination in price between different purchasers "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

There is nothing in the complaint to show how the alleged discrimination might substantially lessen competition, and it certainly could not tend to create a monopoly. Every manufacturer holds a monopoly in the goods of his own manufacture, but there is no allegation that the defendants have a monopoly "in any line of commerce," to use the term of the Clayton Act. Manufacturers of automobiles ordinarily would buy tires in much larger quantities than dealers, and consequently the defendants could generally afford to sell to such manufacturers at a lower price than to dealers. The manufacturers sell to dealers, and the latter to the consumer. There is apparently no competition between the manufacturers of tires and the dealers, nor is it alleged that any exists. The differentiation in price would not therefore substantially lessen competition. If such would be the effect, it must be set forth in some discernible way, and not in the mere language of the statute. There is no unreasonable arrangement set forth, nor is it made apparent how competition may be substantially lessened, or how the defendants were doing more than to select "their own customers in bona fide transactions and not in restraint of trade." More than mere sweeping conclusions in the language of the statute should be alleged to subject parties to trial. I can see no basis for the second cause of action.

The demurrer is sustained, with leave to plead over within 15 days.

KEATOR v. ROCK PLASTER MFG. CO.

(District Court, S. D. New York. February 1, 1919.)

1. ADMIRALTY ⚓18—JURISDICTION—ACTION FOR TORT.

The jurisdiction in admiralty in tort cases is exclusively dependent upon the locality of the act.

2. ADMIRALTY ⚓21—JURISDICTION—ACTION FOR TORT.

Where a person was killed while standing upon a dock, by the falling upon him of rock being discharged from a vessel by means of buckets hoisted by block and fall, the tort was not maritime, and a court of admiralty is without jurisdiction.

In Admiralty. Suit by Grace Keator, administratrix of Alexander Keator, deceased, against the Rock Plaster Manufacturing Company. On exceptions to libel. Exceptions sustained.

Bertrand L. Pettigrew, of New York City (Walter L. Glenney, of New York City, of counsel), for the motion.

Joseph A. Shay, of New York City, opposed.

MAYER, District Judge. Alexander Keator was in the employ of defendant. The accident which resulted in his death is described in the libel as follows:

"Third. That at the time said deceased received his injuries, causing his death, he was standing upon the dock adjoining the plant where rock was being unloaded from a boat, which was moored to said dock. That the rock was being hoisted by means of block and fall, to which there was attached a bucket, which was filled upon the boat and dumped upon said dock.

"Fourth. That while a bucket load of rock was being hoisted from the boat and was over the dock, because of a defective latch or catch, which was intended to hold the bucket closed or locked, opened up and released the load, causing the bucket to tip and the rock to fall, striking the deceased and bringing about the injuries which caused his death."

The first step taken by his widow was as a claimant before the state Industrial Commission, to which body she applied on behalf of herself and Keator's father for relief under the New York state Workmen's Compensation Law (Consol. Laws, c. 67). The Commission allowed the claim, but the Appellate Division, Third Department, reversed the determination of the Commission, and the New York Court of Appeals affirmed the order of the Appellate Division. *Matter of Keator v. Rock Plaster Mfg. Co.*, 224 N. Y. 540, 120 N. E. 56. Judge McLaughlin, writing for the court, stated:

"I am of the opinion, for the reasons stated by me in *Matter of Doey v. Howland Co., Inc.*, * * * decided herewith, that Keator, at the time he was killed, was engaged in the performance of a maritime contract."

The *Doey Case* held that, where the injured person was engaged in the performance of a maritime contract, the New York state Workmen's Compensation Law did not afford relief as the law then stood. *Matter of Doey v. Howland Co.*, 224 N. Y. 30, 120 N. E. 53. Contemporaneously the court decided to the same effect *Matter of Anderson v. Johnson Lighterage Co.*, 224 N. Y. 539, 120 N. E. 55.

The decision in the *Keator* and *Anderson Cases* was by a divided court; three judges dissenting. It was stated on the argument that an application for a writ of certiorari was applied for to and denied by the Supreme Court of the United States.

[1] This suit being here in admiralty, respondent has excepted to the libel on various grounds, all of which go to the point that, the deceased having been killed while standing on the dock, admiralty has no jurisdiction over a cause of action based on tort to recover damages for his death. The jurisdiction of admiralty in tort cases is exclusively dependent upon the locality of the act. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157.

[2] In a number of cases the question has arisen as to whether the tort should be regarded as having happened on the vessel or on land, where the tort was caused by an act which was started on the vessel or on the dock, as the case may be, and ended with the death or injury on the land or the vessel, as the case may be. In these cases it has been uniformly held that the locus of the tort is the place where

the injury was actually inflicted. *The Mary Garrett* (D. C.) 63 Fed. 1009, and cases cited; *Hermann v. Port Blakely Mill Co.* (D. C.) 69 Fed. 646, and cases cited; *The Bee* (D. C.) 216 Fed. 709, and cases cited.

As Keator was killed on the dock, it is apparent that the tort was not maritime, and therefore there is no jurisdiction in admiralty, and the exceptions must be sustained on the ground that there is lack of jurisdiction.

If this conclusion is right, fortunately plaintiff is not without remedy, for it would seem that she has a cause of action at common law against this defendant. Whether this court or the appropriate state court has jurisdiction will, of course, depend on diversity of citizenship.

I deem it my duty to suggest to counsel that this case be expedited in every way. It is highly important that every jurisdictional question shall be decided, if possible, before the statute of limitations shall have run. I have not found any case in the Supreme Court which covers the precise situation here involved on the question of jurisdiction; that is, a case where the alleged defective instrumentality starts on the vessel and in its progress causes the injury on land.

If the decision now made should be erroneous, and a judgment in a common-law action, proceeding upon the theory that the tort is not maritime, should be reversed on review, then the plaintiff would be out of court.

It is extremely desirable that this plaintiff should have her day in such court as may have jurisdiction. In order to safeguard this proposition, I repeat, with emphasis, that counsel should be diligent in the prosecution of the case, so that all jurisdictional questions may be determined before the statute of limitations shall have run.

Settle order on one day's notice.

CLINTON MINING & MINERAL CO. v. JAMISON.

(Circuit Court of Appeals, Third Circuit. April 4, 1919.)

No. 2413.

1. CORPORATIONS ⇨232(3)—ISSUANCE OF STOCK FOR PROPERTY—FINANCING ARRANGEMENTS.

When the stock is full-paid, no exception can be taken to a transaction wherein the owners of mining claims convey their properties to a corporation formed by them in consideration of its whole capital stock, returning to the company three-quarters of the shares as treasury stock for use, in financing the undertaking, whereupon the corporation executes mortgage to secure bonds, which it sells to the incorporators and others, giving as a bonus one share of stock for every dollar subscribed.

2. CORPORATIONS ⇨232(3)—FULL-PAID STOCK—COST OF PROPERTY TRANSFERRED.

The cost of mining claims to the buyers thereof is not a test of the value of the claims, in determining whether stock of a mining company, issued for such claims, when transferred to the company by the buyers, was full-paid; nor were the recited considerations in the conveyances to the buyers, or even in conveyances to the company, evidence of the value of the properties in its hands, on which could be based finding the properties were overvalued.

3. CORPORATIONS ⇨232(3)—ISSUANCE OF STOCK—OVERVALUATION OF PROPERTY—BENEFIT OF DOUBT.

Where there is ground for a difference of opinion as to the value of property transferred to a corporation in return for its stock, on the issue of overvaluation the benefit of the doubt will be given the stockholders.

4. CORPORATIONS ⇨269(3)—STOCKHOLDER'S LIABILITY—OVERVALUATION OF PROPERTY—SUFFICIENCY OF EVIDENCE.

In an action against a stockholder in a mining company to enforce his liability under Civ. Code S. D., § 441, evidence held insufficient to sustain finding that mining property, which defendant stockholder and others transferred to company in exchange for its stock, was overvalued, so that stock was not fully paid.

5. CORPORATIONS ⇨269(3)—ISSUANCE OF STOCK—OVERVALUATION OF PROPERTY.

The fact that a mining corporation failed from 10 to 13 years after issuance of its stock for certain properties is not in itself evidence of any overvaluation of the properties, or lack of value in them at the time of the transaction.

6. CORPORATIONS ⇨232(3)—ISSUANCE OF STOCK—VALUATION.

When property has in good faith been given a value in the issuance of corporate stock for it, the courts will not disturb it because events subsequently occurring show that the property was overvalued, but must determine the question of value on facts as they existed when the transaction was consummated.

In Error to the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Action by the Clinton Mining & Mineral Company a corporation of the state of Iowa, against William W. Jamison, a citizen of the state of Pennsylvania. To reverse a judgment of nonsuit, plaintiff brings error. Affirmed.

A. O. Fording, of Pittsburgh, Pa., for plaintiff in error.

J. M. Hodgson, of Casper, Wyo., and E. C. Higbee, of Uniontown, Pa., for defendant in error.

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

Before WOOLLEY, Circuit Judge, and THOMPSON, District Judge.

WOOLLEY, Circuit Judge. Clinton Mining & Mineral Company, a corporation of Iowa, recovered judgment against Imperial Gold Mining & Milling Company, a corporation of South Dakota, in an action on a tort committed in 1910. Having failed to impose the debtor corporation's liability upon a number of its stockholders by an action in equity (Clinton Mining & Mineral Co. v. Cochran, 247 Fed. 449, 159 C. C. A. 503), the Clinton Company, in 1917, brought this action at law against William W. Jamison, a single stockholder of the Imperial Company to recover the debt due on the said judgment, under authority of a South Dakota statute (Section 441, Civil Code of 1913), which provides:

"Each stockholder of a corporation is individually and personally liable for the *debts* of the corporation to the extent of the amount that is unpaid upon the stock held by him. Any creditor of the corporation may institute joint or several actions against any of its stockholders that have not fully paid the capital stock held by him, and in such action *the court must ascertain the amount that is unpaid upon the stock held by each stockholder* and for which he is liable, and several judgment may be rendered against each in conformity therewith. Liability of each stockholder is determined by the amount unpaid upon the stock or shares owned by him at the time such action is commenced, and such liability is not released by any subsequent transfer of stock. * * *

The plaintiff averred as a matter of fact and introduced testimony to prove, that the entire capital stock of the Imperial Company had been issued for property at an overvaluation, and maintained, as matters of law, that the defendant stockholder is liable under the cited statute for the debts of the corporation to the amount that is unpaid upon the stock held by him, and that the plaintiff's judgment against the Imperial Company is a "debt" of that corporation within the meaning of the statute. For defence, the defendant maintained that the liability which the statute imposes upon stockholders for debts of a corporation is for contractual debts and is not for a judgment obligation founded in tort, on the theory that a stockholder is never liable for the corporation's torts; and that, in consequence, no such liability can arise against him when a corporation's tort obligation is reduced to judgment. The defendant contended further, that the property for which the stock of the Imperial Company had been issued as full paid was not in fact overvalued; or, if overvalued, it was not an excessive overvaluation; that neither fraud nor fraudulent intent was involved in its valuation; and therefore the defendant stockholder cannot in any event be reached on the ground that the stock was not full paid.

At the conclusion of the testimony the defendant moved for a non-suit on several grounds. This motion was granted by the court, not because of lack of proof of overvaluation of the property, but on the ground that the South Dakota statute, imposing upon stockholders liability for corporation "debts" to the extent stock is not paid for, does not embrace an obligation of a judgment rendered in tort. On motion to take off the non-suit, the court sustained its ruling on authority of

Chase v. Curtis, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. Ed. 1038; Bohn v. Brown, 33 Mich. 257; Ward v. Joslin, 105 Fed. 224, 44 C. C. A. 456.

A writ of error was taken by the plaintiff on a very brief bill of exceptions, which disclosed no testimony and consisted merely of a statement—apparently agreed upon by counsel as raising the issues—to the effect that the evidence “tended to prove the shares of capital stock held by the defendant had been issued against property at an overvaluation (though without actual fraudulent intent) and that in this sense the said stock had never been fully paid for.” When the case was argued before us, the discussion was addressed mainly to the point on which the learned trial judge had granted a non-suit, though argument was made also on the law affecting the alleged overvaluation of the property, as shown by the bill of exceptions. The case as argued involved an interpretation of the law of South Dakota as to a stockholder’s liability for the payment of the corporation’s debts to the extent of his holding of its unpaid stock, and also an interpretation of the constitutional provision of the State of South Dakota authorizing the issue of capital stock for property. (Const. Art. 17, § 8.) As a decision by this court interpreting the statutory and constitutional provisions of South Dakota would in no sense bind the courts of that state when called upon to interpret its own statute and constitution, we hesitated in view of the lack of information contained in the abbreviated bill of exceptions to decide the case upon these points, preferring if the case in its other aspects is capable of decision under general law, to leave the interpretation of the law of South Dakota to its own courts. Therefore, of our own motion, we suggested diminution of the record, and, in compliance with the writ of certiorari that followed, the evidence in the case was brought before us for the first time.

We lay aside the interpretation of the word “debts” in the South Dakota statute as a matter which does not call for decision in this case until overvaluation of the property against which the stock was issued has first been determined, for it is on this fact alone that the defendant stockholder’s liability for the corporation’s debts is predicated. If no overvaluation is shown, no recovery can be had against the defendant, whatever may be the meaning of the word “debts” appearing in the statute.

The matter of overvaluation in this case has two aspects; first the law of the case, and second, the facts of the case. There being no judicial expression by the courts of South Dakota on the subject of valuation of property against which under its constitutional provision capital stock of a South Dakota corporation may be issued, and the familiar statutory provision that the judgment of directors as to the value of property for which stock is issued shall in the absence of fraud be conclusive, not being enacted in South Dakota until a later date, both parties looked elsewhere for the law and came into the court as far apart as the decisions themselves are, each having followed the line most favorable to his position. In the law of this subject, there are two rules governing the valid valuation of property against which stock of a corporation may be issued as full

paid. Of one rule, *Van Cleve v. Berkey*, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 592 (followed of necessity in *Babbitt v. Read* [D. C.] 215 Fed. 408, 236 Fed. 42, 149 C. C. A. 252 (C. C. A. 2d), interpreting the Missouri constitution, is the leading case. The rule requires that the value of the property must actually equal the amount of the stock regardless of any question of fraud, fraudulent intent, or the honest opinion of stockholders as to its worth. Under this rule, having its foundation largely if not entirely on interpretations of state laws, the only question for the jury is, Was the property worth the amount of the stock? This is known as the "true value" rule. In it, motive, intent and good faith are disregarded and the one thing to be shown is that the property conveyed for the stock was its equivalent in money and was worth in dollars the face of the shares. The other rule, of which *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420 is cited as the leading case, is known as the "good faith" rule, in which it is recognized that value is a matter about which men may honestly differ and in which the further questions of intention, good faith and fraud are submitted to the jury. Under this rule, to be sure, no device is tolerated to avoid an honest valuation, yet a margin is allowed for honest differences of opinion, and generally the transaction will be upheld even as against subsequent creditors if the valuation was honestly made, although it appear there was an error of judgment and that the valuation was in fact incorrect. *Northwestern M. L. Ins. Co. v. Cotton Exchange R. E. Co.* (C. C.) 70 Fed. 155; *Fletcher's Cyclopedia Corporations*, 3576. Of course, the transaction is always impeachable for fraud, and gross or intentional overvaluation is itself proof of fraud. *Preston v. Cincinnati C. & V. R. Co.* (C. C.) 36 Fed. 54, 1 L. R. A. 140; *Lloyd v. Preston*, 146 U. S. 630, 13 Sup. Ct. 131, 36 L. Ed. 1111; *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; *Fletcher's Cyclopedia Corporations*, Sec. 3576. There is little if any distinction in the cases between actual fraud and fraudulent intent in overvaluation.

If we were forced to follow either rule in order properly to decide the case before us, we might pause before subscribing to the true value rule based as it is on interpretations of state constitutions, and would perhaps incline to the good faith rule as the general rule pronounced by the Supreme Court of the United States. But we find on examining the testimony that the plaintiff was properly non-suited under either rule. We shall therefore address our discussion to what the evidence shows and fails to show under both rules, referring those who are interested in the subject to cases and text books in which they will find it elaborately discussed. *Van Cleve v. Berkey*, 42 L. R. A. 593, note; 5 *Fletcher's Cyclopedia Corporations*, Section 3576; 1 *Parker, N. J. Corporations*, Section 61; 1 *Cook on Corporations* (7th Edition) Section 46; *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420; *Babbitt v. Read* (D. C.) 215 Fed. 395.

Turning to the testimony, it appears that the Imperial Gold Mining & Milling Company was incorporated in 1899 under the laws of South Dakota. Several of its incorporators owned mining claims known as "The Chicken Fraction Lode," "American Express No. 1," "American Express No. 2," "Piedrock" and "No Mistake," situate in Lawrence

County, South Dakota. On April 12, 1900, the incorporators (to whom we shall refer as the vendors) conveyed these properties to the Imperial Company in consideration of its whole capital stock of 1,000,000 shares of the par value of \$1.00 a share, and \$50,000 in money. Regarding the stock as full paid, they then returned to the corporation 750,000 shares as treasury stock for use in financing the undertaking. Whereupon the corporation executed a mortgage to secure \$200,000 bonds, which it sold to the incorporators and others, giving as a bonus one share of treasury stock for each dollar of bonds subscribed. With the money raised from the sale of bonds and also from the sale of treasury stock at 25 to 45 cents a share, the corporation built reduction works and proceeded to the business of mining its properties.

[1] No exception can be taken to a transaction of this kind, when the stock is full paid. *Finletter v. Acetylene L. H. & P. Co.*, 215 Pa. 86, 64 Atl. 429; 1 *Cook on Corporations*, Section 46.

The mining claims which were conveyed for the stock aggregated about thirty-seven acres. They were not mere prospects; they were properties which had been previously developed by mining operations, from which ore had been taken and shipped to the smelter. A number of drifts and tunnels had been run aggregating more than 1,200 feet. These followed and cross cut ore bodies and shoots exposing veins of ore about six hundred feet in length, varying from 8 to 12 feet in height and from 15 to 40 feet in width, running from a low grade of \$6.00 to a shipping grade of \$20.00 a ton. Although no expert had measured up the ore, it was thought at the time that the ore exposed was worth \$250,000, and that the whole mine was fully worth the entire capital stock of the corporation. This valuation was based on metal values in high and low grade ore and on an estimated cost of reduction by the company's proposed cyanide works of \$3.50 a ton, and was made with reference not alone to the probability of finding additional ore above the flat or sedimentary formation, but to the possibility, in view of the proximity of the property to the Homestake mine, a mile and a half away, of encountering beneath the flat formation the continuation of the vertical vein of that highly valuable property.

[2] For proof that the property for which the stock had been issued was overvalued, the plaintiff put in evidence the deeds by which the vendors had acquired the properties, showing the considerations which they had paid. One deed was for a one-third interest in the American Express Group, showing the consideration of \$1.00. Several were for undivided one-fourth and one-eighth interests in the Chicken Fraction Lode, the consideration in each being \$100. Another conveyed an undivided three-fourth interest in the same claim to the Imperial Company for the consideration of \$500; another conveyed a one-eighth interest in the same claim for the consideration of \$1.00; and still another conveyed the American Express No. 2 and other claims for the consideration of \$50,000. All deeds carried cancelled revenue stamps of appropriate denominations. As most of the recited considerations were manifestly nominal they imparted no information as to the real value of the properties conveyed. Obviously, they

may have had values in nowise represented by the recited considerations. Nor is the cost of the claims to those who subsequently conveyed them to the corporation conclusive. The cost to the vendors is not a test of value. *Dickerman v. Northern Trust Co.*, 80 Fed. 450, 25 C. C. A. 549, affirming. *Northern Trust Co. v. Columbia Straw-Paper Co. (C. C.)* 75 Fed. 936; *Grant v. E. & W. Ry. Co.*, 54 Fed. 569, 4 C. C. A. 511, affirming *Coe v. E. & W. R. Co. (C. C.)* 52 Fed. 531; *Commonwealth v. Central Passenger R. Co.*, 52 Pa. 506; *Thomas v. Barthold (Tex. Civ. App.)* 171 S. W. 1071. We are concerned with their value to the corporation and that value may exceed what it cost the vendors, who were doing little more than transferring the properties, whatever their value, from themselves as individuals to a corporation of which they were the owners and through which they expected to finance and operate the properties. Therefore, we do not regard the recited considerations in conveyances to the vendors or even in conveyances to the corporation evidence of the value of the properties in the hands of the vendee corporation on which alone we could sustain a verdict that the properties were overvalued.

[3, 4] If we were to apply to this evidence the Missouri rule, which is the true value rule, requiring a money equivalent in the property for the face of the stock, we find no evidence that the property conveyed for the stock was not the money equivalent of its face. The most that we find is a doubt, the benefit of which the courts give stockholders where there is ground for a difference of opinion as to the value of the property. *Van Cleve v. Berkey*, 42 L. R. A. 593, note 600; *In re L. M. Alleman Hardware Co.*, 181 Fed. 810, 814, 104 C. C. A. 320 (C. C. A. 3d). The plaintiff cannot impose liability on the defendant based upon a doubt that his stock is but partially paid. As the fact must be established by evidence that will sustain this inference, we are satisfied that even under the true value rule, the evidence does not show that the plaintiff has proved its case. *American Tube & Iron Co. v. Baden Gas Co.*, 165 Pa. 489, 30 Atl. 940.

Under the fair value rule, or the general rule as announced by the Supreme Court in *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420, involving the good faith with which property is valued for the purpose of capitalization, we find no evidence indicating an absence of good faith or suggesting either fraud or fraudulent intent on which we could sustain a verdict to the contrary.

Aside from a lack of evidence in this case on which a jury could reasonably find overvaluation of the property, there is no evidence at all on which the court or the jury could fix the measure of the stockholder's liability under the South Dakota statute which provides that, "in such an action the court must ascertain the amount that is unpaid upon the stock held by each stockholder and for which he is liable." Had the case been submitted and had the jury found overvaluation, there is no evidence on which the jury could find how much the property was overvalued, and therefore how much remained unpaid on the stock. Not being able to calculate a deficiency on the stock, the defendant stockholder's liability was not capable of computation.

[5, 6] The only remaining testimony on the subject of overvaluation

of the property was the foreclosure in 1910 of the mortgage given in 1900 to secure \$200,000 bonds and the sale of the property thereunder in 1913, indicating the failure of the undertaking many years after the issue of the stock. But this evidence will not sustain a finding of overvaluation by the jury. It shows the corporation's failure, but not the cause of it. Failure may have been due to a variety of circumstances—exhaustion of ore bodies after working out values equal to the stock issue, unforeseen changes in character of ore with consequent increase in cost of reduction, inefficient or dishonest management. But whatever the cause may have been, the event of failure transpiring from ten to thirteen years after the issue of the stock is not itself evidence of the lack of value of the property at the time of the transaction. We invoke here a general rule of evidence, which is not affected, we surmise, by interpretations which the courts of South Dakota may make with respect to the statute and the constitution of that state. It is the sound rule, that when property has in good faith been given a value, the courts will not disturb it because events subsequently occurring show that it was overvalued. *N. W. Mutual Life Ins. Co. v. Cotton Exchange Real Estate Co.* (C. C.) 70 Fed. 155; *Carr v. LeFevre*, 27 Pa. 413; *Turner v. Bailey*, 12 Wash. 634, 42 Pac. 115; *American Tube & Iron Co. v. Baden Gas Co.*, 165 Pa. 489, 30 Atl. 940. The question of value must be determined upon facts as they existed when the transaction was consummated, not by subsequent events, such as the failure of the undertaking. 5 *Fletcher's Cyclopaedia Corporations*, Section 3576, and cases; *Finletter v. Acetylene L. H. & P. Co.*, 215 Pa. 86, 64 Atl. 429.

The evidence shows that this corporation mined its properties and milled its ore for ten or more years after the stock was issued for the property. The ultimate failure of the corporation ten or thirteen years afterward we do not regard as evidence on which to find that the property was not worth the face of the stock at the time it was taken over.

After very carefully considering the evidence in this case we are of opinion that if the case had been submitted to the jury, and if the jury had found against the defendant on overvaluation of the property, that verdict could not have been sustained. It follows, therefore, that the action of the trial court in awarding a nonsuit was right.

As we have not heard counsel upon the phase of the case on which we base our decision, except by memoranda, we indicate a willingness to hear oral argument should counsel desire it, and therefore direct that, unless a petition for a hearing be presented within sixty days from the date of the filing of this opinion, the judgment below be

Affirmed.

ROSENBLUM v. UBER.

In re B. M. STERN CO.

(Circuit Court of Appeals, Third Circuit. April 2, 1919.)

No. 2407.

1. LANDLORD AND TENANT ⇨248(3)—RENT—PRIORITY—EXECUTION.

A provision in a lease that if default be made in any of its conditions, or if execution be issued against the lessee, or if assignment be made for the benefit of creditors, rent for the entire balance of the term shall at once become due and payable, and a landlord's warrant may issue forthwith, is, under the law of Pennsylvania, not against public policy, and will be sustained to the extent of giving the landlord priority for one year's rent out of proceeds from an execution sale.

2. BANKRUPTCY ⇨325—LANDLORD'S CLAIM.

If a landlord obtains by an action of replevin a part of his rent from the goods of a subtenant upon the premises, his claim against the bankrupt estate of his tenant should be reduced by the amount he so received.

3. BANKRUPTCY ⇨255—LEASES—ACCEPTANCE OR REFUSAL BY TRUSTEE.

A trustee in bankruptcy may at his option assume a lease of the bankrupt, or decline to assume it, as an asset of the estate, and he has a reasonable time within which to exercise this option, and if he considers the lease of value, and assumes it, the bankruptcy operates like any other assignment, and the bankrupt is released from all liability for rent thereafter, but if he deems the lease of no value to the estate, and refuses it, this does not avoid the lease, but leaves the bankrupt lessee liable as before.

4. BANKRUPTCY ⇨255—LEASE OF BANKRUPT—SURRENDER.

A trustee in bankruptcy may, if the landlord consents, surrender a lease of the bankrupt, whereupon the landlord regains possession of the premises, and all unmatured obligations between the parties depending upon the continuance of the leasehold estate are terminated; but in surrendering the lease the trustee has no greater right than the tenant, had he attempted to make a surrender before bankruptcy.

5. LANDLORD AND TENANT ⇨109(4)—LEASE—SURRENDER—ACCEPTANCE OF KEY.

Where a landlord accepted a key from a tenant "upon the express conditions that he would care for the building and rent it, if possible, for the benefit of the estate" of his tenant, who was a bankrupt, he did not thereby accept a surrender of the lease, and he could hold the tenant liable for the difference between the rent provided for in the lease and rent actually collected after taking possession.

6. BANKRUPTCY ⇨255—LEASE OF BANKRUPT.

Where a trustee in bankruptcy attempted to surrender leased premises to the landlord, but the landlord accepted only upon the express condition that he would care for the building and rent it, if possible, "for the benefit of the estate," the effect of the transaction, although the trustee thought that he had surrendered the premises and terminated the liability of the estate under the lease, was a refusal to accept and administer the lease as an asset of the estate, and left the obligation of the bankrupt tenant under the lease just where it was before the attempt to surrender.

7. BANKRUPTCY ⇨350—CLAIMS OF LANDLORD—PRIORITY—"EXECUTION."

A landlord, who had, at the time of filing petition in bankruptcy, a landlord's lien, or the right to distrain upon goods and chattels upon premises demised to the bankrupt, and who had not accepted a surrender of the lease subsequently tendered by the trustee, is entitled, under Bank-

ruptcy Act July 1, 1898, § 64b, cl. 5 (Comp. St. § 9648), to priority of payment of rent in arrear not exceeding one year out of the proceeds of the sale of such goods by virtue of the Pennsylvania statute (Act June 16, 1836 [P. L. 777] § 83), granting a priority for such rent in the distribution of the proceeds of execution sales; a bankruptcy proceeding being in the nature of an "execution."

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

8. BANKRUPTCY ⇨318(4)—LANDLORD'S CLAIM.

In Pennsylvania, a landlord, in bankruptcy proceedings, who has refused the trustee's tender to surrender a lease, but has accepted the key and has taken possession of the building for the purpose, expressly declared at the time, of protecting and caring for the property and rerenting it for the benefit of the estate, is entitled in the distribution of the proceeds arising from the sale of goods and chattels on the premises, first, to payment of rent for one year, and, second, to payment of rent for the balance of the term, under proof of claim filed as a general creditor, when under the terms of the lease all rents were due at the date of the institution of bankruptcy proceedings; but in such case the trustee in bankruptcy is entitled to all the rents collected by the landlord while so in possession of the premises.

Petition to Review and Revise an Order of the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

In the matter of the B. M. Stern Company, bankrupt. Petition by Samuel Rosenblum against William J. Uber, trustee, to review and revise an order of the District Court of the United States for the Western District of Pennsylvania sustaining findings of the referee. Reversed, with instructions.

H. A. Wilkison, of New Castle, Pa., for petitioner.

Leonard M. Uber, of New Castle, Pa., for respondent.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This petition raises two questions of law on an agreed state of facts. The first question is: Whether a landlord, who had at the time of filing the petition in bankruptcy a landlord's lien or the right to distrain upon goods and chattels on premises demised to the bankrupt, and who had not accepted a surrender of the lease subsequently tendered by the Trustee, is entitled under section 64b, cl. 5, of the Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 563 (Comp. St. § 9648), to priority of payment of rent in arrear (not exceeding one year) out of the proceeds of the sale of such goods, by virtue of the Pennsylvania statute (Act of June 16, 1836 [P. L. 777] § 83) granting priority for such rent in the distribution of proceeds of execution sales. This question—which is the important one in the case—is dependent somewhat upon the determination of the second question, which is: Whether in Pennsylvania, a landlord, who has refused the Trustee's tender to surrender the lease, but has accepted the key and has taken possession of the building for the purpose, expressly declared at the time, of protecting and caring for the property and rerenting it for the benefit of the estate, is entitled, in

the distribution of the proceeds arising from the sale of goods and chattels on the premises, first to payment of rent for one year, and second, to payment of rent for the balance of the term under proof of claim filed as a general creditor, when under the terms of the lease all rent was due at the date of the institution of bankruptcy proceedings.

[1] The relevant facts are these: At the time the petition in bankruptcy was filed (December 30, 1916), the petitioner was the owner of a building occupied by the bankrupt under a lease for three years, from April 1, 1916, at a total rent of \$9,225.00, payable at the rate of \$256.25 monthly in advance. The lease provided that, if default be made in any of its conditions, or if execution be issued against the lessee, or if assignment be made for the benefit of creditors, rent for the entire balance of the term shall at once become due and payable, and a landlord's warrant may issue forthwith. It is conceded by both parties that such a provision in a lease is, under the law of Pennsylvania, not against public policy and will be sustained to the extent of giving the landlord priority for one year's rent out of proceeds from an execution sale. *Platt Barber Co. v. Johnston*, 168 Pa. 47, 31 Atl. 935, 47 Am. St. Rep. 877; *In re Keith-Gara Co.* (D. C.) 203 Fed. 585; *Id.*, 213 Fed. 450, 136 C. C. A. 96. And it is conceded further that on the filing of the petition in bankruptcy in this case, the rent for the balance of the term became due and payable.

[2] The receiver, who afterward became the Trustee, took possession of the building and its contents. The building contained goods and chattels belonging to the bankrupt and also goods and chattels belonging to the bankrupt's sub-tenant, Sperry-Hutchison Co. This concern immediately obtained a rule upon the Trustee to turn over the goods belonging to it. On this rule, Sperry-Hutchison Co. prevailed but before it got its property, the landlord levied on it by landlord's warrant for the full rent due for the balance of the term. The Sperry-Hutchison Co. finally regained possession of its property by replevin. There is nothing in the record which shows what happened thereafter. We allude to this phase of the case only to dispose of it as not bearing on the questions of law raised for revision, for, manifestly, if the landlord obtained by this action of replevin a part of his rent from the goods of another upon the premises, his claim against the estate would be reduced by the amount he so received, and a demand by Sperry-Hutchison Co. for the amount which it had thus contributed to the payment of the bankrupt's rent would, in all probability, appear in the form of a claim duly filed against the estate.

We shall address our discussion solely to matters between the tenant and his estate in bankruptcy on the one hand and the landlord on the other. The receiver came into possession of the premises on December 30, 1916, and occupied them for the months of January, February, and March, 1917. He sold the bankrupt's goods and chattels found on the premises and liable to the landlord's distress, and converted them into money. This money now constitutes the fund for distribution. From this fund he paid the landlord \$150.00 on account of rent in arrear for November and December, 1916, leaving due for these months a balance of \$387.50, and paid \$768.75 for use and occupa-

tion of the premises during the months of January, February, and March, 1917, declining later to pay more on the ground that at the end of this period he had surrendered the lease to the landlord and the landlord had accepted the surrender. Subsequently, the landlord filed proof of claim for the rent of the entire term, which, under the terms of the lease, became due on the date of the filing of the petition in bankruptcy, amounting to \$7,306.25. The claim was divided into two parts; the first was for the full amount of one year's rent, claimed as a priority by virtue of his lien as landlord; the second was for rent for the balance of the term, and was made by the landlord as general creditor.

Of the total amount of the proof of claim, the landlord claimed priority for \$3,075.00, under the law of Pennsylvania giving a landlord priority for one year's rent, less the following deductions: \$150.00 paid him by the Trustee on account of rent for the months of November and December, 1916; \$768.75 paid him by the Trustee for his use and occupation of the premises for the months of January, February, and March, 1917; \$525.00 collected by the landlord from the Star Clothing Company within the year as rent under a lease which he subsequently made; leaving \$1,781.25 as the balance of one year's rent, for which the landlord claimed priority. There is manifest inaccuracy in this calculation due perhaps to the payment to the landlord of \$150.00 after the filing of the claim. Subject to correction by the Referee, we make the balance of rent due for one year by priority to be \$1,631.25.

The determination of the landlord's priority for rent covering one year (whether for the admitted balance of \$387.50 for rent in arrear prior to bankruptcy, or for the claimed net balance of \$1,781.25—or \$1,631.25—for a full year) depends, as we have said, upon a determination of the second question involved, which is: Whether the transaction on which the Trustee relies as a surrender of the lease was in fact a surrender. This must first be disposed of.

On the question of surrender of the lease, there is no testimony. It was decided upon a stipulation which both parties agreed contained all the facts. This stipulation is as follows:

"5. On March 16, 1917, the Trustee filed a petition setting forth the fact * * * that the landlord had demanded of the Trustee the rent for the months of January, February, and March, requesting that the question as to whether the Trustee should continue to hold the possession of the building, during the term of the lease, be submitted to the creditors.

"5 (a). On the same day a like petition was filed by the Trustee, stating that under the facts therein stated, the Trustee was unable to determine whether the estate was liable for the rent and prayed for a rule on the landlord to show cause why the claim should be paid by the Trustee.

"5 (b). On the first petition, a meeting of the creditors was called and the question of the surrender of the lease was submitted to them. At the said meeting the landlord and his attorney were present in person and after a lengthy discussion the Trustee was directed by the creditors to surrender the lease and turn over the building to the landlord and an order was made and filed by the Referee to this effect. The Trustee thereupon, and at the said meeting, handed the key to the attorney for the landlord and stated that he thereupon surrendered the lease. The landlord, by his attorney, received the key, but stated that he accepted same upon the express conditions that be

would care for the building and rent it if possible for the benefit of the estate.

"5 (c). As appears by the subsequent proceedings, the landlord immediately took possession of the building, and shortly thereafter rented the first floor to the Star Clothing Company, at a rent of \$150.00 per month."

In this situation the Trustee filed exceptions to the landlord's proof of claim for rent on the ground that he had surrendered the lease to the landlord in March, 1917, and that, in consequence, no rent should be allowed him after that date, and, further, that the landlord had no priority for rent either for the months preceding or the months succeeding that date.

In an elaborate opinion, showing a very careful study of the case, the Referee found that the Trustee had a right to surrender the lease and that he did surrender it; that the landlord had no power to decline to accept the surrender and that he could not validly make a conditional acceptance of surrender; that the landlord's attempted conditional acceptance was in fact a complete acceptance; and that, in consequence, he is estopped from claiming rent for the remainder of the term; and, finally, that a landlord is not entitled under the law of Pennsylvania to priority in the payment of rent from proceeds of the sale of property on demised premises where the same is in custodia legis (i. e. in bankruptcy), except in the two instances specifically provided by the Pennsylvania statute with reference to executions and assignments for the benefit of creditors; and that, as under the Bankruptcy Act a landlord is only entitled to such priority for rent as is given by the state law, the landlord here is not entitled to priority in his claim for rent in bankruptcy. On exceptions to the District Court, the findings of the Referee, both of fact and of law, were sustained on the Referee's opinion.

We find a full and careful statement of this case necessary to a consideration of the questions involved, because the decision of the Referee, affirmed by the District Court of the United States for the Western District of Pennsylvania, not only overturns a practice long established in all the districts of Pennsylvania, and in the District of Delaware, but is diametrically opposed to a decision involving one of the same questions, early made by the District Court of the United States for the District of Delaware and to a decision recently made by the District Court of the United States for the Eastern District of Pennsylvania. Therefore, we are anxious that there shall be no doubt as to the facts on which we are to render a decision, which will affect very directly the future practice in all Federal districts in the State of Pennsylvania, and, we apprehend, in the District of Delaware also.

It may not be amiss to allude on the threshold of this discussion to certain principles of law which have been so well settled that they are no longer open to dispute. One relates to the duty of a trustee with reference to a bankrupt's lease, and another pertains to the power of the lessee (and to the corresponding power of his Trustee in bankruptcy) to dispose of his obligations under the lease.

[3] It is clearly settled that a trustee may, at his option, assume a lease of the bankrupt or decline to assume it as an asset of a bankrupt estate; and he has a reasonable time within which to exercise

this option. If he considers the lease of value to the estate and assumes it, bankruptcy operates like any other assignment and the bankrupt is released from all liability for rent thereafter. But if he deems the lease of no value to the estate and refuses it, this does not avoid the lease but leaves the bankrupt lessee liable as before. In *re Scruggs* (D. C.) 31 Am. Bankr. Rep. 94, 205 Fed. 673.

[4] The trustee may, however, do more than this. He may, if the landlord consents, surrender the lease; whereupon the landlord regains possession of the premises, and all unmatured obligations between the parties depending upon the continuance of the leasehold estate are terminated. But in surrendering the lease, the Trustee has no greater right than the tenant, had he attempted to make a surrender before bankruptcy. To be a valid surrender in either case there must be, not only an offer by the lessee (or the trustee) to yield up the leasehold, but an acceptance of that offer by the lessor, for nothing is better settled in Pennsylvania than that—

“A tenant for years cannot relieve himself from his liability under his covenant to pay rent by vacating the demised premises during the term, and sending the key to his landlord. The reason for it is that in the absence of fraud, one party to a contract cannot rescind it at pleasure. And the landlord may accept the keys, take possession, put a bill on the house for rent, and at the same time apprise his tenant that he still holds him liable for the rent. All this, as was said by Mr. Justice Rogers in *Marseilles v. Kerr*, 6 Wharton, 500, is for the benefit of the tenant, and is not intended, nor can it have the effect, to put an end to the contract and discharge him from rent. * * * There was neither a release nor an eviction here, but the surety claimed to be discharged because after the tenant, who was his principal, sent the keys to the landlord, the latter leased the property to another tenant. Yet there is no pretence that the landlord accepted a surrender; on the contrary the proof is clear that he declined to do so, and notified the defendant below that he would hold him for the rent. * * * Yet it was urged by the defendant below that such subsequent leasing by the landlord, and the acceptance of rent from the tenant, raised a presumption of a surrender. A surrender of demised premises by the tenant during the term, to be effectual, must be accepted by the lessor. The burden of proof is upon the tenant to show such acceptance. * * * When, therefore, the lessor retains the keys, and at the same time notifies the lessee that he will hold him for the rent, there is no room for the presumption of a surrender. Nor does the renting of the premises to another tenant under such circumstances raise such presumption, for the reason that it is manifestly to the lessee's interest that they should be occupied. The landlord may allow the property to stand idle, and hold the tenant for the entire rent; or he may lease it and hold him for the difference, if any.” *Auer v. Penn*, 99 Pa. 370, 44 Am. Rep. 114; *In re Keith-Gara Co.* (D. C.) 203 Fed. 585; *Id.*, 213 Fed. 450, 130 C. C. A. 96.

[5, 6] Applying these principles to the facts stipulated, it appears that the Trustee tried to do one thing and succeeded in doing another. First, acting on the instruction of the creditors, he offered to surrender the demised premises to the landlord and symbolized his offer by the delivery of the key to the landlord's attorney. But we find nothing in the stipulated record which shows or even suggests that the landlord or his attorney accepted the tender as made; but on the contrary the record shows that the attorney speaking for the landlord on accepting the key, specifically stated:

“That he accepted same upon the express conditions that he would care for the building and rent it if possible, for the benefit of the estate.”

Instead of being an acceptance of surrender, the act of the landlord was, in fact, a rejection of surrender, and left the lease where it was before the attempt to surrender was made. The Trustee, by delivering the key and abandoning the property, exercised his option to refuse to accept and administer the lease as an asset of the estate, as he had a right to do, but in doing this, he left the obligation of the bankrupt tenant under the lease just where it was before bankruptcy intervened.

The Trustee's failure successfully to surrender the lease and his refusal to treat the lease as an asset of the estate did not annul the lease, nor did it relieve the tenant from his obligation to pay rent, but left the tenant (and in consequence, the bankrupt estate), liable for rent on a continuing lease for the balance of the term, on proof of claim being seasonably filed. *Auer v. Penn.*, 99 Pa. 370, 44 Am. Rep. 114; *In re Keith-Gara Co.* (D. C.) 203 Fed. 585; *Id.*, 213 Fed. 450, 130 C. C. A. 96. Such proof of claim has been filed, and raises the two questions we have already stated, the first of which concerns payment of rent to the landlord by priority out of proceeds of the sale of goods on the demised premises liable to distress, by reason of the cited provisions of the Pennsylvania statute and Bankruptcy Act.

In considering the provisions of these statutes we should first observe the policy of the law with respect to their subject matter. This subject matter, so far as it is relevant to the issues of this case, is, landlords and tenants, and rents payable to one by the other. The law guards with care the rights of a landlord to his security for rent; and this is for obvious reasons. A landlord's right to rent is given by the instrument of demise; his remedy for the enforcement of that right is ordinarily conferred by law. Before bankruptcy, certain securities for his rent are given him, among these are the goods and chattels of the tenant on the demised premises, and various remedies are afforded him to reach these securities for the payment of his rent. But when bankruptcy intervenes, the whole situation is changed. Bankruptcy takes from the landlord his securities and gives them to the trustee, and deprives the landlord of the legal remedies which but for bankruptcy he might pursue in obtaining his rents and gives him in lieu thereof only such remedies as may be found in a court of bankruptcy in the equitable administration of the bankrupt tenant's assets. When, because of bankruptcy, goods and chattels on demised premises, cease to be security for the landlord's rent and become bankrupt assets and are no longer within the reach of legal process, what constitutes the equitable administration of a law which withdraws such security and takes away such process? When bankruptcy appropriates the landlord's security and cuts off his legal remedies under the exigencies of the debtor's insolvency, it would be most inequitable, speaking generally, to deprive a security holder of his security and hand it over to general creditors. Recognizing this inequity, the Bankruptcy Act, under its general scheme, endeavors not to destroy legal rights either in a debt or in its security, but endeavors rather to preserve them, though it enforces them in a new way made necessary by the bankrupt's financial collapse. In enforcing a landlord's rights in an equitable way, the Bankruptcy Act endeavors to protect them in the same

measure and preserve to them the same advantages so far as practicable that the law gave them before bankruptcy stepped in and interfered with their operation, having regard to their nature, their superiority, their priority. *Bindseil v. Liberty Trust Co.*, 248 Fed. 112; *Id.*, 160 C. C. A. 252. To this end the Bankruptcy Act (section 64b, cl. 5 [Comp. St. § 9648]) provides, that the debts which have priority and to be paid in full are:

"(5) Debts owing to any person who by the laws of the States or the United States is entitled to priority."

The law of the state, which the Bankruptcy Act seeks to recognize and under which the landlord in this case claims priority in the payment in full of a part of his debts, is a statute of Pennsylvania, Act of June 16, 1836 (P. L. 777), § 83. This statute provides, that:

"The goods and chattels being in or upon any messuage, lands or tenements which are or shall be demised for life or years, or otherwise, *taken by virtue of an execution*, and liable to the distress of the landlord, shall be liable for the payment of any sums of money due for rent at the time of taking such goods in execution: Provided, that such rent shall not exceed one year's rent."

It is conceded in this case, that at the time the tenant's goods and chattels on the demised premises came into the possession of his Trustee under operation of the Bankruptcy Act, they were "liable to distress of the landlord," and that, had they been taken in execution before levy of a distress, the proceeds of the execution sale would have been "liable for the payment of (the landlord's) rent" for one year in priority to the payment of the claim of the execution creditor. It is also conceded that by the construction which the courts of Pennsylvania have given this statute, the landlord's priority is not confined to the last year's rent, but extends to one whole year's rent (*Weltner's Appeal*, 63 Pa. 302), and that a covenant for rent payable in advance, or a stipulation in a lease that on breach of a covenant the whole rent for the balance of the term shall at once become due, is, within the terms of the Pennsylvania statute, "*money due for rent at the time of taking such goods*," and also is within the class of "*debts owing to any person*," to which, under section 64b, cl. 5, of the Bankruptcy Act, priority is enforced when awarded by state law. In *re Keith-Gara Co.* (D. C.) 203 Fed. 585. Such covenants, not being against public policy, will be sustained to the extent of giving the landlord priority for one year's rent. *Collin's Appeal*, 35 Pa. 83; *Platt Barber Co. v. Johnston*, 168 Pa. 47, 31 Atl. 935, 47 Am. St. Rep. 877. Thus, the facts of this case bring the landlord within the terms of the Pennsylvania statute so far as they have been interpreted by Pennsylvania courts, and raise squarely the question, whether the landlord is entitled to priority for rent in a distribution in bankruptcy by force of a state statute which gives priority to the landlord only in instances of goods on the demised premises liable to distress, which have been seized and sold in execution or on assignment for the benefit of creditors.

This question was raised many years ago and was answered by the Supreme Court of the United States in *Longstreth v. Pennock*, 87 U. S. (20 Wall.) 575, 22 L. Ed. 451. In that case the Supreme Court, in-

interpreting the same Pennsylvania statute, held, that, the statute, in giving a landlord's claim for rent priority in the distribution of the proceeds of an execution sale of goods on the demised premises liable to distress, extends that priority by equitable intendment to the proceeds of goods similarly situated when seized and sold by an assignee in bankruptcy. This construction by the Supreme Court of the United States of the Pennsylvania Act of 1836, when invoked in proceedings in bankruptcy, has been followed both under the old bankruptcy act and under the present act without question in all Federal districts of the State of Pennsylvania and in the District of Delaware from the date of its announcement until the institution of the proceedings in this case. The law of *Longstreth v. Pennock* is now questioned, because of a recent decision by the Supreme Court of Pennsylvania again bringing under review the Statute of 1836 (and the like Act of March 21, 1772, 1 Smith's Laws, p. 370), and also the Act of May 26, 1891 (P. L. 122), which enlarged the Act of 1836 and extended to the landlord relief in all cases where a tenant makes an assignment for the benefit of creditors of goods and chattels upon demised premises liable to distress. This decision was made in *Grayson v. Aiman, Inc.*, 252 Pa. 461, 97 Atl. 695 (1916), and concerned the Pennsylvania statute, not with reference to its enforcement in bankruptcy, but with reference to its operation in sales by receivers appointed on a bill in equity. In that case, goods on demised premises liable to distress for rent had passed into the hands of a receiver for a tenant, and were sold. The landlord claimed priority in the distribution of the proceeds and asked the court to so construe the statute as to give the landlord priority to the same effect as though goods similarly situated had been levied on and sold under execution process. The Supreme Court of Pennsylvania gave the statute a literal construction and declined to extend its provisions to seizures and sales by receivers. The Trustee in the case at bar took the position, that when the Supreme Court of Pennsylvania held that the landlord's priority in proceeds of sales under execution, specifically conferred by the Pennsylvania statute, did not extend to proceeds of sales by receivers, the statute, *pari ratione*, withheld priority from a landlord in the proceeds of sales in bankruptcy proceedings; and that, as the decision in *Grayson v. Aiman, Inc.*, was a construction of a state statute by the court of last resort of the state that had enacted it, the decision over-ruled *Longstreth v. Pennock* and reversed the practice based thereon and followed in the districts of Pennsylvania. The Referee approved this contention and the District Court sustained his finding.

Whether this decision of the District Court is right depends upon the character of a bankruptcy proceeding in so far as it concerns the seizure and sale of goods liable to distress found on the premises of a bankrupt tenant. If the proceeding is one of execution, then it falls within the terms of the Pennsylvania Act, and the priority of that statute is drawn to the proceeding by force of section 64b, cl. 5, of the Bankruptcy Act. If it is not in its nature an execution, then the priority afforded by the Pennsylvania Act does not reach a proceeding in bankruptcy and cannot be extended to a landlord in the distribution of proceeds of bankruptcy sales.

By early decisions under the old bankruptcy act, bankruptcy proceedings were regarded to "have the effect of a statutory execution so that the case of the bankrupt's landlord may be within the equity of any laws of the respective states which entitle a landlord to payment out of the proceeds of goods taken in execution." *In re Appold*, Fed. Cas. No. 499; *In re Wynne*, Fed. Cas. No. 18,117; *In re Trim*, Fed. Cas. No. 14,174; *In re McConnell*, Fed. Cas. No. 8,712; *In re Bowne*, Fed. Cas. No. 1,741; *Austin v. O'Reilly*, Fed. Cas. No. 665; *In re Dunham*, Fed. Cas. No. 4,145; *In re Hoagland*, Fed. Cas. No. 6,545.

In decisions under the present bankruptcy act, and particularly in decisions by District Courts in this circuit, proceedings in bankruptcy have been similarly regarded. The District Court of the United States for the Western District of Pennsylvania, *In re Hoover* (D. C.) 113 Fed. 136, followed *Longstreth v. Pennock* and construed the application of section 64b, cl. 5, of the Bankruptcy Act of 1898 to the Pennsylvania Act of June 16, 1836, now under discussion, by aptly saying:

"The Bankrupt Court having taken possession of this property, thus liable for the rent, its process whereby the same was sold must, for the purposes of this statute, be regarded as an equitable execution. The case is within the equity of the statute. *Longstreth v. Pennock*, 87 U. S. [20 Wall.] 575, 22 L. Ed. 451."

The District Court of the United States for the Eastern District of Pennsylvania (*In re Delaney*, 251 Fed. 425) as recently as 1918, following *In re Hoover*, and relying on *Longstreth v. Pennock*, declared that "bankruptcy of the tenant operates as an equitable execution," under which the landlord is entitled to priority in the proceeds of sale of goods and chattels liable to distress on the demised premises, by force of the Pennsylvania Act, and in reaching this conclusion, regarded the decision in *Grayson v. Aiman, Inc.*, as not bearing on the question.

The District Court of the United States for the District of Delaware, *In re Mitchell*, 116 Fed. 87, following *Longstreth v. Pennock* and *In re Hoover*, construed the Delaware statute—which in substance is identical and in language is similar to that of the statute of Pennsylvania—as extending the priority which it gave the landlord in the distribution of the proceeds of execution sales to proceedings in bankruptcy, and held that the state statute is such as the courts of the United States would and should recognize under section 64b, cl. 5, of the Bankruptcy Act. In reaching this conclusion, the District Court for the District of Delaware refused to distinguish this case (as later did the District Court for the Eastern District of Pennsylvania, *In re Delaney*), in which goods seized in bankruptcy were liable to distress but against which no distress had been levied when bankruptcy began, from the case of *In re Hoover*, in which goods so liable to distress had actually been distrained but execution of the distress warrant had been interrupted by bankruptcy proceedings, holding that the landlord's lien, as it is commonly called, or the landlord's security, as it is sometimes called, is established by law, not by force either of distress actually levied in one case or the issuance of an execution in another.

It thus appears throughout the judicial history of bankruptcy statutes, that a bankruptcy proceeding has been variously termed "a statutory execution," "an equitable execution," "the equivalent of an execution," "in effect an attachment and injunction," and has been uniformly regarded, in essence, though not in form, an execution which draws to itself for enforcement, by reason of section 64b, cl. 5, of the Bankruptcy Act, such priorities as are accorded landlords in the distribution of proceeds of execution sales by the law of the state in which the bankruptcy proceeding is being carried on. *Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 866; *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405.

We are therefore of opinion that the decision of the Supreme Court of Pennsylvania in *Grayson v. Aiman, Inc.*, 252 Pa. 461, 97 Atl. 695, is not in conflict with the decision of the Supreme Court of the United States in *Longstreth v. Pennock*.

[7] The decision of the Referee, sustained by the District Court, with reference to the landlord's claim of priority for the balance of rent for one year is reversed with instructions to make a new order with respect thereto conformably with this opinion.

[8] The second part of the landlord's proof of claim is for rent due for the balance of the term, that is, for rent for the term following the year for which rent has been allowed by priority. This rent amounts to \$4,231.25, less \$2,475.00, rent which the landlord had collected from the Star Clothing Company, sub-tenant, during that period, leaving a balance of \$1,752.25 (or, as we make it, \$1,756.25). The landlord arrived at this sum by deducting from the total rents due, rents received by him from the sub-tenant, and by setting off the latter against the former. On exceptions by the Trustee, the Referee disallowed the whole of the claim for rent after December 31, 1916, on the theory that rent had been paid for January, February, and March, 1917, and that the lease having then been surrendered, no rent was due thereafter, either by priority or otherwise, but allowed a portion of the claim for the balance of rent confessedly due for the months of November and December, 1916, amounting to \$387.50.

As we have held that there was no surrender of the lease, and that the landlord is entitled to one year's rent by priority, manifestly he is entitled also to prove his claim of rent due for the balance of the term and to receive in payment thereof the same dividends as other general creditors receive. The landlord, however, claims more than this. He maintained the lease in force by refusing to accept its surrender, and, according to his own stipulation, accepted possession of the property "upon the express conditions that he would care for the building and rent it if possible *for the benefit of the estate*." He succeeded in renting the building, but instead of collecting the rents and handing them to the Trustee for the "benefit of the estate," he kept them and appropriated them to his own benefit by way of set-off against his claim for rent.

As the landlord is entitled to rent for the balance of the term, not by preference or by priority under any statute, but only by reason of his position of general creditor, he must look for payment to the gen-

eral assets of the estate. These belong to and must first come into the hands of the Trustee. They are made up as well of rents collected from the demised premises under a subletting for the benefit of the estate as of other assets of the bankrupt. The mere accident that in this instance these rent credits were collected by the landlord gives him no right to withhold them from the Trustee and no right to retain them and use them as a set-off against his general claim for rent due him from the estate. In *Singerly v. Fox*, 75 Pa. 112, where a landlord set off his debt to a receiver for goods purchased against a debt due by the receiver to the landlord for rent, the Supreme Court, on disallowing the set-off, said:

"We can readily see how, at least this part of the proceedings of a court of equity might degenerate from a regular and orderly process to a mere scramble for the debtor's goods. We can further see, that if the partnership [in this case the bankrupt estate] prove insolvent, one creditor might get his whole claim, and another nothing."

As the landlord held the bankrupt tenant (and therefore his Trustee) for rent for the balance of the term, the Trustee is entitled to whatever the demised property produced during that period, before meeting obligations of the estate to the landlord.

If, in the final outcome, this is a hardship to the landlord, it is one which he imposed upon himself by electing to hold the tenant on the lease rather than to accept the surrender of the lease. The landlord was confronted with a practical problem. Had the assets of the bankrupt estate been considerable and the prospect of renting the premises slight, the landlord would have profited by refusing the surrender; had the assets on the other hand been inconsiderable and the prospect of renting the premises good, he would have profited by accepting the surrender. The thing the landlord did was to decline the surrender of the lease. Having elected to accept one situation, he cannot now have the profits arising from both situations.

The findings by the Referee on the landlord's proof of general claim for rent for the balance of the term, as sustained by the District Court, are reversed, and the District Court is instructed to enter another order, directing the landlord to pay the Trustee \$2,475.00—the rents received by the landlord for the balance of the term following the year for which rent has been allowed him by priority—and when so paid, allowing the landlord such dividends in discharge of his general claim as are declared to general creditors.

As the two claims for rent—one by priority and the other as a general claim—arise out of the same lease, are affected by the same transactions, and are, in consequence, inseparably connected, the District Court is further instructed to embody in its revised order a disallowance of both claims filed by the landlord in his one proof of claim, unless he pays to the Trustee within a reasonable time all moneys he has collected in renting the property for the benefit of the estate, except the sum of \$525.00, which is the sum he received from the subtenant during the year in which he has been awarded rent by priority, and which he has deducted from the amount of rent so claimed.

MARTINEZ v. MENDEZ.

(Circuit Court of Appeals, First Circuit. March 10, 1919.)

No. 1350.

1. JUDGMENT ⇨647—CONCLUSIVENESS—DECLARATION OF HEIRSHIP—EX PARTE PROCEEDING.

A decree declaring one sole heir of deceased, being obtained in an ex parte proceeding under Rev. St. Porto Rico 1913, § 1558, is conclusive, if at all, against natural children, in their subsequent proceeding for a declaration of heirship, only to the extent it declared him an heir, entitled to the share given him by law.

2. JUDGMENT ⇨672—PARTIES BOUND—INTERVENERS.

Proceeding for declaration of heirship of minors was made adversary, with the result that the judgment was binding, by one claiming sole heirship, but not made a party, intervening under Rev. St. Porto Rico 1913, § 1559, and being accorded full opportunity to litigate the question.

3. EVIDENCE ⇨332(1)—DETERMINATION OF HEIRSHIP—DECREE AS TO ACKNOWLEDGMENT OF NATURAL CHILD.

A decree in an adversary proceeding, declaring minors acknowledged natural children of deceased, though not recorded in the civil registry, as provided by Rev. St. Porto Rico 1913, §§ 235, 3388, 3389, is admissible in a proceeding for declaration of heirship of the minors and conclusive against one who was party to the prior proceeding; section 3390 permitting other evidence than the record in the registry to be admitted "when a litigation is instituted before the courts."

4. DESCENT AND DISTRIBUTION ⇨71(2)—ESTABLISHMENT OF HEIRSHIP—LIMITATIONS.

Where legitimate son of intestate obtained, in September, 1912, a decree in an ex parte proceeding declaring he was the sole heir ab intestate of his father, and in a later adversary suit against the legitimate son a decree was entered that certain minors were the acknowledged natural children of such decedent, which decree was affirmed in June, 1916, the right of the minors to bring petition, pursuant to Rev. St. Porto Rico 1913, § 1558, to be declared heirs ab intestate of the decedent had not prescribed in October, 1916, under section 5124, assuming its applicability, since the minors were not in position to institute the proceeding prior to June, 1916, when judicially declared acknowledged natural children.

5. BASTARDS ⇨101—INHERITANCE BY—ACKNOWLEDGED CHILDREN.

Under Rev. St. Porto Rico 1913, §§ 3886, 3983, 4001, 4009, legally acknowledged natural children are heirs in the intestate succession of their natural father, entitled to portion half that of a legitimate child left by him.

6. COURTS ⇨359—APPEAL FROM SUPREME COURT OF PORTO RICO—FOLLOWING DECISION BELOW—LOCAL LAW.

The conclusion of the Supreme Court of Porto Rico as to construction of provisions of local laws as to heirship not being clearly wrong should be affirmed.

Appeal from the Supreme Court of Porto Rico.

Petition by Cecilia Mendez for declaration of heirship of her children, as acknowledged natural children of deceased. Victor P. Martinez y Gonzales intervened in opposition, and from a decree of the Supreme Court of Porto Rico, affirming a judgment of the district court adverse to him, he appeals. Affirmed.

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

Victor P. Martinez, of San Sebastian, Porto Rico, for appellant.
Carlos Franco Soto, Juan B. Soto, and Hugh R. Francis, all of San Juan Porto Rico, for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. This is an appeal from a decree of the Supreme Court of Porto Rico declaring Pedro Angel and Laura Maria Mendez, minors, heirs ab intestate of Victor Martinez y Martinez.

It appears that Victor Martinez y Martinez was the father and common ancestor of the appellant, Victor P. Martinez y Gonzales, and the two minor children; that he died intestate, and that, at the time of his death, August 26, 1912, resided in San Sebastian, in the judicial district of Aguadilla; that on September 27, 1912, the appellant, who was the legitimate son of Victor, obtained a decree in an ex parte proceeding in the district court of Mayaguez declaring that he was the sole heir ab intestate of his father; that on January 4, 1915, in an adversary suit brought against Victor P. Martinez in the district court of Aguadilla, the minor children, Pedro Angel and Laura, were decreed the acknowledged natural children of their deceased father, which decree was affirmed on appeal to the Supreme Court of Porto Rico June 24, 1916; that on October 31, 1916, Pedro Angel and Laura, represented by their mother Cecilia Mendez, brought a petition pursuant to section 19 of an act relating to special legal proceedings (Revised Statutes of Porto Rico, § 1558) in the district court of Aguadilla, asking that Pedro Angel and Laura be also declared heirs ab intestate of Victor Martinez y Martinez; and that January 26, 1917, the district court of Aguadilla entered a decree declaring Pedro Angel and Laura heirs ab intestate of the deceased Victor and entitled to the portion assigned to them by law. It further appears that the appellant, Victor P. Martinez, not having had notice of the proceeding for the declaration of heirship in favor of Pedro and Laura before the decree was entered, on March 14, 1917, in pursuance of section 20 of an act relating to special legal proceedings (Revised Statutes of Porto Rico, § 1559), intervened in the cause and filed a "motion in opposition," praying for the annulment of the decree of January 26, 1917, and setting forth various grounds of defense to the petition; that April 28, 1917, a reply to the motion was filed; that May 7, 1917, the district court entered a decree denying the motion; and that from the denial of this motion Victor P. Martinez appealed to the Supreme Court of Porto Rico, where, on January 30, 1918, a decree was entered affirming the decree of the district court of Aguadilla. It is from the last-mentioned decree of the Supreme Court that the present appeal is prosecuted.

In the Supreme Court it was held that, inasmuch as Victor Martinez y Martinez died in the Judicial District of Aguadilla, the district court of Aguadilla, rather than that of Mayaguez, had jurisdiction to entertain the petition for the declaration of heirship; that the decree procured by Victor P. Martinez, in the ex parte proceeding in the district court of Mayaguez, declaring him the sole heir was not *res judicata* to the extent of precluding the minor children, whose status as acknowl-

edged natural children had been judicially declared, from being subsequently declared heirs; that the decree of the district court of Aguadilla of January 4, 1915, in the action of acknowledgment, affirmed by the Supreme Court June 25, 1916, was competent and conclusive evidence as to the status of Pedro and Laura as acknowledged natural children of Victor Martinez y Martinez, without proof that the decree had been recorded in the civil register; that under the laws of Porto Rico governing the rights of the parties to this controversy, the legally acknowledged natural children, Pedro and Laura, were heirs of their deceased father; and that they were not guilty of laches and their right to maintain the petition had not prescribed, as they were not in a position to prosecute the petition until after the judgment of June 24, 1916, was entered in the Supreme Court, affirming the judgment of the district court of January 4, 1915, declaring them acknowledged natural children.

[1, 2] In the first and sixth assignments of error the appellant complains that the Supreme Court erred in rendering judgment declaring the minor children heirs ab intestate without making him a party to the proceeding, and that this was in violation of section 74 of the Code of Civil Procedure (Revised Statutes of Porto Rico, § 5058); that it also erred in not giving due force and effect to the decree of the district court of Mayaguez of September 27, 1912, declaring him sole heir; and that this was in violation of section 1219 of the Civil Code (Revised Statutes of Porto Rico, § 4325). As above pointed out, the decree of the district court of Mayaguez, declaring the appellant sole heir, was obtained in an ex parte proceeding under section 1558 of the Revised Statutes of Porto Rico, and we think it was conclusive, if at all, as against the minor children in their subsequent proceeding for declaration of heirship, only to the extent that it declared him an heir of his deceased father, entitled to the share given him by law. Moreover, as it is provided in section 20 of the act relating to special legal proceedings (Revised Statutes of Porto Rico, § 1559), which embraces proceedings for the declaration of heirship, that "final judgment having been rendered, any claimant who has had no notice of the proceedings and did not appear therein and who has a well-founded right to the inheritance may establish and enforce his right against those who have been judicially declared heirs thereby," and as the appellant availed himself of this right by intervening and filing his motion in opposition to the petition of the minors we think that he thereby made that an adversary proceeding in which he was accorded full opportunity to litigate the question whether he was or was not the sole heir, and that, as this question was decided against him, he is concluded thereby.

[3] In the second and fifth assignments of error the appellant complains that as the decree of January 4, 1915, affirmed June 24, 1916, in the adversary proceeding declaring the minor children acknowledged natural children, does not appear to have been recorded in the civil register (1) that it was incompetent as evidence, and (2) that their status as acknowledged natural children would not be established until it was so recorded. It is true that section 318 of the Civil Code (Re-

vised Statutes of Porto Rico, § 3388) provides that "acts relating to the civil status of persons shall be recorded in the registry devoted to that purpose," and that section 18 of an act to establish a law of civil register (Revised Statutes of Porto Rico, § 235), and section 319 of the Civil Code (Revised Statutes of Porto Rico, § 3389) provide that "acknowledgments" or "decrees regarding filiations" are acts relating to the civil status required to be recorded; but it is evident that the judgment or decree was competent as evidence in this litigation, for section 320 of the Civil Code (Revised Statutes of Porto Rico, § 3390) permits other evidence than the record in the registry to be admitted "when a litigation is instituted before the courts." The judgment or decree was therefore properly received in evidence, and as between these parties was conclusive of the fact that the minors were the natural children of Victor Martinez y Martinez legally acknowledged.

[4] In the fourth and seventh assignments of error the appellant complains that the court erred in holding that the right of the minor children to petition the court to be declared heirs ab intestate had not prescribed, relying on section 140 of the Code of Civil Procedure (Revised Statutes of Porto Rico, § 5124). If the limitation provided for in section 140 has any application to a situation like the one here in question, the petition was seasonably brought for the minor children were not in a position to institute the proceeding before June 24, 1916, when they were judicially declared acknowledged natural children, and the present petition was brought within about four months thereafter.

[5] The third and eighth assignments of error raise the same question—that the court erred in construing the provisions of the Civil Code relating to intestate succession in force when Victor Martinez y Martinez died, August 26, 1912, and in holding that his natural children legally acknowledged were not excluded from the inheritance of their father, he having left surviving him a legitimate child.

In the Civil Code, chapter III, relating to intestate succession, it is provided:

"(3983) Sec. 887. In the absence of testamentary heirs, the law gives the inheritance, according to the rules hereafter set forth, to the legitimate and natural relatives of the deceased, to the widower or widow, and to the people of Porto Rico."

In chapter IV of the Civil Code, relating to the order of intestate succession, it is provided:

"(4001) Sec. 905. Legitimate and acknowledged illegitimate children and their issue succeed to their fathers and other ancestors without distinction of sex or age, and even though they proceed from different marriages."

And in article third of said chapter IV, it is provided:

"(4009) Sec. 913 (as amended by Act of March 9, 1911, p. 236). In default of legitimate descendant or ascendant the natural children legally recognized shall succeed the deceased in the whole of the inheritance. * * * Should there be any legitimate descendants or ascendants, the natural descendants shall receive only that portion of the inheritance allowed to them by the act amending and repealing sections 795, 796, etc., of the Civil Code, approved March 9, 1905."

March 9, 1905, the Legislature of Porto Rico amended sections 795, 796 and 797 of the Civil Code, and in section 14 of the amending act provided:

"(3886) Sec. 14. When the testator leaves legitimate children or descendants, and natural children, legally acknowledged, each of the latter shall have a right to a portion equal to one-half of that pertaining to each of the legitimate children who have not received any additional portion: Provided, it can be included in the third which may be freely disposed of, from which it must be taken, after the burial and funeral expenses have been deducted."

We think these provisions of law, when fairly construed, demonstrate that legally acknowledged natural children are heirs in the intestate succession of their natural father and are entitled to the portions provided for in section 14.

[6] At any rate we are satisfied that the conclusion reached by the Supreme Court of Porto Rico as to the construction of these provisions of law is not clearly wrong, and that its decision should be affirmed. *Cardona v. Quinones*, 240 U. S. 83, 36 S. Ct. 346, 60 L. Ed. 538.

The decree of the Supreme Court of Porto Rico is affirmed, with costs to the appellee.

MARTINEZ v. MARTINEZ et al.

(Circuit Court of Appeals, First Circuit. March 10, 1919.)

No. 1351.

Appeal from the Supreme Court of Porto Rico.

Petition by Pedro Angel Martinez y Mendez and another for appointment of an administrator, opposed by Victor P. Martinez y Gonzales. Decree of appointment was affirmed by the Supreme Court of Porto Rico, and respondent appeals. Affirmed.

Victor P. Martinez, of San Sebastian, Porto Rico, for appellant.

Juan B. Soto, Hugh R. Francis, and Carlos Franco Soto, all of San Juan, Porto Rico, for appellees.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. This is an appeal from a decree of the Supreme Court of Porto Rico, affirming a decree of the district court of Aguadilla appointing an administrator of the estate of Victor Martinez y Martinez, who was a resident of and died at San Sebastian, Porto Rico, in the district of Aguadilla, August 26, 1912, and ordering a temporary allowance for the support of his two minor children Pedro Angel and Laura Maria Martinez y Mendez.

Many of the questions raised on this appeal have been decided in our opinion handed down this day in case No. 1350 between these parties. 256 Fed. 596, — C. C. A. —. As to the remaining questions, we think they were properly decided by the Supreme Court and do not call for further discussion.

The decree of the Supreme Court of Porto Rico is affirmed, with costs to the appellees.

NATIONAL SURETY CO. v. GLOBE GRAIN & MILLING CO.

(Circuit Court of Appeals, Ninth Circuit. February 25, 1919. Rehearing Denied May 12, 1919.)

No. 3209.

1. APPEAL AND ERROR ⇐1008(1)—REVIEW—FINDINGS.

In an action tried to the court, findings of fact are conclusive on the appellate court, though it might have reached a different conclusion on the evidence.

2. INSURANCE ⇐285—FIDELITY INSURANCE—RECOVERY.

Where an employer's application set out that no fact had come to the employer's knowledge tending to indicate an employé was unreliable, deceitful, dishonest, or unworthy of confidence, and no reason why a surety company should not become a surety, and the surety company issued a policy to make good any loss the employer might sustain by any act of personal dishonesty, forgery, or embezzlement by the employé, the employer could not recover on the policy, where the employer knew the employé had previously overdrawn his accounts, and the books of a branch office in his charge showed further overdrafts.

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

Action by the Globe Grain & Milling Company against the National Surety Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions to enter judgment for defendant.

O'Melveny, Millikin & Tuller and Hocker & Austin, all of Los Angeles, Cal., for plaintiff in error.

W. G. Van Pelt and E. S. Williams, both of Los Angeles, Cal., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The defendant in error applied to the plaintiff in error to become surety, beginning October 15, 1915, for certain of its employés for the amounts and in the positions set opposite their names, respectively, including one T. F. Hayes.

"These employés, and each and every of them, while in the service of the undersigned employer," the application expressly declared, "have always performed their respective duties in a faithful and satisfactory manner. There has never come to the notice or knowledge of the employer any act, fact, or information tending to indicate that they or any of them are negligent, unreliable, deceitful, dishonest, or unworthy of confidence. As far as the employer knows, the habits of each and all of them are good, and the employer knows no reason why you cannot safely become surety for them and each of them.

"The above and foregoing statement and representations are each, every, and all warranted by the employer to be true, and are made for the purpose of inducing the National Surety Company to become such surety, and said statements and representations shall apply to each and every employé hereafter added to the schedule to be covered by said bond as therein provided.

"Dated at Los Angeles the 15th day of October, 1915."

Upon that application the plaintiff in error issued its policy to the defendant in error in consideration of the payment of an annual premium computed at an agreed rate and payable on the 15th day of October during each and every year that the bond should continue in force, agreeing "to make good within sixty (60) days after satisfactory proof thereof, to the Globe Grain & Milling Company, of Salt Lake City, Utah, employer, any loss which the employer may sustain by reason of any act of personal dishonesty, forgery, theft, larceny, embezzlement, wrongful conversion, or abstraction on the part of any employé named in the schedule" attached, including said Hayes, the amount of whose bond was \$5,000. Subsequent to the issuing of the bond Hayes embezzled from the defendant in error \$5,000, resulting in the present action by it to recover of the insurance company the amount so embezzled, with costs.

The case was tried before the court without a jury by stipulation of the parties, and resulted in certain findings of fact upon which judgment was entered in favor of the insured.

[1] Allegations of fact made in defense of the action, to the effect that Hayes drank to excess, was accustomed to overdraw his account with the milling company, and was an habitual gambler on horse races and at poker prior to the giving of the insurance, with the knowledge of the president of the insured, were negated by the findings made by the trial court, and under the well-established rule such findings are conclusive upon us, however convincing we might otherwise consider the argument of the plaintiff in error that upon the evidence such findings should have been otherwise. *Tyng v. Grinnell*, 92 U. S. 467, 23 L. Ed. 733; *Dooley v. Pease*, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457; *Meyer v. Everett P. & P. Co.*, 193 Fed. 857, 863, 113 C. C. A. 643.

[2] The court below, however, found these further facts to be true: That when Hayes (who had been the agent of the milling company at Woodland, Cal., before being transferred as its agent at Salt Lake, Utah) left Woodland he was overdrawn in his accounts in the sum of about \$812.68, which overdraw had been expressly permitted by the milling company, and was in the nature of a loan by it to him; that the same was not communicated by the milling company or any of its officers to the insurance company, which made no inquiry as to any indebtedness owing by Hayes to the milling company; that when Hayes was sent by the milling company to Woodland he stated to the president of that company that on account of some business ventures in which he had been formerly engaged in Mexico he had lost some money and was in debt and was obliged to make certain payments, and therefore asked the president of the milling company to be allowed to overdraw his account while at Woodland, which request was granted, and that he was so overdrawn when he left Woodland in the sum of \$812.-68, besides which he then owed the milling company \$500 on a note, advanced to him by the milling company in order to enable him to maintain a loan at the Merchants' National Bank of Los Angeles for \$2,500, which latter loan was secured by stock held by Hayes in a corporation operating in Mexico; that between September, 1914, when Hayes left Woodland, and the 1st of December, 1915, the overdraft

was reduced to \$304.32, and that, including the \$500 note, he was on the day last mentioned indebted to the milling company in the sum of \$804.32; that when he was sent to Salt Lake the permission theretofore given him to overdraw his account was withdrawn by the president of the milling company, who had, however, always implicitly believed in his integrity and honesty; that after the said Hayes went to Salt Lake City as such agent, and particularly after February 1, 1916, he abstracted, used, and applied the money of the milling company in betting on horse races, in buying grain on margins in the grain market, and otherwise for his own personal use, of which, however, the milling company had no notice until May 31, 1916, at which time it immediately discharged him from its employment; that on or about March 1, 1916, a balance sheet dated February 29, 1916, prepared by or under the direction of Hayes at his office in Salt Lake City, showing assets and liabilities of the milling company at its Salt Lake agency and containing an item marked "Personal Accounts, \$3,239.70," was received through the mail at the office of the milling company at Los Angeles, from the office of Hayes at Salt Lake; that the time when such statement was delivered through the mail was not the time when the outside agencies of the milling company were expected or required to report to its Los Angeles office, and was not looked for there; that such statement was received by a clerk of the milling company at its Los Angeles office, whose duties were those of assistant auditor, and was filed by him without any examination, and without calling it to the attention of any of the officers of the milling company; that while it did not so appear in the said statement of the said item of \$3,239.70 marked as "Personal Accounts," \$1,099.02 was then an overdraft of Hayes at the Salt Lake office, and the balance of the said sum of \$3,239.70 consisted of sundry personal items owing to the milling company in the regular course of business by various customers with whom it was doing business at its Salt Lake office; that the entry "Personal Accounts" in the balance sheet, which was a printed form prepared by the milling company for general use throughout its business, both at Los Angeles and its branches, was not intended to, and did not, show merely the personal account of the agent of the company in the place where the statement was made, but might, and was intended to, and did, show the personal accounts of other parties owing to the company in the regular course of business, as well as general expense accounts and other items of expense incurred by the agent or representative of the company in the regular course of his business for and on behalf of the company; that it was customary and regular for large amounts to be entered under that caption in such reports, which had nothing to do with the personal standing or account of the agent at the agency where the statement was prepared; that the said statement of February 29, 1916, was the only statement or report sent by Hayes to the milling company, from October 15, 1915, to May 31, 1916, except statements relative to his grain purchases and sales in the regular course of his business for the company; that all of the abstractions of Hayes at the Salt Lake office were entered by him on the books of the company, and that credits he placed on those books

consisted at times of winnings by him on horse races or on marginal transactions in the stock or in the grain market, but no part of the same was ever known to the company, and that between October 15, 1915, and May 31, 1916, the milling company never checked or audited or examined the books of Hayes at the Salt Lake office, and did not know their contents in any respect; that neither the company nor its officers ever knew that Hayes was overdrawing his account at the Salt Lake office until May 31, 1916.

The evidence shows without conflict (and the same is without conflict with any of the findings) that it was the custom of the milling company to permit its employés to overdraw their accounts, but that when Hayes was sent to Utah that permission was expressly withdrawn from him. He was first sent there in the early part of January, 1915, by the milling company to buy grain for it, returning to Los Angeles several times between that time and the month of July of the same year, during which month he returned to the company's Salt Lake office with instructions to there open a set of books, and where the company established a branch office and a bank account about September 15th, with Hayes in charge. From that time to May 31, 1916, there was never any audit made of the company's books kept by Hayes at Salt Lake. It will be seen, therefore, that notwithstanding the peculations of Hayes were entered by him on the books of the company, and could have been easily discovered by their examination, no examination of them whatever was made by the company, and it did not even know of the overdrawing of his account, contrary to the express order of its president, until May 31, 1916.

Can it be properly held that the company was not bound to know that its books showed upon their face the embezzlement of its funds by one of the employés, the honesty of whom it applied to the plaintiff in error to insure, upon an application which expressly warranted the truth of its statement that there had never come to its notice or knowledge any act, fact, or information *tending to indicate* that he was negligent, unreliable, deceitful, dishonest, or unworthy of confidence, and that it knew no reason why the insurance company could not safely become surety for him? We think not. Beyond question, the defendant in error knew that the permission it had, along with its other employés, theretofore accorded Hayes of overdrawing his account, was expressly withdrawn from him when he was sent to Utah, and beyond question the company's own books kept by him at its Salt Lake office showed upon their face his embezzlement of the funds of the company at the very time it applied to the plaintiff in error for the insurance in question. Under such circumstances, we are of the opinion that the applicant cannot be heard to say that it did not know what its own books showed, especially in view of the fact that there must have been some reason for the express withdrawal by the defendant in error, when it sent Hayes to Utah, of the privilege of overdrawing his account, which it had theretofore accorded him along with its other employés. We think the case fairly comes within the true doctrine of the case of *Guarantee Co. v. Mechanics', etc., Co.*, 183 U. S. 402, 22 Sup. Ct. 124, 46 L. Ed. 253, and accordingly—

The judgment is reversed, and cause remanded to the court below, with directions to enter judgment for the defendant, with its costs.

GILBERT and MORROW, Circuit Judges (concurring). We are of the opinion that the judgment should be reversed, and that upon the findings of the court below judgment should be directed to be entered in favor of the plaintiff in error upon the following grounds:

Prior to the date of the application for insurance, Hayes had been in the service of the insured for more than five years, and during the whole of that time he had been permitted to overdraw his account. No restriction was placed upon the amount which he might overdraw; the permission being to overdraw in a "reasonable amount." After being in the service of the insured at Woodland, Cal., for several years, he was transferred in January, 1915, to Salt Lake City, where he remained until he was discharged. At the date of the application, October 15, 1915, his account at Woodland was overdrawn in the sum of \$717.13, in addition to which he owed the insured upon a note \$500, which was originally an overdraft, and he was overdrawn on his Salt Lake account in the sum of \$432.93. He testified that, when he was discharged on June 1, 1916, his account was overdrawn about \$6,600. His heaviest overdraft at any time at Woodland was \$1,154.33 in excess of the \$500 note. Blewett, the assistant auditor of the insured, checked up Hayes' account before he went to Salt Lake and he testified: "I knew then that he was overdrawn too much." The president of the insured stated to the general auditor of the surety company that "Hayes being short \$1,000 or so in Woodland was entirely different from his being short \$7,000 or \$8,000 in Salt Lake City." If there was a difference, it was but a difference in degree. Hayes, having been permitted habitually to overdraw his account prior to going to Salt Lake, thereafter continued to indulge his habit and largely increased his overdraft. No examination of his account was made while he was at Salt Lake.

The parties to the contract were not on a plane of equal opportunity for information, and the fact that Hayes' account was overdrawn, and that he was in the habit of overdrawing the same at and before the time when the contract was entered into, was one that should not have been withheld from the surety company. It is not conceivable that the surety, if advised of that habit, would have entered into the contract. In *Frost on Guaranty Insurance*, § 74, it is said:

"The chronic defaulter, for the purpose of becoming a 'risk' under a fidelity insurance policy, is *persona non grata* to the insurer. The surety companies, as a matter of prudence and business policy, invariably decline a 'risk' who has been seriously in arrears in any previous employment. The reasonableness of this position has never been questioned, either by the courts or the public, so far as we are aware."

Where the insured states in its application that nothing is known concerning the employé's habits affecting his title to confidence, when the fact was the employé was engaged in hazardous speculation with the knowledge of the insured, there can be no recovery upon the bond. *United States Fidelity & Guaranty Co. v. Blackly Hurst & Co.*, 117 Ky.

127, 77 S. W. 709. In *Belleview L. & B. Ass'n v. Jeckel*, 104 Ky. 159, 46 S. W. 482, it was held that if a party taking a guaranty from a surety conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions as to the real state of facts, such concealments will amount to a fraud, because the party is bound to make the disclosure, and the omission to make it, under the circumstances, is equivalent to an affirmation that the facts do not exist. Of similar import is *Deposit Bank of Midway's Assignee v. Hearne*, 104 Ky. 819, 48 S. W. 160; *Hebert v. Lee*, 118 Tenn. 133, 101 S. W. 175, 12 L. R. A. (N. S.) 247, 121 Am. St. Rep. 989, 11 Ann. Cas. 1029.

"There is no principle of law better settled than that persons proposing to become sureties to a corporation for the good conduct and fidelity of an officer to whose custody its moneys, notes, bills, and other valuables are intrusted, have the right to be treated with perfect good faith. If the directors are aware of secret facts materially affecting and increasing the obligation of the sureties, the latter are entitled to have these facts disclosed to them." *Morse on Banking*, p. 226.

Not only was there failure to disclose to the surety company the habitual overdraft of Hayes, but the application for the fidelity bond contained statements, warranted to be true, one of which was: That there had never come to the notice or knowledge of the employer any act, fact, or information tending to indicate that the employé was unworthy of confidence, and that his employer knew "no reason why you cannot safely become surety for him." We think that there was a clear breach of the warranty of want of knowledge of facts tending to indicate that Hayes was worthy of confidence, and of the warranty that his habits were good, and that his employer knew of no reason why the bonding company should not become surety for him.

HELLEMS v. ROSZEL

(Circuit Court of Appeals, Fourth Circuit. February 17, 1919.)

No. 1628.

1. TAXATION ⇌ 713—TAX SALES—REDEMPTION—RECORD OF RECEIPT—BONA FIDE PURCHASER.

Under Code W. Va. 1913, c. 31, § 16 (sec. 1074), providing that, if the receipts on redemption from tax sale are not filed with the clerk of the county court, the redemption is void as to assignees for valuable consideration without notice, the assignee of a tax purchase must show that he was a bona fide purchaser to entitle him to the land as against the former owner, who paid the amount required to redeem to the purchaser after the assignment, but did not file a receipt.

2. TAXATION ⇌ 725—TAX SALES—REDEMPTION AFTER ASSIGNMENT OF CERTIFICATE—NOTICE TO OWNER.

The assignee of the purchaser of land at tax sale cannot defeat the owner's redemption by payment to the purchaser, unless the owner had notice of the assignment.

3. TAXATION ⇨725—TAX SALE—REDEMPTION—ASSIGNMENT—DELIVERY OF RECEIPT.

Since Code W. Va. 1913, c. 31 (secs. 1058-1112), gives a receipt for money paid at tax sale no greater significance than an ordinary receipt, and section 19 authorizes the execution of a tax deed without surrender of the receipt, redemption on payment to the original purchaser is not ineffective against an assignee, because the receipt had been surrendered to the assignee and was not demanded by the owner.

4. TAXATION ⇨696—REDEMPTION FROM TAX SALE—STATUTES—CONSTRUCTION.

Statute authorizing redemption by the owner of land sold for taxes must be liberally construed in the owner's favor.

Pritchard, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Suit by L. M. Hellems against S. Samuel Roszel. Decree dismissing the bill, and plaintiff appeals. Reversed.

Linn & Byrne, of Charleston, W. Va., for appellant.

Robert S. Spilman, of Charleston, W. Va., and Samuel Price, of Lewisburg, W. Va., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. On September 10, 1913, S. Samuel Roszel commenced an action of unlawful detainer against L. M. Hellems in the District Court for the Southern District of West Virginia, to recover possession of 25 acres of land in Greenbrier county. On November 11, 1914, L. M. Hellems filed his bill in this court, seeking to enjoin the law action of detainer and to remove as a cloud upon his title the tax deed upon which Roszel relied in his law action. After the pleadings in the equity suit were made up, the defendant Roszel moved to dismiss the bill on the ground that the facts stated therein did not constitute a defense to his tax deed. On December 17, 1917, the District Court sustained the motion of dismissal, with leave to the plaintiff to tender an amended bill within 20 days. The plaintiff declined to amend, and a final decree of dismissal was entered on February 9, 1918.

The question, therefore, made by the appeal, is whether the following facts appearing from the bill constitute a cause of action: The tract of land was charged as the property of I. W. Hellems with the taxes for the years 1907, 1908, and 1909, and returned as delinquent as to the taxes of 1909. It was sold by the sheriff according to law, on December 11, 1911, and purchased by W. D. Slaven for \$5.03. On that day, the sheriff, by his deputy, Watts, executed a receipt to W. D. Slaven for \$5.03, purporting to be for the redemption of the land. On the same day the sheriff, by his deputy, James W. McClung, executed another receipt, purporting to be for the purchase money paid by Slaven. On May 17, 1912, I. W. Hellems made a conveyance of a tract of land, including the 25 acres, to L. M. Hellems. On October 1, 1912, Slaven indorsed an assignment of the tax purchase on the sheriff's receipt for the purchase money to E. C. Harrison. On October 10, 1912,

Harrison assigned the purchase to Roszel. Within 12 months from the date of the tax sale, L. M. Hellemes, owner of the land, paid to L. E. McClung, to whom Slaven, the purchaser, referred him as his agent, the amount of the bid, which was the whole amount claimed by L. E. McClung as necessary for the redemption. But it does not appear whether this payment was made before or after Slaven's assignment to Harrison on October 1, 1912. On October 15, 1912, Slaven wrote to I. W. Hellemes that he would have to pay other back taxes, referring him to L. E. McClung for the amount. On November 20, 1912, L. M. Hellemes paid McClung \$4, taking from him a receipt therefor for the taxes of 1908. On the same day there was indorsed on the original receipt for redemption issued to Slaven by the sheriff this receipt:

"Received of Lem Hellemes amount in full redemption the tract of land named herewith. Nov. 20, 1912.

W. D. Slaven,

"By L. E. McClung."

It does not appear whether or not Slaven had actually paid this delinquent tax for 1908. If he had, then under the statute the redemption could not be complete until November 20, 1912, when the owner paid the amount demanded. There is no allegation in the answer that Slaven or Harrison or Roszel had at any time given Hellemes notice of the assignment of the purchase. After the expiration of 12 months from the tax sale, Roszel had the land surveyed as required by the statute, and received from the clerk, as assignee of Slaven, a deed for the land.

[1] Under the West Virginia statute, there is no doubt that Harrison's tax title is good, unless the steps taken by Hellemes, the owner, operated to redeem the land from the sale. Section 15, chapter 31 (sec. 1073) Code of West Virginia, provides that the owner of the land—

"may redeem the same by paying to the purchaser, his heirs or assigns, within one year from the sale thereof, the amount specified in the receipt mentioned in the tenth section of this chapter, and such additional taxes thereon as may have been paid by the purchaser, his heirs, or assigns, with interest on such purchase money, and taxes at the rate of 12 per centum per annum from the time the same may have been so paid."

With respect to the method of redemption, section 16 (sec. 1074) provides:

"When the owner of real estate sold for the nonpayment of taxes thereon, or any other person having the right to redeem the same, shall pay the amount mentioned in section 15 of this chapter, the purchaser, his heirs or assigns to whom such payment is made, shall sign and give to the owner or other person redeeming, duplicate receipts showing when and by whom payment is made and the amount paid; or duplicate certificates or statements that the former owner or other person having such right, redeemed the real estate. * * * One of said duplicate receipts or writings shall be filed with the clerk of the county court of the county in which the real estate was sold, on or before the day on which the right to redeem the same will expire under the provisions of the said fifteenth section of this chapter, and the clerk shall indorse on both such duplicates the fact and time of such filing. If the same be not so filed, such redemption shall be void as to creditors and subsequent assignees of the benefit of the purchase of such real estate, from the purchaser thereof, his heirs or assigns, for valuable consideration without notice, at any time before the same is so filed. If such receipt or writing be filed after

the time herein required, it shall operate as a notice to all persons from and after the date of such filing."

[2] This last section was not complied with by the owner of the property by procuring of Slaven, the purchaser, the duplicate receipts provided for, and filing them with the clerk of the county court. Therefore, if Harrison and Roszel purchased after this payment of the redemption money to the original purchaser, the payment would be ineffectual against them. But the burden of alleging and proving that they were purchasers for value after the redemption was upon them. Without such allegation and proof, they could not avail themselves of the failure of the owner to comply with the statute for the protection of an assignee for value without notice. If the assignment was made to them before the attempted redemption, the payment to the purchaser of the redemption money was good, in the absence of notice to the owner of the assignment. As assignees, they were charged with notice of the right of the owner to redeem within 12 months, and the right of the owner to pay to the original purchaser could only be defeated by notice of the assignment. *Clarke v. Hogeman*, 13 W. Va. 718, 729; 2 *Pomeroy's Equity Jurisprudence* (4th Ed.) §§ 702-704; *Withers v. Greene*, 9 How. 213, 13 L. Ed. 109; 5 C. J. 978, and authorities cited; 2 R. C. L. 30; *Dillingham v. Trader's Insurance Co.*, 120 Tenn. 302, 108 S. W. 1148, 16 L. R. A. (N. S.) 220.

[3] There is nothing whatever in the statute to indicate that the memorandum receipt issued by the sheriff has any greater significance than an ordinary receipt evidencing the payment of the obligation assumed by the purchaser. The statute does not provide that it is necessary to the validity of the assignment that it should be indorsed on this receipt, nor does it require that the owner should demand the delivery of this receipt when he pays the redemption money. It is significant too that section 19 (sec. 1077), authorizing the clerk to make a deed in pursuance of the purchase where the land has not been redeemed, does not require the production of the sheriff's receipt. On the contrary, that section provides that such deed—

"shall be made to the purchaser himself or to such person as he may direct, either in writing acknowledged as a deed is required to be acknowledged, or by his joining therein."

[4] An assignment made by the purchaser is not an assignment of the receipt, but an assignment of the purchase of which the receipt is nothing more than evidence. The receipt imports no obligation assumed by the owner of the land or any one else, and is therefore not like a bond or mortgage, a chose in action, of which it has been held in some cases the obligor should demand possession on making payment. It is nothing more than an acknowledgment of the payment of the purchase money. Its delivery or possession imported no right in an assignee and demand of its surrender by the owner was not required as a condition of redemption. The court cannot as against an owner seeking to redeem give an effect to the receipt not expressed in the statute; for the statute must be liberally construed in his favor. *Dubois v. Hep-*

burn, 10 Pet. 1, 9 L. Ed. 325; Poling v. Parsons, 38 W. Va. 80, 18 S. E. 379. The principle is applied in Hess v. Potts, 32 Pa. 407, in which the facts were very similar to those here involved.

As it appears by the pleadings that the owner of the land paid the redemption money to the original purchaser within 12 months from the date of the sale and it does not appear that he had notice of the assignment of the purchase, or that the defendant was a subsequent assignee of the bid for value without notice, the payment by the owner to the original purchaser was effectual as a redemption of the land under section 15, and Roszel as assignee of the purchase took nothing under the deed executed by the clerk.

Reversed.

PRITCHARD, Circuit Judge (dissenting). It is with reluctance that I dissent from the opinion of the majority of the court in this instance, but a careful consideration of the statutes of West Virginia relating to land sales for taxes impels me to do so.

Section 15, chapter 31, of the Code of West Virginia provides that—

“The owner of any real estate so sold, his heirs or assigns, or any person having a right to charge such real estate for a debt, may redeem the same by paying to the purchaser, his heirs or assigns, within one year from the sale thereof, the amount specified in the receipt mentioned in the tenth section of this chapter and such additional taxes thereon as may have been paid by the purchaser, his heirs, or assigns, with interest on said purchase money, and taxes at the rate of 12 per centum per annum from the time the same may have been so paid, and such additional expenses as may have been incurred by such purchaser before the expiration of said one year in procuring survey and giving notice as provided in section 19 of this chapter.”

This is a year's grace granted to the owner, provided he exercises the right thus granted within a year by complying with the provisions of the statute.

The Supreme Court of West Virginia, in the case of State v. King, 47 W. Va. 437, 35 S. E. 30, in discussing the right conferred upon the owner, said:

“While it is law that he may redeem these lands, and eject the claimants, yet the law does not permit him to do so; nor is it just to the state that he should until he satisfies the unpaid taxes due thereon. The inchoate title of these claimants until the payment of the arrearage taxes is superior to the forfeited title, and may become absolute.”

It does not appear that the owner has complied with any of the provisions of the statute. I am not unmindful of the rule that in a case like the one at bar the statute should be construed most favorably to the owner, but the rule is subject to this qualification, viz.: Where the owner is granted a fixed time within which he may redeem his property by the payment of all taxes and costs he must comply with the plain provisions of the statute, of which he is presumed to have knowledge.

In addition to the section above quoted, section 16, chapter 31, of the Code of West Virginia, in contemplation of the fact “that the purchaser, his heirs or assigns may refuse to receive the same, or may not reside or cannot be found in the county,” provides that it shall be the duty of the owner to pay the amount of taxes due to the clerk of

the county court, and in the absence of objection it becomes the duty of the clerk to give the purchaser a receipt for the same. However:

"If the purchaser, his heirs, or assigns, disputes the right of any one so paying money to the clerk to redeem the real estate for the redemption of which such money is paid, he or they may within one year after such payment give to such person or his heirs, executors or administrators a notice in writing of such dispute, requiring him or them to appear before the circuit court of the county on a day to be named in such notice and prove his or their right to redeem the said real estate."

Such notice might be served at least 10 days before the day on which it is returnable, and the Court shall make an order according to the facts and direct the clerk of the county court to execute to the purchaser, his heirs or assigns, a deed to the real estate, as required by the statute.

When we come to consider the facts of this case, we find that the owner has not complied with any one of these provisions. Instead of doing so, he went to the original purchaser who had already assigned and transferred his receipt for the purchase money to E. C. Harrison, and Harrison in turn had transferred the interest he thus acquired to the appellee—thus giving the appellee an inchoate right under the statute to have his deed made at the end of the year, as provided by law, upon having the premises surveyed so as to determine the quantity of land to be conveyed, which he did, thus perfecting a complete chain of title to the premises in question by strict compliance with the law. At the time the owner paid the money to the original purchaser, he knew, or ought to have known, and as a matter of precaution, that it was his duty to take from such purchaser the receipt for the purchase money the sheriff had given him at the time he purchased the land in question. It does not appear that he even demanded a receipt for the same, and if he had done so his demand would have been unavailing, inasmuch as the purchaser by operation of law had parted with the inchoate right he originally had under the statute, and he therefore was no longer the purchaser in the sense contemplated by the statute, and the payment to him was not a compliance with the statute in any sense of the word. In other words, the original purchaser had ceased to sustain any relation whatever by operation of law to the purchase of the land. From the moment he parted with his inchoate right he was an absolute stranger to the transaction, and therefore not entitled to receive the purchase money and interests as provided by the statute.

Under these circumstances, I think that the assignee of the purchaser having had a survey made at the end of the year, it became the duty of the clerk to execute and deliver to him a deed, and the clerk having executed and delivered him a deed to the premises he thereby acquired a perfect title to the land.

MULVANEY et al. v. KING PAINT MFG. CO. et al.

(Circuit Court of Appeals, Second Circuit. February 13, 1919.)

No. 175.

1. SHIPPING ⇨54—CHARTER—LIABILITY OF CHARTERER.

Where a barge is chartered to a corporation for a fixed time, the corporation to have exclusive possession it becomes subject to the same liability as a bailee.

2. BAILMENT ⇨14(1)—LIABILITY OF BAILEE FOR HIRE—LOSS OF GOODS.

A bailee for hire is responsible only for ordinary diligence in the care of the property bailed, unless by his contract he has expressly or by fair implication assumed a greater responsibility, but where he has contracted absolutely to return the property, he is liable for the loss of the goods from any cause.

3. CONTRACTS ⇨303(1)—EXCUSE FOR NONPERFORMANCE—DIFFICULTY.

A party must perform his contract obligations, unless performance is rendered impossible by act of God, the law, or the other party; unforeseen difficulties in performance being no excuse.

4. BAILMENT ⇨14(1)—LIABILITY OF BAILEE—CONTRACT.

An express provision, in a contract of bailment for hire, to keep the property safely, does not enlarge the common-law liability of the bailee, and does not make him an insurer for the safety of the article.

5. BAILMENT ⇨11—CONSTRUCTION OF CONTRACT.

The provisions of a contract of bailment should not be enlarged beyond their plain meaning to impose further liability upon the bailee.

6. SHIPPING ⇨54—LIABILITY OF CHARTERER—INJURY TO VESSEL—CONSTRUCTION OF CHARTER.

Provision in the charter of a barge that the barge was to be returned in the same condition as received with usual wear and tear does not render the charterer liable as insurer, or enlarge his common-law liability as bailee to use ordinary care to preserve the barge.

7. SHIPPING ⇨54—LIABILITY OF CHARTERER—INJURY TO VESSEL—ACTS OF GOD.

The charterer of a barge under a charter which did not enlarge his common-law liability is not liable for injuries to the barge, occasioned by the acts of God, or of another person for whom the charterer was not liable.

8. SHIPPING ⇨58(2)—LIABILITY OF CHARTERER—INJURIES TO VESSEL—WEAR AND TEAR—PRESUMPTIONS.

The presumption of want of care arising from failure to deliver a barge in as good order as it was received by charterer is rebutted, where the injury might have occurred through ordinary wear and tear, and the master testified that there was no fault in her navigation, nor any unusual occurrence which would account for the damage.

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

Libel, for breach of charter, by Mary L. Mulvaney and others against the King Paint Manufacturing Company, in which the Simmons Transportation Company was impleaded. Decree for respondents, and libelants appeal. Affirmed.

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

Haight, Sandford & Smith, of New York City (Henry M. Hewitt, of New York City, of counsel), for appellee King Paint Mfg. Co.

Frederick W. Park, of New York City, for appellee Simmons Transp. Co.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The barge Leader was demised to the King Paint Manufacturing Company under the terms of the following letter:

"Kent Avenue, S. 9th, and S. 10th Sts.,

"Brooklyn, N. Y., June 2, 1916.

"Mr. J. Mulvaney, Summit, Columbia Heights, Brooklyn—Dear Sir: Confirming our numerous telephone conversations with both you and Mr. Murphy this letter will confirm the charter of barge Leader for a period of six months from June 2d at a monthly rental of \$300.00 per month for bare boat, barge to be returned to you in same condition as received with the usual wear and tear.

"Charter money to be paid every thirty days.

"Thanking you for your courtesy in this matter and with kindest regards, we remain,

"Very truly yours,

King Paint Mfg. Co.,

"Per Robert M. King."

On June 2d, the King Paint Manufacturing Company subchartered the barge to the Simmons Transportation Company under the same terms, except that the rental was fixed at \$387.50 per month. The barge was delivered on the same day, direct from the libellant. While thus navigated, under the terms of this charter, and on June 30, 1916, the barge was damaged by reason of the Black Tom disaster, which, concededly, was without fault on the part of the charterers. The resulting loss to libellants amounted to \$599.90. A survey held on November 29th showed the chime log was split, a bottom plank was broken, and a doorsill was split. The bottom plank was damaged by the explosion at the Black Tom dock, but the evidence is not clear as to how the damage to the chime log occurred or as to how the door sill was split. The district judge found that the damaged chime log could be seen only when the vessel was in dry dock, and rejected the testimony that it was in good condition when seen, as claimed by the witness Pritchard, in August. The record is barren of proof as to an occurrence which would cause injury while the vessel was under charter to the respondent Simmons Transportation Company. Capt. Olson, who was in charge of the barge during the entire period of the charter, states that she was not in any collision, nor was she jarred or jolted in any manner, such as might bring about an injury as that sustained to the chime log. And he says she had plenty of water. He was unable to account for the damage. It was stated that the cost of repairing would amount to \$325. No evidence is offered to indicate how the damage to the doorsill occurred, but the cost of repair was given as about \$10. The district judge held that the char-

terers were not liable for the injury to the vessel occurring from the Black Tom disaster, and held that there was no evidence to show that there was any negligence by the charterers resulting in damage to the chime log or doorsill, and that the charterers would be relieved from liability, since he found this was but injury occurring through ordinary wear and tear. He further found that there was no proof as to the condition of the bottom of the barge at the time of delivery to the respondents.

[1] Libelants filed a libel against the King Paint Manufacturing Company, which in turn pleaded in the subcharterer, the Simmons Transportation Company. Libelants' theory is that they are entitled to succeed for breach of an express covenant to return the barge in the same condition as received, with the usual wear and tear excepted. This barge was demised to the King Paint Manufacturing Company, which, so far as the libelant is concerned, had exclusive possession, and may therefore be held as the bailee subject to the liability thus imposed.

[2] In the *Sun Printing & Publishing Ass'n v. Moore*, 183 U. S. 642, at page 654, 22 Sup. Ct. 240, at page 245 (46 L. Ed. 366), Justice White said:

"It is elementary that, generally speaking, the hirer in a simple contract of bailment is not responsible for the failure to return the thing hired, when it has been lost or destroyed without his fault. Such is the universal principle. This rule was tersely stated by Mr. Justice Bradley in *Clark v. United States*, 95 U. S. 539 [24 L. Ed. 518], where it was said (p. 542): 'A bailee for hire is only responsible for ordinary diligence and liable for ordinary negligence in the care of the property bailed. This is not only the common law, but the general law on the subject [citing authorities].'"

Where, by contract of bailment, the hirer has either expressly or by fair implication assumed the absolute obligation to return, even although the thing hired has been lost or destroyed without his fault, the contract embracing such liability is controlling, and must be enforced according to its terms. A bailee who assumes but the common-law liability is exempt from liability for loss of the consigned goods arising from inevitable accident. But the bailee may, however, enlarge his responsibility by contract, express or fairly implied, and render himself liable for the loss by destruction of the goods committed to his care. The bailment or compensation to be received therefor being a sufficient consideration for such an undertaking. *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093.

[3] It is well settled that if the party, by his contract, charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him. *Dermott v. Jones*, 2 Wall. 1, 17 L. Ed. 762.

[4] So, an express provision in a contract of bailment for hire to keep the subject of the trust safely will not enlarge the common-law liability of the bailee, for such an obligation the law implies that is to keep as safely as an ordinarily prudent man would his own goods. Such a provision will not constitute the bailee an insurer for the

safety of the thing bailed; and, should it be destroyed by unavoidable casualty or stolen without the fault of the bailee, he will not be responsible. *Ames v. Belden*, 17 Barb. [N. Y.] 513.

[5] In determining the scope of the terms of the agreement, contracts of bailment should not be enlarged beyond their plain meaning to impose further liability upon the bailee. A covenant to insure should never be implied, and should be imposed only where it is found in the agreement by clear and explicit language. Story on Bailment, § 35.

[6] It was held in *Ames v. Belden* (17 Barb. [N. Y.] 513) that the covenant to return a boat in as good condition as it was, with the exception of ordinary use and wear, simply imposed an obligation which the common-law liability imposed.

In *Young v. Leary*, 135 N. Y. 569, 32 N. E. 607, the covenant required the vessel to be redelivered in the same condition as she is now, any ordinary wear and tear excepted. There the court said:

"When language is used which does no more than express in terms the same obligation which the law raises from the facts of the transaction itself, the party using the language is no further bound than he would have been without it."

It would therefore appear that the charterers here are liable only to the extent of the stipulations of the contract, and in construing the contract, since the terms merely declare the liability which the common law would impose, the liability of the bailee is neither increased nor changed, and the charterer undertook merely to return the barge after six months in the same condition as received, with the usual wear and tear. There is no obligation to do more.

[7] The damage to the barge here consists of such as were received from the Black Tom disaster, and that which was claimed to come from some other source. Here the charter does not make the charterers insurers. They cannot be held for the damages caused by the Black Tom explosion, which, concededly, was not due to their negligence, but that of a third party or to an act of God.

[8] The damage to the chime log and the small damage to the doorsill might well have occurred through ordinary wear and tear of the vessel during the period of the charter. When it is made to appear that damage was done to the barge, there was a presumption of liability for want of care arising from the failure to deliver in like order as received, but this presumption of negligence was overcome by the testimony of the captain in charge of the barge, showing that there was no fault in her navigation or any unusual occurrence which would account for the damage to the chime log or the doorsill.

We therefore conclude that such injury was that which was contemplated by the parties as due to ordinary wear and tear. The decree is therefore affirmed.

THOMPSON et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 13, 1919.)

No. 167.

1. LARCENY ⇨32(2, 9)—INDICTMENT—NAME OF OWNER.
At common law, an indictment for larceny must charge that the thing stolen was the property of the actual owner, or of a person having a special property as bailee, from whom it was stolen, except that ownership might be charged to persons unknown to the grand jurors.
2. LARCENY ⇨32(2), 40(2)—INDICTMENT—OWNERSHIP IN UNITED STATES.
In a prosecution under Criminal Code, § 47 (Comp. St. § 10214), penalizing stealing property of the United States, the indictment must charge, and evidence must show, that the property belonged to the United States.
3. CRIMINAL LAW ⇨448(16)—EVIDENCE—CONCLUSION—OWNERSHIP.
A witness' conclusion as to the ownership of property is admissible where only a question of fact is involved, but not when the ownership depends upon the legal effect of a transaction.
4. CRIMINAL LAW ⇨448(16)—EVIDENCE—CONCLUSION OF LAW—OWNERSHIP.
In a prosecution for stealing property of the United States, testimony that stolen sugar belonged to the United States, because it had been requisitioned under Act Aug. 10, 1917, § 10 (Comp. St. 1918, § 3115½ii), is inadmissible, because stating a conclusion of law.
5. CRIMINAL LAW ⇨1169(9)—HARMLESS ERROR—EVIDENCE.
Error in admitting witness' conclusion that the stolen property belonged to the United States, because it had been requisitioned by the government, is not reversible error, if he was correct in his conclusion.
6. LARCENY ⇨7—OWNERSHIP OF PROPERTY—"PROPERTY OF UNITED STATES."
Where the United States had requisitioned sugar as authorized by Act Aug. 10, 1917, § 10 (Comp. St. § 3115½ii), and the refiner had placed the specified quantity on a barge not under its control, the sugar became the "property of the United States," within Criminal Code, § 47 (Comp. St. § 10214), penalizing persons stealing property of the United States.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property of the United States.]
7. CRIMINAL LAW ⇨1036(4)—APPEAL—RESERVING GROUNDS FOR REVIEW—EVIDENCE.
The contention that requisition by the United States of certain sugar under Act Aug. 10, 1917, § 10 (Comp. St. 1918, § 3115½ii), had not been shown by the best evidence, cannot be made upon appeal, where not raised while testimony was being taken or during judge's charge.
8. CRIMINAL LAW ⇨1043(1)—APPEAL—RESERVING GROUNDS FOR REVIEW—EVIDENCE.
A request that a larceny indictment be dismissed for failure to show the stolen property belonged to the United States does not save the point that ownership was not established by competent evidence, where there is evidence in the record, either best or secondary, of ownership by the United States.

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

Edward E. Thompson and Albert E. Ingracia were convicted of stealing property of the United States, and bring error. Affirmed. Certiorari denied 249 U. S. —, 39 Sup. Ct. 391, 63 L. Ed. —.

The plaintiffs in error, who were defendants below, will be hereinafter referred to as defendants. The defendants were indicted for

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

a violation of section 47 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1097 [Comp. St. § 10214]), which is found in the margin.¹

The indictment charged that defendants did on the 15th day of December, 1917, unlawfully take and carry away, with intent to steal, property of the United States, to wit, 15 bags each containing 100 pounds of granulated sugar.

The jury returned a verdict of guilty with a recommendation of mercy. The court thereupon imposed a sentence of two years' imprisonment, in the Atlanta penitentiary, on each defendant.

Alexander S. Drescher, of Brooklyn, N. Y. (Isadore Oshlag, of Brooklyn, N. Y., on the brief), for plaintiffs in error.

Melville J. France, U. S. Atty., of New York City (Charles J. Buchner, Sp. Asst. U. S. Atty., of Brooklyn, N. Y., of counsel), for the United States.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). This case has been brought into this court upon the theory that the United States did not prove that the title to the property taken was in the United States as alleged in the indictment. What the act of Congress punishes is the stealing of the property of the United States, so that, unless the property at the time it was taken was in the United States, the conviction cannot be sustained, even though the property was feloniously taken.

The Criminal Code punishes "whoever shall * * * steal * * * property of the United States." Stealing and larceny, it is sometimes said, have the same meaning at common law. *Satterfield v. Commonwealth*, 105 Va. 867, 52 S. E. 979; *State v. Richmond*, 228 Mo. 362, 128 S. W. 744; *State v. Fair*, 35 Wash. 127, 76 Pac. 731, 102 Am. St. Rep. 897; *Cohoe v. State*, 79 Neb. 811, 113 N. W. 532; *Flint v. Holman*, 82 Vt. 297, 73 Atl. 585; *Hughes v. Territory*, 8 Okl. 28, 56 Pac. 708; *Sullivan v. Territory*, 8 Okl. 499, 58 Pac. 650. And see *State v. Perry*, 94 Ark. 215, 126 S. W. 717; *Gardner v. State*, 55 N. J. Law, 17, 26 Atl. 30. *Bouvier* states that the term "stealing" has nearly the same meaning as "larceny," but does not specify in what the difference consists. And in *Commonwealth v. King*, 202 Mass. 379, 88 N. E. 454, the court says that the word "steal" includes criminal taking or conversion by way either of larceny, embezzlement, or by obtaining by false pretenses.

While it is not necessary in the instant case to inquire into the exact difference which may exist between the word "steal" and the word "larceny," we may point out in passing that the word "steal," as used in acts of Congress, is not always synonymous with the word "larceny." For in reference to the provision of the Criminal Code (10 U. S. Compiled Statutes 1919 Ann. § 10364) it has been held un-

¹ "Sec. 47. Whoever shall embezzle, steal or purloin any money, property, record, voucher or valuable thing whatever, of the moneys, goods, chattels, records or property of the United States shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

necessary that the indictment should allege the ownership and value of the property and that it was feloniously stolen, taken, and carried away. See Judge Brewer's decision in *United States v. Falkenhainer* (C. C.) 21 Fed. 624, 627. See, also, *United States v. Trosper* (D. C.) 127 Fed. 476. And in the indictment in the instant case the indictment does not allege, and it is not so much as suggested by the counsel for the defendants that it should have alleged, the value of the sugar which was stolen. In *Dimmick v. United States*, 135 Fed. 257, 70 C. C. A. 141, the Circuit Court of Appeals in the Ninth Circuit sustained an indictment under the same section of the Criminal Code as is herein involved. The indictment in that case charged defendant with stealing money "belonging to" the United States, and it was claimed that there was "no averment of ownership in the United States." The court overruled the objection saying that—

"While every indictment for larceny must allege an ownership of the property stolen, and would be defective without such an allegation, there are no particular words or phrases which the law requires to be used."

The words "belonging to the United States" were regarded as equivalent to "the property of the United States" and hence sufficient.

[1. 2] It is elementary that, to constitute a good indictment for larceny, it is necessary at common law that the thing stolen should be charged to be the property of the actual owner, or of a person having a special property as bailee, and from whose possession it was stolen, although an indictment charging ownership in one to the grand jurors unknown is sufficient at common law. *Joyce on Indictments*, § 351 n. Such an indictment, however, could not be sustained, of course, if brought in a federal court under section 47 of the Criminal Code; that being the provision upon which the indictment in the instant case is based. It is vital, if the conviction in this case is to be sustained, that the indictment should charge and the evidence should show that the sugar was in fact the property of the United States. In the instant case, can the sugar be said to belong to the United States, or to be the property of the United States?

It appears that the sugar which the defendants were charged with having stolen were 15 bags of granulated sugar which had been taken from a cargo of 300 bags of sugar loaded on a barge lying at Pier No. 12 in the East River, in New York City. This sugar came from the Arbuckle Sugar Refinery in New York. The general manager of that establishment was asked whether the bags were the property of the United States, and whether he could tell whose sugar it was on December 15, 1917. He was allowed to answer over objection that it was the property of the United States, and exception was duly taken. He was asked on cross-examination how he knew the sugar belonged to the United States. And he replied:

"A. Because the government had requisitioned it. It was in our warehouse previously to that date, and the government had requisitioned it, and I have here, if you desire to see it, the requisition from Mr. Hoover for that particular lot of sugar, of which these 2 bags and the remaining 15 were a part.

"Q. How are you able to identify these 2 particular bags, or the 15 bags; how sure are you? A. When I went down to the station house, I looked at all the 15 bags, and took our code mark from them, and then went back to my office, and got the record out, and found that that was the particular sugar that belonged to the government.

"Q. What do you mean by code mark? A. That little mark on there shows when the sugar was made, on each bag.

"Q. And when the government requisitioned the sugar, you were able to tell that this sugar was in a particular lot that they requisitioned? A. Yes, sir; in the warehouse. That lot was all set aside, 89,600 bags, known by us as government sugar, that would be only on government orders. We considered it in handling as part of the government's and kept our records entirely separate for that. Now I checked up these bags in the station house with our records, and I found that these particular bags were a part of that government sugar."

[3] The ownership of property may be of so plain and uncontroverted an origin as to make it merely a matter of fact. When this is the case, the conclusion of a witness that A. is the owner of the property may be received in evidence. *Bunke v. New York Telephone Co.*, 188 N. Y. 600, 81 N. E. 1161; *Hunnicut v. Higginbotham*, 138 Ala. 472, 35 South. 469, 100 Am. St. Rep. 45; *Perkins v. Sunset Telephone & Telegraph Co.*, 155 Cal. 712;¹ *Union Hosiery Co. v. Hodgson*, 72 N. H. 427, 57 Atl. 384. But the ownership of property may depend upon what a transaction means in terms of law, in which case it is evidently a matter for the judge, and in such a case the conclusion of the witness is not properly admissible. See *Chamberlayne's Law of Evidence*, vol. 3, § 2359; *Wildman v. State*, 139 Ala. 125, 35 South. 995; *Hamilton v. Smith*, 74 Conn. 374, 50 Atl. 884; *Mains v. Webber's Estate*, 131 Mich. 213, 91 N. W. 172.

Professor Wigmore, in his work on Evidence (volume 3, § 1960), says:

"If a witness, in the course of his testimony, comes to mention that A. 'possessed,' or B. 'owned,' or C. was 'agent,' let him not be made dumb under the law, and be compelled by evasions and circumlocutions to attain the simple object of expressing his natural thought. If there is a real dispute as to the net effect of the facts, these may be brought out in detail on cross-examination.

"The phrases of this class of chief occurrence are the following: Whether a person was in possession; whether a person was owner; whether there was a sale, or passing of title," etc.

[4, 5] In the instant case the witness who testified that the ownership of the sugar was in the United States, because the government had requisitioned it, stated a conclusion of law, which was not for him to determine. But the error committed in allowing him to express it is not to be regarded as reversible error, if the reason he gave for his conclusion appears justifiable as matter of law.

[6] Congress had passed Act Aug. 10, 1917, c. 53, 40 Stat. 276 (Comp. St. 1918, §§ 3115 $\frac{1}{8}$ e-3115 $\frac{1}{8}$ gr), which was entitled "An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel." Section 10 of the act (section 3115 $\frac{1}{8}$ gii) provided in part as follows:

"The President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the army or the main-

¹ 103 Pac. 190.

tenance of the navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor."

Under this act it is evident that payment did not have to precede or to be contemporaneous with the taking or requisitioning of the supplies; and when the requisition for a specific number of bags of granulated sugar was served on the Arbuckle Bros., and the requisite number of bags of sugar of the quality called for was set aside in the refinery as the government's property to be held subject to its orders, and which was subsequently and in pursuance of the orders of the government withdrawn from the refinery, put on trucks and carted to Pier No. 12 in the East River to be there loaded on a barge to carry it to a vessel of the Metropolitan Line to be transported to designated parties in Boston it sufficiently shows title in the United States to support an indictment which charges that the sugar was the property of the United States. The fact that the United States had not yet paid for it and that no delivery into the possession of the United States had been made does not militate against this conclusion. When there is an unconditional contract for the sale of specific goods in a deliverable state, unless a different intention appears the property in the goods passes to the buyer when the contract is made, without payment of the price or delivery of the goods, notwithstanding that the buyer cannot take away the goods until the price is paid or tendered. The only difference between an unconditional requisition of the goods of the United States under this act and a sale lies in the fact that the government could take the goods before payment. And the law is well established that, although goods remain in the possession of the seller, yet there is such a delivery as will pass the property, even as against third persons, if they are segregated and set apart for the buyer. *In re Pease Car, etc., Works* (D. C.) 134 Fed. 919; *Morse v. Sherman*, 106 Mass. 430; *Whitcomb v. Whitney*, 24 Mich. 486; *World Manuf. Co. v. Hamilton-Kenwood Cycle Co.*, 123 Mich. 680, 82 N. W. 528; *Brewer v. Salisbury*, 9 Barb. (N. Y.) 511.

In the instant case nothing remained for Arbuckle Bros. to do to pass the title to the United States. Not only had the identity, quantity, and quality of the sugar requisitioned been ascertained, and the sugar been segregated and set apart from the mass of sugar in the refinery and become known to those in charge there as sugar belonging to the United States, but it had been delivered by Arbuckle Bros. to barge No. 7, which was a carrier independent of it, and so had passed from their immediate control; and if the title had so far passed from Arbuckle Bros. that, if they had attempted to sell it to a third person while it was on barge No. 7, no title would have passed to the latter under the authorities, then it is perfectly clear that the property belonged to the United States, so that third persons, who attempted to steal instead of to buy it, cannot escape punishment upon the claim that the ownership was not in the United States as alleged in the indictment.

[7, 8] But it is said that it was insufficiently proved that the United States had requisitioned the sugar; that the proof presented was

incompetent, and that some official connected with the Food Administrator's office should have been called to establish the fact. We do not need to consider this objection, now made for the first time; the defendants not having challenged at the trial the authenticity of the requisition order from Mr. Hoover, which the general manager of the Arbuckle Sugar Refinery said had been received and acted upon, and which he stated he had with him in court, but which defendant's counsel were not sufficiently interested in to look at. No suggestion was made while testimony was being taken, or after the taking of the testimony closed, and at the time of the charge, that the fact of the government's requisition had not been shown by the best evidence or sufficiently proved. The court's attention not having been specifically called to the matter at the time of his charge to the jury, it cannot now be considered. A request that the indictment be dismissed on the ground that it had not been shown that the sugar was the property of the United States is not sufficient to enable counsel now to say that that fact was not made out by competent evidence, when there is evidence in the record, whether the best or not, that there was a requisition.

Judgment affirmed.

McGINNISS et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 13, 1919.)

No. 166.

1. CONSPIRACY ⇨27—ESSENTIALS—OVERT ACT.

At common law, a conviction for conspiracy might be had without showing an overt act toward executing the conspiracy.

2. CONSPIRACY ⇨27—OVERT ACT.

Under Cr. Code, § 37 (Comp. St. § 10201), it is necessary to prove, not only unlawful conspiracy, but that one or more of the parties did an act to effect its object.

3. CRIMINAL LAW ⇨680(1)—CONSPIRACY—ORDER OF PROOF.

It is better practice to require evidence establishing a conspiracy before receiving evidence of overt acts to effect the conspiracy's object.

4. CRIMINAL LAW ⇨510—EVIDENCE OF ACCOMPLICE—CORROBORATION.

The uncorroborated evidence of an accomplice, if straightforward and unequivocal, may sustain a conviction.

5. CRIMINAL LAW ⇨780(1)—INSTRUCTIONS—TESTIMONY OF ACCOMPLICE.

Where a conviction is sought upon the uncorroborated testimony of an accomplice, the court should clearly instruct the jury to exercise care and caution in accepting it.

6. CRIMINAL LAW ⇨561(1)—EVIDENCE—REASONABLE DOUBT.

A conviction may be had only upon evidence showing accused guilty beyond a reasonable doubt.

7. CONSPIRACY ⇨48—EVIDENCE—DIRECTED VERDICT.

The unsupported testimony of an accomplice who contradicted himself and was discredited by his own testimony *held* to present no substantial evidence that defendant conspired with him to violate Cr. Code, § 37 (Comp. St. § 10201), by forging a document which should admit the

prosecuting witness into the United States Military Academy without taking a mental examination, and motion to direct an acquittal should have been granted.

In error to the District Court of the United States for the Eastern District of New York.

John J. McGinniss and Frank D'Ambrosia were convicted of conspiracy, and they bring error. Reversed.

Caldwell, Holmes & Bernstein, of Brooklyn, N. Y. (Frank W. Holmes and Eldred E. Jacobsen, both of Brooklyn, N. Y., of counsel), for plaintiffs in error.

John J. McGinniss, of New York City, in pro. per.

Melville J. France, U. S. Atty., of New York City (Vine H. Smith, Sp. Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The plaintiffs in error, and one Harry Tichenor Allison, were indicted for a violation of section 37 of the United States Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. § 10201]). They were charged by indictment with—

“falsely making a certain writing for the purpose of defrauding the United States by obtaining the admission of the said Allison as a cadet at the United States Military Academy at West Point, New York, without his being subjected to an examination, he, the said Allison, being not then and there possessed of the educational qualifications required by the United States in the case of candidates admitted to the said academy without any examination as the said defendants and each of them at the time or times when they severally participated in said conspiracy well knew, that is to say, the said defendants conspired and planned that certain form entitled form I, provided by the United States to candidates seeking admission to the said academy without examination, should be filled in with statements in writing so that the said form as so filled in should falsely state that said Allison had certain educational qualifications which in fact he did not have, as the said defendants and each of them at the time or times aforesaid well knew, and further conspired and planned that the said writing when so filled in should bear a forged signature purporting to be the signature of the president of an institution of learning certifying to the statements set forth in the said writing; and further conspired and planned that said writing should purport to have been acknowledged by such president before Frank D'Ambrosia, one of the defendants above named, and that said writing so filled in, signed and acknowledged, should be submitted to the authorities at the United States Military Academy aforesaid for the purpose of procuring admission to the said academy of the said Allison.”

McGinniss was charged in the indictment with having affixed a certain stamp thereon and with writing in the body of the acknowledged, “Frank W. Atkinson, Ph. D., Polytechnic Institute * * * 14 February, * * * 8,” and with having received from Allison \$50. D'Ambrosia was charged with having acknowledged the signature of Atkinson as being his act and deed when he knew that it was not an acknowledged act of Atkinson's. Allison was charged with forging the name of Frank W. Atkinson, Ph. D., to this paper and sending the same to the military academy at West Point in order that he might be admitted without an entrance examination. Allison pleaded guilty and became a

witness for the government and, as far as we are able to ascertain, gave the only evidence as to the occurrences which in any way involve either of the plaintiffs in error. He testified that he met McGinniss in May, 1917, on an occasion when he went to the latter's office to acknowledge the execution of a paper relating to his entrance to a military training camp at Plattsburg, and that his first talk with McGinniss concerning this particular paper was a week before February, 1918, and that he had not seen D'Ambrosia between May, 1917, and February 14, 1918. On this latter day he says he went to McGinniss' office and there saw only McGinniss, at which time he (Allison) had the form one-third filled out. McGinniss looked at the paper and said if he wanted it filled in to come back later as D'Ambrosia was not there. Allison took the paper away with him and came back at about 5 o'clock with the paper all filled in with the signature Frank W. Atkinson written thereon by himself. He was unable to state whether or not it was stamped "Polytechnic Institute." Further, that the name "Frank D'Ambrosia" was not put on the paper in his presence. When he came back at 5 o'clock, he says McGinniss opened the door and he had a conversation with him about the price and gave him \$50. That he left the paper at McGinniss' office, calling later, at about 8 o'clock that evening, and took the paper home with him. At this last call, he saw neither McGinniss nor D'Ambrosia. The paper was given to him by some woman.

The other witnesses called by the government were Frank W. Atkinson, president of the Polytechnic Institute of Brooklyn, who says he did not sign the paper or acknowledge its execution, and Taton and Dowden, officers connected with the Department of Justice. Their testimony deals only with what occurred at the time of the arrest of Allison and D'Ambrosia, at which time Allison declared that the arrest was a "frame-up," and D'Ambrosia said, "Do you know me?" to which Allison replied, "I never saw him before."

Another witness, Schbley, testified that she at one time saw Allison walking in the direction of McGinniss' office on the 14th of February, 1918.

D'Ambrosia and McGinniss both took the stand in their own behalf. The former testified of his recollection of the call of Allison, and that on the day in question Allison came in first, alone, asking him to take the acknowledgment of Atkinson, which he refused to do without seeing the affiant. Later, Allison returned with a man who was represented to him to be Atkinson, at which time D'Ambrosia says he went through the formalities of asking, "Is that your signature?" and he said, "Yes," and, "I put my seal on it."

McGinniss, a member of the bar, testified in his own behalf. He described his office as having two large rooms "like a front and back parlor," at No. 126 Willoughby street, Brooklyn. He says it was in the winter time, and he had a fire burning in the grate; that he was standing outside near the fireplace in the main office when Allison came along, and stated that he wanted to have an acknowledgment taken. McGinniss asked him if that was his (Allison's) signature, to which he said, "No." McGinniss then advised him that it was necessary to

bring Atkinson before a notary. Allison then said he was making an application for entrance into West Point; asked him to look at it, and then fill out the acknowledgment. McGinniss further told him D'Ambrosia was out and then returned the paper to Allison and the latter left. He says that the name "Frank W. Atkinson, Ph. D.," was on the paper at the time, and also the stamp, "Polytechnic Institute." That he filled in the blank in the acknowledgment, "Frank W. Atkinson * * * 14 February, * * * 8," and that he told Allison to take Atkinson to a notary, and he said he never received any money from Allison or had any further conversation with him about the matter.

The cross-examination of Allison indicated many contradictions, illustrated by his several versions of when he met McGinniss at the Graham Café previous to the time of the alleged taking of the acknowledgment, and, further, the recollection of what occurred at the time of the arrest. His statement in one place that he wrote the signature "Frank W. Atkinson" at his home, whereas he stated on direct examination that it was written in McGinniss' office.

The indictment charged a conspiracy to commit an offense, not to commit a fraud. The district judge, however, submitted the case to the jury as a conspiracy "for the purpose of defrauding the United States by obtaining the admission of a man by the name of Allison to the military academy at West Point."

Section 29 of the Criminal Code (Comp. St. § 10193) provides that—

"Whoever shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited or willingly aid, or assist in the false making, altering, forging, or counterfeiting, any * * * order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any of their officers or agents, any sum of money; or whoever shall utter or publish as true, or cause to be uttered and published as true, any such false, forged, altered, or counterfeited * * * contract, or other writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or whoever shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or officer of the government of the United States, * * * contract, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, shall be fined," etc.

Under this section, if the forged document in question was intended to be used by Allison in fraud, and thus obtaining entrance into West Point Military Academy, it would be a crime, and, if the plaintiffs in error conspired with Allison to commit this offense against the United States, they would be guilty of the crime of conspiracy, providing the proof established beyond a reasonable doubt that such a conspiracy was formulated.

[1-3] In the charge of conspiracy at common law, the unlawful combination was said to be the crime, and it was not necessary to aver or to prove an overt act. Section 37 has gone beyond such rigid abstraction and prescribes as necessary to the offense not only the unlawful conspiracy but that one or more of the parties must do an act to effect its object, and provides that, when such act is done, all

the parties to such conspiracy become liable. *Hyde v. United States*, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614. In the earlier case of *United States v. Britton*, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698, Judge Woods said:

"The offense charged in the counts of this indictment is a conspiracy. This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiae*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that in an indictment for conspiracy under section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

And again in *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419, the Supreme Court said:

"That the conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

Therefore, it would appear that prior to the decision in *Hyde v. United States*, *supra*, it was incumbent upon the prosecution to establish a conspiracy to plead in the indictment, and prove as the gist or gravamen of the offense, the conspiracy. Now, due to the phrase of the statute and its interpretation in the *Hyde Case*, a conspiracy alone does not constitute the offense. It needs the addition of the overt act. Such act is something more than evidence of a conspiracy. It is held to constitute the execution or part execution of the conspiracy, and by such execution or part execution the crime is consummated. But this change or addition which has found its way into the crime of conspiracy cannot be held to excuse the government from establishing that a conspiracy in fact existed, and this should be established before evidence of the overt act to effect the object of the conspiracy is received. It is now too common in the everyday trial of cases in conspiracy, to permit proof of alleged overt acts which inflame and prejudice the minds of juries without first sufficiently proving that a conspiracy in fact exists. Better practice for the due administration of the law is to require evidence establishing a conspiracy before evidence is received as proof of overt acts to effect the object of the conspiracy.

[4-7] We are satisfied that the evidence here falls far short of even presenting for the jury a question from which might be inferred an agreement to an unlawful thing, and, in particular, to do the unlawful thing of forging a document that was to be used for the purpose of defrauding the United States. Considering Allison's evidence at its face value, it does not indicate the slightest knowledge by D'Ambrosia of what the paper to which he put his name as commissioner was to be used for. A conviction may be had in the federal courts upon the uncorroborated evidence of an accomplice if the story, as told, is straightforward and has a ring of truth and indicates unequivocally the guilt of the accused. *Bosselman v. United States*, 239 Fed. 84, 152 C. C. A. 132. The presiding district judge, however, in a case where

it is sought to convict upon the uncorroborated testimony of an accomplice, should cautiously and sharply direct the jury's attention to the exercise of care and caution in viewing such evidence and that the testimony of the accomplice be convincing proof of the guilt of the accused. We find nothing in the charge of the court which indicates such caution. He was a confessed cheat and forger, and a deserter from the army, and as an imposter was still under investigation by the Department of Justice. A mere reading of his testimony indicates a discredited character, whose mental condition might, with decent curiosity, be inquired into. Most of the questions which formed the basis of his main narrative were of a leading character, and his frequent evasive answers, such as: "I am kind of shady about that." "I cannot remember so." "Well, if I have forgotten that is a minor affair." "I cannot remember because I have been through a whole lot since February 14th." "I have had different kinds of treatment since that and it is out of my head." "No, sir; I cannot remember that unless you bring it up." When asked if he put the stamp, "Polytechnic Institute," on the document, his answer was: "If I did, I have no knowledge of it, sir." At one time in his testimony, he says that he gave McGinniss \$50; another time, \$100; and, still another version, that he gave him an "Admiration" cigar. His flippant manner, requiring caution by the court for directness of reply, his resort to a claim of untrusty memory and hazy recollection, his contradictions as to the occurrence when he met the plaintiffs in error at McGinniss' law office, and his disclaimer of having paid any money when arraigned before the United States commissioner at which time he charged the government officials with trying to "railroad me," all emphasize the untrustworthiness of the witness' testimony and make it unworthy of belief. It is only when the evidence is sufficiently convincing of the guilt of the accused beyond a reasonable doubt that one may lawfully be convicted of a crime, and, in a case such as this, the better practice was not to place reliance upon the testimony of this accomplice and to require corroborating testimony before giving credence to him. *Holmgren v. U. S.*, 217 U. S. 509, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778. We feel required to say that the uncorroborated testimony of this perpetrator of a crime, confessed under oath, and not supported by other witnesses, with a possible hope of immunity from punishment, is not only insufficient to establish the guilt of the plaintiffs in error beyond a reasonable doubt, but that it presents no substantial evidence of it.

In rebuttal, the government offered records of a conversation had between the plaintiffs in error at McGinniss' law office, which were taken by the use of a dictagraph. Apart from the unfortunate blasphemy and vulgarity of expressions had, there is nothing that was said at this conference which in any way corroborated the testimony of Allison. On the other hand, the receipt of such evidence, with all its moral delinquencies, could not but have had an adverse effect to the plaintiffs in error upon the minds of the jury. Such expressions, which we do not deem it necessary to recite here, could but create in the minds of the jury a low estimate of the morals of the two plaintiffs in error, with a consequential prejudice. The practice of entering

into the confidential domain of a lawyer's office, installing this instrument, and, by such method of eavesdropping, enter into the confidences of the defense, ought not to be encouraged. It is sufficient to say here that it did not in any way help the government's case in establishing either corroboration or the guilt of the accused. But it undoubtedly inflamed the jury and prejudiced the plaintiffs in error beyond the hope of a fair and impartial trial. The plaintiffs in error may not be lawfully deprived of their liberty for a period of one year and six months without proof of their guilt beyond a reasonable doubt, much less without substantial evidence of it, and we cannot permit the perpetration of such an injustice, since it rests solely upon the testimony of Allison. We are of the opinion that the district judge should have granted the motion to direct an acquittal.
Judgment reversed.

PEEPLES v. TRUST CO. OF GEORGIA.

In re GEORGIA STEEL CO.

(Circuit Court of Appeals, Fifth Circuit. March 24, 1919.)

No. 3323.

RAILROADS ⇔ 167—MORTGAGES—CONSTRUCTION—PROPERTY INCLUDED.

A mortgage covering certain realty, railroad rolling stock, and other personalty, and all property, whether real or personal, constituting additions or betterments to the mortgaged property, includes after-acquired locomotives, steam shovels, etc., used upon the premises.

Appeal from the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

In the matter of the Georgia Steel Company, bankrupt. Petition by the Trust Company of Georgia, trustee for the bondholders of the Georgia Steel Company, against Oscar T. Peeples, trustee for Georgia Steel Company, bankrupt. Decree for petitioner, and the bankruptcy trustee appeals. Affirmed.

See, also, 248 Fed. 886, 160 C. C. A. 644; 250 Fed. 438, 162 C. C. A. 508.

J. B. Sizer, of Chattanooga, Tenn. (Sizer, Chambliss & Chambliss, of Chattanooga, Tenn., on the brief), for appellant.

Daniel W. Rountree and Clifford L. Anderson, both of Atlanta, Ga., for appellee.

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

WALKER, Circuit Judge. By the decree appealed from it was decided that certain movable and detached articles of personal property, which were acquired by the Georgia Steel Company after it executed a mortgage or deed of trust to the appellee Trust Company of Georgia, were embraced in that conveyance and were subject to be sold under a foreclosure of it. The correctness or incorrectness of

that ruling is the sole question presented for decision. The instrument was made to secure bonds issued by the Georgia Steel Company. The property intended to be covered was set out under three heads, designated, respectively, I, II, III. Under head or subdivision I are described lands, mineral rights in land, timber, mud and water privileges, and railroad rights of way. Immediately succeeding the particular descriptions set out under that head are the following provisions:

"Also all real property of every character and description, together with all and singular the improvements thereon, which the said party of the first part owns, or which it may control by lease or otherwise, or in which it holds any interest whatsoever, including all mineral rights, timber, mud and water privileges, rights of way and other easements of every character located in either of the counties of Cherokee, Bartow, Catoosa, Dade, or Walker, in the state of Georgia, or Jackson or De Kalb counties, in the state of Alabama.

"Also that portion of the company's Cole City branch railroad lying in Marion county, Tennessee, and which extends from the line of the state of Georgia to Shellmound, on the Nashville, Chattanooga & St. Louis Railway, together with the rights of way and privileges belonging thereto.

"Also all real property of every character and description, together with all and singular the improvements thereon, which the said party of the first part owns, or which it may control by lease or otherwise, or in which it holds any interest whatsoever, including all mineral rights, timber, mud and water privileges, rights of way and other easements of every character located in either of the counties of Cherokee, Bartow, Catoosa, Dade, or Walker, in the state of Georgia, or Jackson or De Kalb counties, in the state of Alabama, whether said property be specifically included in the foregoing description or not.

"It being the intention of this instrument to convey to the trustee all the right, title and interest of the company, of whatever nature such interest may be, in, of and to said lands and each and every parcel thereof, as well as in, of or to any other real estate now belonging to the company, whether the same be specifically described or not, together with all and every the rents, issues, income, appurtenances, tenements, hereditaments, fixtures, rights, easements, leases, leaseholds, rights of way, licenses and privileges thereto belonging or in any wise appertaining, as well as all and every authority to enter upon, use and enjoy any lands to the full extent that the company has hitherto used, owned, employed or enjoyed the same, or which it or its grantors has or have heretofore claimed or which it now claims the right to convey, own, use, employ or enjoy."

Immediately after the just copied part of the instrument are the following provisions:

II. "All lands, mines, buildings, machinery and other property, real or personal, of every character and description whatsoever constituting additions to and betterments and improvements of the said mortgaged properties in respect of which bonds shall be issued under this indenture."

III. "Together with all and singular the machinery, buildings, warehouses, factories, mills, shops, magazines, furnaces, houses and structures of every character upon the lands hereby conveyed; and all steam engines, locomotive engines, boilers, tramways, cars, cables, fans, loaders, railroad tracks, mining and manufacturing machinery and equipments, plans, conductors, tools, implements and personal property of every kind in any way connected with the mining and transportation of ores and coal upon or from said premises, or with the manufacture of iron, steel or other products thereon and wheresoever situated (excepting coal, coke, iron ore and minerals after the same have been mined, and also excepting certain railroad rails and splices leased from the Alabama Great Southern Railway Company by lease dated March 15, 1905, and from the Nashville, Chattanooga & St. Louis Railway by leases dated November 1, 1905, and December 9, 1905), and all patents, patent rights

and licenses under patents, now owned by the company or to which it is now in any way entitled.

"To have and to hold all and singular the said lands, premises, property, real and personal, and appurtenances, hereby mortgaged, conveyed or assigned, or intended so to be, with the remainders, reversions, privileges and appurtenances now or hereafter belonging or in any wise appertaining thereto, unto the trustee, its successors and assigns, forever. But in trust, nevertheless," etc.

From time to time after the execution of the mortgage or deed of trust the grantor therein purchased and placed upon the premises mortgaged, for use in connection with the mining operations, movable and detached articles of personal property, such as locomotives, dinkeys, steam shovels, mine cars, etc., which were in the possession or control of the mortgagor's trustee in bankruptcy at the time of the filing of the petition for the foreclosure of the mortgage. What is complained of is the action of the court in deciding that the property just mentioned was embraced in the mortgage and should be sold under the foreclosure of it.

The controversy turns upon the meaning or effect of the above-quoted subdivision II of the instrument's statement of what is embraced by it. In behalf of the appellant it is contended that that provision cannot properly be given the effect of making subject to the conveyance such after-acquired property as that in question. Attention is called to the Georgia statute, which provides that "a mortgage given by a person or corporation to a trustee or trustees, to secure an issue of bonds, shall, when it is expressly so stipulated therein, embrace * * * after-acquired property of such person or corporation" (Georgia Code of 1910, § 3256), and to decisions to the effect that prior to the enactment of that statute after-acquired property could not be embraced, even by express stipulation. *Durant v. Duchesse D'Auxy*, 107 Ga. 456, 464, 33 S. E. 478; *Penton v. Hall*, 140 Ga. 235, 79 S. E. 917.

It is contended that the language used in subdivision II shows that it was intended to be used in the present tense, so as to include only property constituting additions to and betterments and improvements of the mortgaged property at the time the instrument was executed. Another contention is that it was not intended to embrace such detached personal property as that in question, which, when subsequently acquired by the mortgagor, did not constitute permanent or fixed improvements on real estate.

If subdivision II is given the meaning attributed to it in behalf of the appellant, it embraced nothing in addition to what was embraced by subdivisions I and III. Subdivision I covered all the mortgagor's then owned real estate intended to be conveyed, including all appurtenances, fixtures, or improvements thereon owned or controlled by the mortgagor. Subdivision III embraced all the mortgagor's then owned personal property, such as that in question and used as it was. Evidently subdivision II was intended to cover property other than that which was explicitly covered by the provisions which immediately preceded and succeeded it. The use in subdivision II of the language, "real or personal property of every character and description whatsoever constituting additions to and betterments and improvements of

the said mortgaged properties," is a clear manifestation of an intention to embrace something other than "said mortgaged properties"; in other words, something in addition to what the mortgagor owned at the time the mortgage was executed. If the provision is given any effect at all in addition to that of the other subdivisions of the description of what was intended to be embraced, it is in necessary effect, within the meaning of the above-quoted Georgia statute, an express stipulation that after-acquired property of the kind mentioned was to be embraced by the mortgage. If the language used in that subdivision had been "all lands, mines, buildings, machinery and other property constituting additions to and betterments or improvements of the said mortgaged properties," it would have been, to say the least, questionable whether such personal property as that in question could properly be regarded as additions to or betterments or improvements of the previously described mortgaged real estate.

But the language used explicitly embraces personal as well as real property. If it was in contemplation that any personal property whatsoever would constitute an addition to or a betterment or improvement of the previously described mortgaged real estate, certainly such personal property as that which is in question was intended to be included. The mortgaged real estate included lands, mineral rights, railroad rights of way, and a railroad, all constituting parts of a mining property operated by the mortgagor. No personal property well could be considered as having a better claim to be regarded as constituting additions to or betterments or improvements of such mining real estate than locomotives, dinkeys, steam shovels, mine cars, etc. Those things are not to be excluded on the ground that such movable and detached articles of personal property do not constitute additions to or betterments or improvements of real estate, as the language of the instrument makes it plain that it was contemplated that purely personal property might come within the category stated. By subdivision III of the description of the property intended to be embraced in the mortgage, personal property such as that in question which then was owned by the mortgagor passed by the mortgage, if it was in any way connected with the mining and transportation of ores and coal upon or from the previously described and mortgaged real estate, or with the manufacture of iron, steel, or other products thereon. The language of subdivision II, considered in the connection in which it was used, is indicative of an intention to treat such after-acquired property as that in question, placed and used as it was, as constituting additions to, or betterments or improvements of, the previously described mining property, and to subject it to the mortgage. To hold that that property is not covered by the mortgage, we think, would amount to depriving the provision mentioned of an effect which its language shows was intended.

A result of the above-stated conclusion is that the decree appealed from is not subject to the objections urged against it. That decree is affirmed.

THE STRATHEARN.*

(Circuit Court of Appeals, Fifth Circuit. March 24, 1919.)

No. 3140.

1. SEAMEN ⇨24—WAGES—RECOVERY.

Act March 4, 1915, § 4 (Comp. St. § 8322), authorizing seamen to collect half their wages at ports of call after voyage commences, provided demand be not made before expiration of five days, etc., authorizes demand two days after calling at port, where over five days had elapsed since commencing voyage.

2. SEAMEN ⇨4—WAGES—FOREIGN SEAMEN.

Act March 4, 1915, § 4 (Comp. St. § 8322), empowering seamen to collect half their wages at ports of call, and providing section should apply to seamen on foreign vessels while in American harbors, is applicable to British seamen shipped on British vessel in British port, while vessel is in an American harbor.

3. SEAMEN ⇨15—WAGES—RECOVERY IN AMERICAN PORTS—LEGISLATIVE POWER—FOREIGN CONTRACTS.

Act March 4, 1915, § 4 (Comp. St. § 8322), empowering seamen to collect half their wages in American ports of call, is not invalid as rendering unenforceable in this country a wage contract lawfully made by foreigners in another country.

4. CONTRACTS ⇨101(1)—VALIDITY.

A contract may be valid and enforceable where executed, but unenforceable in another jurisdiction.

5. CONSTITUTIONAL LAW ⇨307—DUE PROCESS—DENIAL OF REMEDY—SEAMEN—WAGE CONTRACT.

Act March 4, 1915, § 4 (Comp. St. § 8322), empowering seamen to collect half their wages at American ports of call, does not unconstitutionally deprive a foreign vessel of contract rights without due process, because it renders unenforceable in American ports a wage contract lawfully entered into abroad.

Appeal from the District Court of the United States for the Northern District of Florida; William B. Sheppard, Judge.

Libel by John Dillon against the Strathearn Steamship Company, claimant of the steamship Strathearn. From a decree dismissing the libel (239 Fed. 583), the libellant appeals. Reversed.

Silas Blake Axtell, of New York City, L. W. Nelson, of St. Augustine, Fla., and W. J. & H. W. Waguespack, of New Orleans, La., for appellant.

J. E. D. Yonge, of Pensacola, Fla. (W. A. Blount, A. C. Blount, Jr., and F. B. Carter, all of Pensacola, Fla., and Ralph Jas. M. Bullowa, of New York City, on the brief), for appellee.

Frederic R. Coudert and Howard Thayer Kingsbury, both of New York City, specially appearing on behalf of the British vice consul at Pensacola, Fla., as amicus curiæ.

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

WALKER, Circuit Judge. [1] This is an appeal from a decree dismissing the libel of the appellant, John Dillon, against the British steamship Strathearn, to recover the wages the libellant had earned

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

*Certiorari granted 249 U. S. —, 39 Sup. Ct. 494, 63 L. Ed. —.

as a carpenter on that ship prior to the date of his demand from the master of the ship, made two days after its arrival in the port of Pensacola, where the ship delivered cargo, of one-half part of the wages he had earned, which demand was not complied with. The action of the court was the result of its conclusion that the demand was prematurely made, having been made within less than five days after the arrival of the ship at the port where the demand was made, though no such demand had previously been made, and the appellant's service and the ship's voyage had begun several months before. The *Strathearn* (D. C.) 239 Fed. 583. The following is the provision of the statute:

"Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary shall be void: Provided, such a demand shall not be made before the expiration of, nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full wages earned. * * * And provided further, that this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement." Act March 4, 1915, c. 153, § 4, 38 Stat. 1165 (Comp. St. § 8322).

The provision that "such demand shall not be made before the expiration of, nor oftener than once in five days," is not to be given the effect of requiring that five days must have elapsed after the arrival of a ship at a port where it loads or delivers cargo before a demand for half wages can be made with the effect given to it by the statute. Evidently the intention was that such a demand should not have the effect given to it by the statute if it is made within five days "after the voyage has commenced," or if made sooner than five days after the making of a previous demand contemplated by the statute. The appellant's demand was not premature.

The decree appealed from is sought to be sustained on other grounds, of which mention will be made:

[2] It is contended that the appellant was not within the terms of the statute, because he was a British subject, who shipped on a British vessel in a British port. There is nothing to indicate that the word "seaman," in the clause "that this section shall apply to seamen on foreign vessels while in harbors of the United States," etc., was intended to include only seamen of this country, or that that clause was intended to have the same meaning it would have had if, instead of the word "seamen," the words "American seamen" had been used. Another clause in the same sentence, "and the courts of the United States shall be open to such seamen for its enforcement," makes it quite plain that foreign seamen are within the provision. It cannot be supposed that the last-quoted clause would have been inserted, if only seamen of this country had been in contemplation. Legislation was not needed to open the courts of the United States to them. Provisions of the act looking to the abrogation of treaties containing provisions inconsistent with it are indicative of the legislative intention to make such provi-

sions as the one in question applicable to foreign seamen while in the ports of the United States. The circumstance that the title of the act shows that a part of its purpose was "to promote the welfare of American seamen in the merchant marine of the United States" is not indicative of an intention to make the provision in question applicable to American seamen only. It well may have been regarded that competition of American seamen in foreign ports with foreign seamen for service on foreign vessels would be hampered, if in American ports only American seamen had the right given by the provision in question, so that on that ground the services of foreign seamen would be preferred by foreign vessels destined to American ports.

[3, 4] By the articles signed by the libellant in Great Britain he agreed to serve on a voyage not exceeding three years' duration to any port or places within designated limits, which included ports of this country, for stated wages, which, less advances made, were payable on completion of the agreed service, which had not been completed when the demand for half the wages earned was made. In behalf of the appellee it is contended that if the provision in question is so construed as to be applicable to the case at bar, it is invalid on the ground that it is one not within the legislative power of the United States to make, in that it undertakes to nullify contracts entered into between foreigners in a foreign jurisdiction, in which such contracts are valid and enforceable. The enforcement of the provision in question in behalf of a foreign seaman situated as the appellant was does not have that effect. From the fact that a contract is valid and enforceable in the jurisdiction in which it was made, it does not follow that it is effective to govern the relations of the parties to it while they are in another jurisdiction with the law or public policy of which it is in conflict. A contract may be valid and enforceable where it was made, and yet be unenforceable in another jurisdiction. *Union Trust Co. v. Grosman*, 245 U. S. 412, 38 Sup. Ct. 147, 62 L. Ed. 368; *The Kensington*, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190. The fact that the seaman and the vessel are British does not prevent the American law being applicable to them while both are in an American port. *Patterson v. Bark Eudora*, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002.

The shipping contract would be given the effect of contravening a law of the United States if it were permitted to prevent the acquisition and exercise of a right given to "seamen on foreign vessels while in harbors of the United States" by a statutory provision the terms of which make it plain that the right is given notwithstanding any contract stipulation to the contrary. The statute in question is not given an extraterritorial operation by according to it the effect of preventing the existence of a contract made in another jurisdiction from depriving a seaman who is a party to such contract of a right given to him by statute while both the seaman and the ship are within the territory of the nation the law of which gives the right. The foreign contract does not prevent the relations of the parties to it being governed by the law of the place where the seaman and the ship are. The law of the place where the contract was made would be given an ex-

tratorritorial operation if it is allowed to determine the question of the enforceability of the contract in another jurisdiction, the law of which forbids the enforcement of such a contract.

[5] Another suggestion is that, if the provision in question is held to be applicable to the facts of this case, it is violative of the Constitution of the United States, in that it deprives a party of contract rights without due process of law. The statute does not purport to affect, and does not affect, the rights of the parties under a contract made in a foreign jurisdiction, except to prevent such contract standing in the way of the enforcement of the domestic law in behalf of and against parties who have subjected themselves to the domestic jurisdiction. "It is part of the law of civilized nations that, when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement." *Wildenhuis' Case*, 120 U. S. 1, 11, 7 Sup. Ct. 385, 387 (30 L. Ed. 565). A contract made in Great Britain for the services of a British seaman on a British vessel which goes to an American port is not so far effective as to be enforceable in the latter place, if its enforcement there would result in setting at naught the law of that place. As the foreign contract is incapable of giving the right claimed by virtue of it, the statute in question cannot properly be regarded as depriving a party to the contract of a right under it; the right claimed not being one which was conferred by the contract or otherwise. The obligation of a contract entered into in one jurisdiction does not extend so far as to entitle the parties to such contract to be exempt from the operation of the law of another jurisdiction to which they subject themselves, which law forbids such effect being given to the contract as is sought to be given to it in that jurisdiction. In our opinion the provision in question is not invalid on either of the grounds urged against it.

The court erred in dismissing the libel.

The décret appealed from is reversed.

LASWELL v. HUNGATE et al.

(Circuit Court of Appeals, Seventh Circuit. December 19, 1918.)

No. 2620.

1. CHARITIES ⇨36—DEVISE TO FREE SCHOOL—CHARGING TUITION AGAINST NONRESIDENT.

Any of the so-called "free" schools of a city, established under the public school laws of the state, for which Const. Ill. art. 8, § 1, and Hurd's Rev. St. Ill. 1917, c. 122, § 127, call, satisfies a devise for support of "a school in said city the tuition of which school shall be free," "such free school as said [city] council shall see fit," though under section 115 tuition is required of nonresident pupils.

2. CHARITIES ⇨37—GENERAL CHARITABLE INTENT—CY PRES DOCTRINE.

General charitable intent, making applicable the cy pres rule, were there no existing school to which the devise were applicable, held shown by devise for support of "a school" in a city, "the tuition of which shall be free," "such free school as said [city] council shall see fit," with declaration, "I have made the gift for the benefit of the young * * * and do not wish them to lose the benefit of the gift by the neglect of others."

3. CHARITIES ⇨18—WANT OF TRUSTEE—JUDICIAL APPOINTMENT.

A charitable trust will not fail for want of a trustee, or inability of party named to act, but chancery will designate another trustee.

4. CHARITIES ⇨20(5)—DESIGNATION OF BENEFICIARY BY CITY.

Even if a city cannot act as trustee of property devised for support of a school in the city, it may, as contemplated by the devise, designate the school to be supported.

5. CHARITIES ⇨38—PERPETUITIES ⇨4(4)—REQUEST IN CHARITABLE GIFT.

Mere request, in will making devise for support of a school in a city, that the city keep testator's family burial lot in repair, imposes no obligation, much less creates a perpetuity, and so does not affect validity of charitable gift.

6. CHARITIES ⇨23—VALIDITY—POSSIBILITY OF MISUSE.

A devise for support of a free school to be designated by a city is not invalid, on the theory that it leaves the city free to designate a school whose teachings are contrary to public policy, as not only must it be presumed that it will properly discharge its duty, but, if it should fail therein, the courts could lend their aid.

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

Suit by Clara M. Laswell against John Hungate, executor of Benjamin F. Johnson, deceased, and others. Bill dismissed, and plaintiff appeals. Affirmed.

The appeal is from a decree of the District Court dismissing appellant's bill for want of equity appearing upon its face. It appears from the bill that Benjamin F. Johnson, of the city of La Harpe, Hancock county, Ill., died testate in 1906, leaving surviving his widow and one child, the appellant. He left property in Hancock county worth about \$300,000, consisting of several thousand acres of land lying outside of the city.

His will, dated in 1895, provided:

(1) For payment of debts.

(2) Bequest of \$100 to daughter.

(3) Devise to daughter for her natural life of a quarter section of land in Hancock county, with certain restrictions and limitations respecting payment of taxes and selling or mortgaging her interest.

- (4) Bequest to grandson of a watch and \$500.
- (5) Bequest to his wife of household furniture and the like.
- (6) Devise to wife during her natural life of the family residence at La Harpe and annual income of \$1,000.
- (7) Provision for fire insurance on the home and personal property.
- (8) "None of my real estate is to be sold but rented out, and my cash funds loaned on real estate security and the net annual income derived therefrom after paying the legacy to my wife Phebe Ann Johnson and all taxes, repairs, and other proper charges, is to be delivered to the city of La Harpe, Hancock county, Illinois, to be appropriated annually to the support of a school in said city the tuition of which school must be free."
- (9) "And it is my will and I hereby direct that on the death of my said wife, Phebe Ann Johnson and my said daughter Clara May Bishop or either of them, the property or funds the deceased had a life interest in, together with all accumulations and any and all other property I may leave not disposed of by the previous provisions of this will shall be delivered to the city of La Harpe, Hancock county, Illinois, to be held (and owned) by said city forever in trust to create and establish a fund to be appropriated the annual income thereof to the support of a school in said city the tuition of which school must be free. The city council of said city managing such funds and estate and paying the annual income to the support of such free school as said council shall see fit. My real estate is not to be sold but rented out and my cash funds loaned on real estate security."
- (10) "I hereby constitute and appoint John H. Hungate executor of this my last will, and also trustee to hold, manage and control my estate real and personal and the increase and accumulation thereof until the time arrives as herein limited to vest said real estate in the city of La Harpe, and I direct that the court having jurisdiction of the probating of this will shall require of the trustee such bonds as shall be adequate to protect and preserve the estate and in case of the death or refusal to act of said trustee, then the master in chancery of Hancock county, Illinois, may be appointed his successor under this will."

The codicil, dated in 1897, provides:

"I hereby direct that the taxes and repairs and painting needed on the premises in the said city of La Harpe, county and state aforesaid, which I have willed to my wife Phebe Ann during her natural life is to be paid from the income from my estate and should the buildings be damaged or destroyed by fire or otherwise they are to be repaired or replaced the same as they are with the exception of the barn, if that is destroyed it need not be rebuilt."

"Also any and all leases which I may make which have not expired by their own limitations at the time of my death are to be in full force and effect until they expire by their own limitations."

"And I hereby request the said city of La Harpe through their proper officials to see that my family lot in the graveyard and the stones and monuments thereon are kept in a proper state of repair in consideration of my gift to the said city, but there is no penalty attached if they fail to do so, as I have made the gift for the benefit of the young who are to take their place as men and women in the world and do not wish them to lose the benefit of the gift by the neglect of others."

The will and codicil were duly admitted to probate.

The bill sought to have declared void the eighth and ninth clauses of the will, whereunder the bulk of the testator's property is devised in trust for the support of a school as stated in said clause.

Thomas E. D. Bradley, of Chicago, Ill., for appellant.

D. E. Mack, of Carthage, Ill., and John Hungate, of La Harpe, Ill., for appellees.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above).

[1] The main ground for the claimed invalidity of clauses 8 and 9

is that there was no school in La Harpe such as is described in these clauses, viz. a school in said city, tuition in which school must be free, and that there is no provision in the will for founding, but only for supporting, a school; that the will and codicil discloses no general charitable intent of the testator whereunder the *cy pres* doctrine may be invoked, and the devise therefore must fail.

From the bill it appears that there were so-called public schools in La Harpe; indeed, the president and members of the board of education of that city are as such made parties to the bill. It is maintained, however, that under the laws of Illinois the public schools of the state are not schools in which tuition is free, but that these schools are primarily available only to pupils within the school district, that others desiring the benefit of the schools must pay tuition.

One of the institutions upon which we in this country pride ourselves is the system of free schools. It is evident that such schools are not self-sustaining, but funds must be provided to maintain them. This is ordinarily done by public taxation. In making practical provision for public free education each school unit—usually a school district—provides buildings and facilities for the reasonably necessary requirements of the particular unit to be served, but not accommodations in one district sufficient for the world at large. Where, however, it can be done without prejudice to resident pupils, nonresident pupils may be admitted and tuition may be collected from them. Chapter 122, § 115, Rev. Stat. Ill. But these schools are not any the less public or “free” schools in any reasonable application of these terms, or schools in which the tuition must be free, because the educational facilities they afford may be extended to nonresidents and tuition required of such.

If, instead of employing the expression “a school in said city the tuition of which school must be free,” the testator had said “a free school of the city,” it would hardly be questioned that a public school of the city was within his contemplation. Under the subject of “Powers and Duties of Boards of Education” the Illinois statutes provide:

“First, to establish and support free schools for not less than six nor more than ten months in each year.” Chapter 122, § 127, Rev. Stat. Ill.

In the latter part of the ninth clause of the will, referring again to the same object of his benefaction as before referred to, the testator employed the expression “support of such free school as said council shall see fit.” Surely the testator should not be held to greater particularity of description or expression than is employed in the statutes of his state whereunder the city of his residence maintained free schools. This statute was enacted in pursuance of the constitutional provision that—

“The General Assembly shall provide a thorough and efficient system of free schools whereby all children of this state may receive a good common school education.” Section 1, art. 8, Constitution of Illinois 1870.

Neither the constitutional nor the statutory provision for free schools contemplated that each such school must be free in the sense contended for by appellant, viz. a school wherein tuition shall be free for the whole world.

It is apparent that the testator did not intend to bind the city to limit the benefit of the devise to any particular school. He used twice the expression "a school in said city," employing the indefinite article, and this, with the words "such free school as the council shall see fit," manifests an intent to lodge in the city a discretion as to the school, limiting the benefaction to a school or the pupils of a "school wherein the tuition must be free," or a "free school," but not excluding schools at La Harpe established under the public school laws of the state of Illinois.

[2] But, if appellant's contention in this regard were sound, would not the equitable doctrine of *cy pres* apply here, so that the devise would in any event be sustained? The doctrine is so well stated in Story's Equity Jur. § 1169, that it may with profit be here quoted:

"Another principle equally well established is, that if the bequest be for charity it matters not how uncertain the persons or the objects may be, or whether the persons who are to take are in *esse* or not, or whether the bequest can be carried into exact execution or not, or whether the legatee be a corporation capable in law of taking or not, for in all these and the like cases the court will sustain the legacy and give it effect according to its own principles; and where a literal execution becomes inexpedient or impracticable, the court will execute it as nearly as it can according to the general purposes, or as (as the technical expression is) *cy pres*."

This very statement of the law has been definitely and repeatedly upheld by the Supreme Court of Illinois. *Kemmerer v. Kemmerer*, 233 Ill. 327, 84 N. E. 256, 122 Am. St. Rep. 169; *Crerar v. Williams*, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454; *Heuser v. Harris*, 42 Ill. 425.

That the law is as thus stated is not controverted, but it is contended that the devise is of specific nature, not charitable, and does not show a general charitable intent on the part of the testator, and that therefore the *cy pres* doctrine does not apply. The absence of limitation upon the city beyond the indication that the school shall be free, and the broad general discretion granted it, point strongly to a general intent of the testator to devote his property to charitable purposes. But if this alone were not sufficient, in our judgment the concluding words of the codicil leave no room for doubt as to his general intent to create a charity, when he says:

"I have made the gift for the benefit of the young who are to take their place as men and women in the world and do not wish them to lose the benefit of the gift by the neglect of others."

In this statement of his broad and beneficent purpose there may clearly be read an intent that the gift should not be defeated through strained construction of his phrases, or even through the casual employment of inept words. The limitation of the benefaction to the support of a school, and that a school in which tuition must be free, does not so specifically define and circumscribe the devise as to indicate absence in the donor of a general charitable intent. *Vidal v. Girard*, 2 How. 127, 11 L. Ed. 205; *Perin v. Carey*, 65 U. S. 465, 16 L. Ed. 701; *Ould v. Washington Hospital*, 95 U. S. 303, 24 L. Ed. 450; *Russell v. Allen*, 107 U. S. 164, 2 Sup. Ct. 327, 27 L. Ed. 397; *Sickles v. City of New Orleans*, 80 Fed. 868, 26 C. C. A. 204.

It is contended that the clauses provide, not for founding or institut-

ing a school, but only for "support," and that, as the public schools are not intended, the devise must fail for want of an existing school which might be the object of the support. If the testator did not intend a public school to be the beneficiary, and, as stated in the bill, there were then no other schools in the city to which the support might be applied, what could he have intended by the devise? He surely knew the facts; and unless there be imputed to him the intent that his devise should defeat itself for want of an already existing free school in the city, we are not at liberty to give the word "support," as used in the clauses, the narrow and limited construction contended for. On the contrary, the very nonexistence of any such a school would seem only to emphasize our conclusion that the clauses manifest intent of the testator that, in the discretion of the council, the fund be applied to any free school in the city, whether then existing or afterwards brought into being, and whether created or founded wholly or in part out of or as a result of the testator's benefaction, or otherwise. But, aside from this, if the fact were that there was then no existing school to which the devise was applicable, this would serve only to make the more apparent the donor's general charitable intent, and the more certainly would apply the *cy pres* rule.

[3, 4] It is contended that the city has not the power to take and hold this property or the income, for any such purpose. It is a sufficient reply that a trust will not fail for want of a trustee. If the city cannot act as trustee, a court of chancery will designate another trustee. Even though the city could not take or hold this property or the income from it, we perceive no reason wherefore it may not, as contemplated by the devise, designate the school in whose support the trust fund shall be administered.

[5] As to the contention of invalidity of these clauses because in the codicil the income is to be applied in part, without the designation of what part, to the perpetual maintenance of the family burial lot of the testator, the codicil itself supplies the answer. It creates no such charge on the estate or obligation on the trustee, but expressly negatives any such conclusion. The codicil merely requests the city to see that the lot and monument are kept in proper state of repair. It would seem that, as though in anticipation of such line of attack, he specified, "but there is no penalty attached if they fail to do so." Of course the term "penalty" is not thus used as relating to a fine, imprisonment, or the like, but as indicating the absence of any obligation to comply with the request, and the clear intent and purpose that the charity shall be in no wise thereby periled or penalized. The clause does not assume to impose an obligation, must less to create a perpetuity.

[6] Nor is there merit in the point that, the devise failing to designate the kind of school to be supported, the city might designate some school whose teachings are contrary to public policy. We cannot anticipate that the support will be extended to schools for teaching vice or crime or conceded immorality, if indeed such could be said to come within the designation of "school." It must be presumed that the city will properly discharge its duty; but, if it should fail in this through a perversion of the trust fund from its beneficent and chari-

table purpose, the courts would doubtless deal with such a situation to the end that the true aims and purposes of the devise might be effectuated, not destroyed.

The charge that the city has abandoned the property and the trust is not supported by any facts stated in the bill from which such conclusion would flow. With the menace of litigation continually before it, first a contest of the will, which failed, then this suit to invalidate the trust clauses, the city has so far been in no situation to carry out the testator's charitable intent. Whatever might be the consequences of abandonment by the city, abandonment does not appear.

The decree of the District Court is affirmed.

COCO-COLA CO. v. MOORE et al.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1919.)

No. 5205.

1. APPEAL AND ERROR ⇨758(1)—NOTICE OF ERROR NOT SPECIFIED—PRESUMPTION AS TO EXAMINATION OF RECORD.

If the Circuit Court of Appeals concludes to notice a manifest error not specified according to rule No. 24 (188 Fed. xvi, 109 C. C. A. xvi), there is no implication that it has undertaken the task of going through the record and examining other errors not specified.

2. ATTORNEY AND CLIENT ⇨166(3)—ACTION FOR COMPENSATION—EVIDENCE.

In suit for compensation as attorneys in defendant company's suit to restrain unfair trade competition by another firm, plaintiffs' evidence of the amount of business done by defendant company in the United States generally was properly admitted, not to show defendant's ability to pay, but as bearing on the results obtained by the litigation.

3. EVIDENCE ⇨142(5)—SIMILAR FACTS—VALUE OF ATTORNEYS' SERVICES.

In an action by attorneys for compensation for services rendered defendant company in its suit to restrain unfair competition, defendant's evidence as to the compensation which it had paid attorneys in other actions was properly ruled out, as opening the door to the admission of collateral issues, and also as possibly based on specific contracts.

4. EVIDENCE ⇨487, 543(2)—OPINION OF LAYMEN—VALUE OF LEGAL SERVICES.

The officers of a corporation which employed attorneys to conduct a suit to restrain unfair trade competition were not qualified as laymen to express an opinion as to the reasonable value of the services of counsel, for such evidence can be given only by members of the bar.

5. EVIDENCE ⇨543(2), 572—EXPERT OPINION—VALUE OF ATTORNEYS' SERVICES—QUALIFICATIONS OF OTHER ATTORNEYS.

In an action by attorneys to recover for professional services rendered defendant company in conducting a suit to restrain unfair trade competition, evidence of attorneys who had not had experience in trade-mark or unfair competition cases was admissible on behalf of plaintiff attorneys; objection that such witnesses were not qualified going to the weight, and not the admissibility, of the evidence.

6. EVIDENCE ⇨543(2)—EXPERT OPINION—ATTORNEY'S FEES IN UNFAIR COMPETITION CASE.

In an action by attorneys for services rendered defendant company in suit to restrain unfair trade competition by another firm, testimony of three lawyers, experts in the field of trade-mark and unfair competition, and possessed of large experience in courts where such litigation is

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carried on, was admissible on behalf of defendant company, though the attorneys knew nothing about the customary fees charged at the local bar of the small city where the case was tried.

7. CUSTOMS AND USAGES ⇐12(1)—EFFECT ON CONTRACT—KNOWLEDGE OF PARTIES.

In suit on an implied contract, a local custom cannot be given controlling force, unless shown to have been known to and contemplated by the parties at the time the services were rendered.

In Error to the District Court of the United States for the Eastern District of Arkansas; Frank A. Youmans, Judge.

Action by John M. Moore and others against the Coco-Cola Company. To review judgment for plaintiffs, defendant brings error. Reversed, with directions to grant new trial.

Elias Gates, of Memphis, Tenn. (Samuel Frauenthal, of Little Rock, Ark., on the brief), for plaintiff in error.

Charles C. Reid, of Little Rock, Ark., for defendants in error.

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

AMIDON, District Judge. The plaintiffs, Moore et al., sued defendant, Coco-Cola Company, to recover compensation as attorneys. The case has been here before, and was reversed because of improper rulings on questions of evidence. 246 Fed. 942, 159 C. C. A. 214. It was again tried and comes here now upon the same class of errors, namely, rulings upon the receipt or rejection of evidence.

[1] On the former review the brief of the plaintiff in error, the Coco-Cola Company, contained no specification of the errors relied upon, as required by our rule 24. 188 Fed. xvi, 109 C. C. A. xvi. Notwithstanding this omission we decided to notice a manifest error of so grave a character that we thought it ought not to be passed by, notwithstanding the failure to comply with the rule. It is now insisted that as to all questions involved in the former record as to which we expressed no opinion, our silence should be interpreted as a holding that we had examined them and found them to be without merit. There is no justification for this inference. If a court concludes to notice a manifest error not specified according to the rules, there is no implication that it has undertaken the task of going through the record and examining other errors which had not been specified. We will therefore proceed to consider the errors which have been properly specified on the present review.

[2] Plaintiffs offered evidence of the amount of business done by the defendant in the United States generally, and it was received over defendant's objection. The ruling was proper. The evidence was not offered for the purpose of showing defendant's ability to pay, but as bearing upon the results obtained by the litigation. The original suit was brought to restrain unfair trade competition by the firm of Butler Bros., and a decree was obtained restraining them from the practices complained of. This decision had great value to the com-

pany, regardless of the amount of damage inflicted by the wrongful conduct of Butler Bros. It established the company's trade rights, and was an important precedent condemning the practices of all who infringed those rights. While the decree would not be *res adjudicata* as against other wrongdoers, its effect in the business world would be highly beneficial. The result is akin to a decree in a patent case sustaining the patent, and adjudging a defendant guilty of infringement. The amount involved in the particular case may be insignificant, but the decree sustaining the patent, and condemning the infringement is of great value in other jurisdictions where the injury to the patentee's right may involve large values.

[3, 4] Defendant offered evidence as to the compensation which it had paid to attorneys in other actions. This evidence was properly ruled out. It could not have been received without giving right to an inquiry into all the suits in which the services were performed. That would have involved the case upon trial in collateral issues. The compensation also may have been based upon specific contracts, and would thus be wholly irrelevant in determining what was the reasonable value of services rendered upon quantum meruit. It is likewise true that the defendant's officers were not qualified as laymen to express an opinion as to the reasonable value of the services of counsel. Such evidence can only be given by members of the bar. *Howell v. Smith*, 108 Mich. 350, 66 N. W. 218; *Hart v. Vidal*, 6 Cal. 56; *Chamberlayne on Evidence*, § 2163.

[5] Plaintiffs offered evidence of attorneys who had not had experience in trade-mark or unfair competition cases. This was objected to upon the ground that such attorneys were not qualified to give opinions as to the reasonable value of attorney's fees in such litigation. The court overruled the objection, and received the evidence. The ruling was proper. The objection went to the weight of the evidence, and not to its admissibility. When the nature of the action, the time devoted to it, the amount involved, the results obtained, and other like factors proper for consideration in fixing the compensation of attorneys, are stated, any member of the bar, in good standing, may testify as an expert as to what would be a reasonable compensation for the services performed, although the witness has never had experience in the same field of litigation. Such experience would add to the weight of his evidence, but the want of it does not render his opinion incompetent.

[6, 7] Defendant offered the evidence of three lawyers, one from New York, one from Chicago, and one from Washington. They were experts in the field of trade-mark and unfair competition, and possessed of large experience in courts where such litigation is in the main carried on. They knew nothing about the customary fees charged at the local bar of Little Rock, Ark., where the case was tried, in which plaintiffs rendered the services sued for. The evidence was objected to on the ground that the witnesses were not shown to be familiar with the fees charged at Little Rock, and for that reason were disqualified. The objection was sustained. We think the ruling was erroneous and highly prejudicial. There had been little, if any, litigation in unfair competition cases at Little Rock. No cus-

tomary fee for such services had been established there as the result of experience. It is well known that litigation of this kind is mainly confined to large commercial centers. It has come to be regarded as a distinct branch of the law, and, like patent law, is largely in the hands of a distinct class of practitioners. Litigation of this kind is national, and not local. To confine testimony in such a case to what is usual in the community is simply to deny one of the valuable sources of information. Knowledge of the usual compensation paid for such service can only be learned from those who live in the centers where such litigation is most frequent, and to deny a litigant the right to produce the testimony of persons having that kind of qualification is to substitute theory for experience. It is claimed that the ruling is based upon *Ward v. Kohn*, 58 Fed. 462, 7 C. C. A. 314. Such a view divorces the opinion from its facts. The services sued for there were rendered in a criminal case at Louisville, Ky. The reasonableness of plaintiffs' compensation had been testified to by eminent members of the bar of that city. Defendant offered evidence of lawyers residing in Little Rock, Ark., who had no knowledge of the usual fees in Louisville. This evidence was excluded, and what is said in the *Ward Case* is based upon the remoteness geographically of the two cities, and the wide difference in the fees of lawyers in what was then a provincial town like Little Rock, as compared with the usual compensation in a large commercial city like Louisville. The language of the opinion cannot be separated from the facts of the case. *Northern Pacific Ry. Co. v. N. A. Tel. Co.*, 230 Fed. 347, 355, 144 C. C. A. 489, L. R. A. 1916E, 572; *King v. Pomeroy*, 121 Fed. 287, 294, 58 C. C. A. 209. Here the litigation is entirely different. It is not local, but national, and is conducted mainly by specialists, and their judgment is the best evidence as to what is reasonable compensation for such services. We do not understand that the decision in *Ward v. Kohn* was intended to limit testimony to lawyers of the particular city in which the services were rendered. There would be distinct objections to such a rule. When plaintiffs are eminent members of the bar, their brethren of the same bar are reluctant to give evidence against them in a suit for their compensation. *Esprit du corps* is a factor in such cases which courts cannot disregard. In the medical profession it is considered unprofessional for one doctor to testify against another in civil litigation. If the defendant in the *Kohn Case* had offered evidence of members of the bar in Cincinnati, Ohio, or Nashville, Tenn., or possibly St. Louis, Mo., who showed themselves to be familiar with the usual compensation paid for services, such as the plaintiffs were suing for, and the evidence had been rejected because the witnesses were not members of the Louisville bar, it would probably have been error to exclude the evidence. In suits on implied contract a local custom cannot be given controlling force unless it is shown to have been known to and contemplated by the parties at the time the services were rendered. *Bowling v. Harrison*, 6 How. 248, 12 L. Ed. 425; *Chicago, Milwaukee & St. P. Ry. Co. v. Lindeman*, 143 Fed. 946, 949, 75 C. C. A. 18. In this day of mobile judges and lawyers, the bar of a city cannot establish a market

overt for professional services and require all comers to take notice of their local customs.

The judgment is reversed, with directions to grant a new trial.

BARNETT et al. v. KUNKLE et al. *

(Circuit Court of Appeals, Eighth Circuit. March 8, 1919.)

No. 5200.

1. REFORMATION OF INSTRUMENTS ⇨17(1)—MISTAKE—INTEREST IN LAND.

A mutual mistake as to the interest of the grantor in the land is a mistake of fact, not of law, though induced by a mistaken view of the law.

2. REFORMATION OF INSTRUMENTS ⇨20—FRAUD OF GRANTEE—INTEREST CONVEYED.

Where an Indian, who could not read English, mistakenly believed that he had only a one-half interest in the land conveyed, and was confirmed in that belief by statements of the grantee, equity will grant relief to the grantor from a deed conveying the entire estate.

3. REFORMATION OF INSTRUMENTS ⇨16—INTENT OF PARTIES—INTEREST CONVEYED.

Where both parties to a deed believed that the grantor owned only a one-half interest in the land, and the grantee informed the grantor, who could not read English, that the deed conveyed only a one-half interest, the grantor is entitled to relief against the deed, which in terms conveyed the entire interest in the land.

4. EQUITY ⇨262—MOTION FOR JUDGMENT ON PLEADINGS.

Where a grantor is entitled to have a deed conveying a tract of land reformed, because of mutual mistakes and misrepresentations by the grantee, so as to convey only a one-half interest, a cross-bill in a suit to quiet the title by subsequent grantees, who were also grantees from the alleged husband of grantor's daughter, alleging that the daughter was not legally married, so that the grantor inherited the entire interest, raised an issue of fact, and it was error to give judgment against him on the pleadings.

5. EQUITY ⇨262—JUDGMENT ON PLEADINGS.

In a suit to quiet title, where the defendants filed a cross-bill to reform a deed, answers to the cross-bill, alleging plaintiffs to be bona fide purchasers, allege an affirmative defense, which must be proved, and do not entitle plaintiffs to judgment on the pleadings.

Hook, Circuit Judge, dissenting in part.

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

Suit by W. A. Kunkle and others against Tucker Barnett and others to quiet title to land. Decree for plaintiffs, and defendants appeal. Reversed, with directions.

Lewis C. Lawson, of Holdenville, Okl., for appellants.

A. A. Davidson, of Tulsa, Okl. (P. C. West, R. S. Sherman, Grey Moore, and J. A. Veasey, all of Tulsa, Okl., and John B. Patterson, of Okemah, Okl., on the brief), for appellees.

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

⇨For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Rehearing denied May 24, 1919.

AMIDON, District Judge. Annie Bird, a full-blood Creek citizen, died in September, 1909, intestate and without issue, seized of the lands in controversy as her allotment. She left surviving her Tucker Barnett, her father, an alleged husband, Jimmie Bird, with whom she had lived for years, and a sister, Maggie Harjo.

January 26, 1910, Tucker Barnett conveyed the land by warranty deed to one Lake Moore, under whom plaintiffs claim.

On January 11, 1913, Jimmie Bird, the alleged husband of Annie Bird, conveyed the land by quitclaim deed to one Litchfield, from whom plaintiffs afterwards obtained title.

This suit was brought by plaintiffs Kunkel and the Prairie Oil & Gas Company against Tucker Barnett, Maggie Harjo, and others to quiet their title to the land. Defendants answered, and also filed a cross-bill, setting up claims to the land as heirs of the allottee, and alleging that Jimmie Bird was not her lawful husband, because at the time of his marriage to her, and at the time of her death, he had a former wife living from whom he had not been divorced. They also alleged that the estate of Annie Bird was an inheritance from her parents, who were duly enrolled citizens of the Creek Nation, and therefore the land reverted to them in equal shares, under the rule in *Shulthis v. McDougal*, 170 Fed. 529, 95 C. C. A. 615; so that Tucker Barnett, the father, would take a half interest, and the other half would pass to Maggie Harjo as the sole lineal heir of her mother, to whom it would have passed if the mother had been living.

The cross-bill also alleged that the deed from Barnett to Moore was void, because it conveys the entire estate, when it was the intent of Barnett that it should convey only a half interest. It is charged that Moore, at the time the deed was executed, expressly represented to the Indian that he owned only a half interest and that the deed conveyed only a half interest, and that the Indian was unable to read and had no independent advice, but acted wholly upon Moore's statement.

To this cross-bill complainants filed answers setting up, among other things, that they were bona fide purchasers for value.

On the case being called for trial, plaintiffs moved for judgment on the pleadings, which motion was sustained, and a decree entered dismissing the cross-bill on the merits, and establishing plaintiff's title. To review that decree defendants bring the present appeal.

The case was greatly complicated at the time the pleadings were drawn, and the trial had in the lower court, by uncertainty as to whether the inheritance from Annie Bird was controlled by the rule in *Shulthis v. McDougal*, 170 Fed. 529, 95 C. C. A. 615, or by the statute of inheritance of Oklahoma. Section 8418 of the Revised Laws of Oklahoma for 1910. Since the decree here under review was made, that uncertainty has been settled by the decision of the Supreme Court in *Jefferson v. Fink*, 247 U. S. 288, 38 Sup. Ct. 516, 62 L. Ed. 1117. It is there held that the inheritance is controlled by the statute of Oklahoma, which provides as follows:

"If the decedent leave no issue, the estate goes one-half to the surviving husband or wife, and the remaining one-half to the decedent's father or mother, or, if he leave both father and mother, to them in equal shares. * * *

If decedent leave no issue, nor husband nor wife, the estate must go to the father or mother, or if he leave both father and mother, to them in equal shares."

Under this statute, if Jimmie Bird was the husband of Annie Bird, the inheritance passed one-half to him and one-half to the father, Tucker Barnett. If Jimmie Bird was not her husband, then the entire estate passed to Tucker Barnett.

Under this law Maggie Harjo took no interest in the property, and is out of the case, except to the extent that her asserted interest at the time the deeds were made may be considered in determining the belief under which Moore and Barnett acted at the time the deed was signed.

Under the decision in *Jefferson v. Fink*, Barnett was the owner of the entire estate, in case Jimmie Bird was not the lawful husband of Annie Bird at the time of her death. Whether he was such husband involves an inquiry into questions of fact, and possibly as to what law controls in determining family status among the Indians of Oklahoma. Barnett was entitled to a trial upon that issue, unless he is precluded by his deed. The averments of the cross-bill are imperfect, but they are sufficient as against a motion for judgment upon the pleadings.

In our judgment he is entitled to relief against the deed upon either of three grounds:

[1] 1. The deed was given under a mutual mistake of both grantor and grantee as to the extent of Barnett's interest in the land, they both believing that he had only a half interest. Looking at both the bill and cross-bill, as we must, Moore must have believed that Barnett owned a half interest and Jimmie Bird a half interest; while Barnett must have believed that he and Maggie Harjo each owned a half interest. A mistake as to the extent of a party's interest in land is a mistake of fact and not of law, although it may be induced by a mistaken view of the law. *Pomeroy's Equity Jurisprudence* (4th Ed.) § 849. The rule is there stated as follows:

"Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, or estates, either of property or contract, and enters into some transaction, for the purpose of affecting such assumed rights, interests or estates, equity will grant its relief defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact."

This rule was expressly approved by this court in *Order of United Commercial Travelers v. McAdam*, 125 Fed. 358, 61 C. C. A. 22, and accurately states the law both in this country and in England.

[2] 2. The deed was given under a mistake by Barnett, as to the extent of his interest, which mistake was aided and confirmed by the statement of Moore that Barnett owned only a half interest. Considering the relative knowledge and ability of the parties to judge of such matters, this statement of Moore would constitute such an equitable circumstance as would justify granting relief to Barnett. *Pomeroy's Equity Jurisprudence*, § 847, and the numerous authorities there cited.

[3] 3. At the time the deed was signed it was the belief of both parties that Barnett was the owner of only a half interest, and that

was all either party intended to convey. The deed, therefore, fails to express the real contract between the parties; and it would be a fraud to permit Moore, who prepared it and is charged in the cross-bill to have represented to the Indian, who could not read English, that it conveyed only a half interest, to hold the entire estate, if it should turn out that Barnett was in fact the owner of the entire estate at the time the deed was given. *Carrell v. McMurray* (C. C.) 136 Fed. 661; *Walden v. Skinner*, 101 U. S. 577, 25 L. Ed. 963; *Snell v. Insurance Co.*, 98 U. S. 85, 25 L. Ed. 52; *Medical Society v. Gilbreth* (D. C.) 208 Fed. 899; *Phillipine Sugar Co. v. Phillipine Islands*, 247 U. S. 385, 389, 38 Sup. Ct. 513, 62 L. Ed. 1177; *Pomeroy*, § 845.

[4] It seems clear, therefore, that Barnett, as against Moore, is entitled to a reformation of the deed, so that it will convey only a half interest, provided Jimmie Bird was not the lawful husband of Annie Bird. And as to the latter issue, as well as the issues relating to the giving of the deed, he was entitled to a trial upon the facts, and it was error to give judgment against him upon the pleadings.

[5] We are aware that the defendants Kunkle and the Prairie Oil & Gas Company claim to be good-faith purchasers. That, however, is an affirmative defense, and must be proven by them. *Wright-Blodgett Co. v. U. S.*, 236 U. S. 397, 35 Sup. Ct. 339, 59 L. Ed. 637; *Northern Colorado Coal Co. v. U. S.*, 234 Fed. 34, 36, 148 C. C. A. 50.

The case was greatly confused in the pleadings and arguments at the time it was before the trial court, because of uncertainty as to whether the inheritance was controlled by the rule in *Shulthis v. McDougal* or by the statute of Oklahoma. All that confusion has now been cleared up by the decision of the Supreme Court in *Jefferson v. Fink*. It may be that the pleadings ought to be reframed, so as to present the issue as it now exists. If so, the trial court will be at liberty to deal with any such matter in a way to promote a fair trial of the case upon the merits.

The decree is reversed, and the trial court is directed to proceed with the suit in accordance with the views here expressed.

HOOK, Circuit Judge. I do not think the pleadings as presented to the trial court and to us upon the record entitle appellant Barnett to a trial of the question whether he had a larger estate than the one he intended to convey.

AGGERS v. SHAFFER et al.

(Circuit Court of Appeals, Eighth Circuit. February 25, 1919.)

No. 4940.

1. COURTS \Leftrightarrow 312(1)—JURISDICTION OF FEDERAL COURTS—SUIT BY ASSIGNEE—“CHOSE IN ACTION.”

Under the law of Oklahoma an oil and gas lease of the ordinary kind gives the lessee a present vested interest in the premises, and a suit by his assignee to protect his rights thereunder is not one on a “chose in action,” within Judicial Code, § 24 (Comp. St. § 991), in which he must show diversity of citizenship between his assignor and defendants to give a federal court jurisdiction.

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

2. MINES AND MINERALS \Leftrightarrow 79(6)—OIL LEASE—FORFEITURE.

An oil and gas lease requiring quarterly payments of rental until development work was begun, but not providing for forfeiture, nor making time of its essence, *held* not forfeited by a slight delay in making a payment through mistake.

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

Suit in equity by Charles B. Shaffer against W. A. Aggers and others. Decree for complainant, and defendant Aggers appeals. Affirmed.

For opinion below, see 241 Fed. 139.

Joseph C. Stone, of Muskogee, Okl. (Edward H. Chandler, Farrar L. McCain, John B. Meserve, and Ralph W. Garrett, all of Tulsa, Okl., Charles A. Moon, of Muskogee, Okl., and Francis Stewart, of Kansas City, Mo., on the brief), for appellant.

George S. Ramsey and Malcolm E. Rosser, both of Muskogee, Okl. (Edgar A. De Meules and Villard Martin, both of Tulsa, Okl., and J. Berry King, of Muskogee, Okl., on the brief), for appellee Shaffer.

John Devereux, of Tulsa, Okl. (F. B. Dillard and Bird McGuire, both of Tulsa, Okl., on the brief), for appellees other than Shaffer and Hyer.

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

PER CURIAM. This is a suit by Charles B. Shaffer, the assignee of an oil and gas lease of land in Creek county, Okl., against W. A. Aggers and others, to cancel subsequent leases, to enjoin the defendants from interfering with him in the enjoyment of his lease, and for other relief. Upon final hearing the plaintiff, Shaffer, was awarded a decree (241 Fed. 139), and the defendant Aggers, a subsequent lessee, appealed.

The lease was for the term of five years and as much longer as oil or gas was found in paying quantities. The lessee paid the lessors \$120 as consideration at the execution of the lease and contracted to commence a well on the premises within 12 months or thereafter

pay the lessors a rental of \$120 per annum, quarterly in advance, until the well was commenced. If a well was driven and oil or gas found, the lessors were to receive substantial returns therefrom. The lessee had the right at any time to surrender the lease for cancellation upon paying the lessors \$1, provided he exercised it before bringing any suit or action to enforce its terms.

[1] The appellant contends that the trial court did not have jurisdiction of the suit. The ground of jurisdiction was diversity of citizenship, and such diversity existed between the plaintiff, on the one side, and the defendants, including the appellant, on the other. But it is urged that plaintiff's suit was for the specific performance of an optional unilateral contract, was therefore to recover upon a chose in action, within the meaning of section 24, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091 [Comp. St. § 991]), and, since the citizenship of plaintiff's assignor was not disclosed, the jurisdiction of the court below did not appear. It is enough to say of this that by the law of Oklahoma, where the land is, a lease like that held by plaintiff grants a present vested interest in the premises (*Northwestern Oil & Gas Co. v. Branine*, 175 Pac. 533; *Rich v. Doneghey*, 177 Pac. 86), and that the right he sought to protect and enforce is not a chose in action within the meaning of section 24 of the Judicial Code. The citizenship of plaintiff's assignor was therefore immaterial. The authority of *Brown v. Wilson*, 160 Pac. 94, L. R. A. 1917B, 1184, relied on for a contrary conclusion, is destroyed by the later cases above cited. Upon the nature of such leases, see *Guffey v. Smith*, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856, held in the *Rich Case*, supra, to be substantially in accord with the rule in Oklahoma; also *Kemmerer v. Midland Oil & Drilling Co.*, 144 C. C. A. 154, 229 Fed. 872.

[2] The remaining question is whether plaintiff's lease was forfeited by his failure to pay an installment of rent or delay money, as sometimes called, at the time it was due. There was such a failure, but it was clearly due to an accident or mistake induced by a confusion for which one of the lessors was primarily responsible. The lease provided that all payments should be made directly to the lessors or deposited to their credit in a designated bank in Oklahoma; also that the lessee should not be bound by any change in the ownership of the land, except upon notice with proof of the conveyance. The plaintiff, as assignee of the lease, adopted the course of making payments to the bank. After he had promptly made eight quarterly payments, covering a period of two years, he was informed that the lessors had sold the land in two parcels to separate grantees. One parcel was sold to W. J. Blaine and wife, and the proportion of annual rental attributable to it was \$80, or \$20 quarterly. This part of the leased premises only is in controversy in this suit.

One of the lessors, H. L. Marks, claimed to be the exclusive agent of the Blaines to receive their part of the rental payments. Marks also had a controversy with the Oklahoma bank, where the payments had been made, about matters for which the plaintiff was not responsible, and he desired a change to a bank in Kansas. As the time for the ninth quarterly payment was approaching there was considerable cor-

respondence between the plaintiff and Marks about the change in titles, the authority of the latter to represent the Blaines, the furnishing of proof of the conveyances, and the change of the depository bank. The ninth payment was made in time to the Kansas bank for the credit of Marks as agent of the Blaines. Two weeks before the tenth payment became due plaintiff sent a draft for \$20, the correct amount, to the Kansas bank, but made a mistake in his instructions regarding the credit. He directed that the amount be credited to Blaine, instead of to Marks, as agent of Blaine and wife. The bank did not know Blaine and held the draft without notifying the plaintiff. The mistake was discovered eight days after the payment was due. Plaintiff immediately tried to correct it, but Marks instructed the bank to decline to receive the payment on his account and refused payment himself. He orally asserted a forfeiture of the lease and afterwards gave plaintiff written notice to that effect. Thereafter the appellant, Aggers, with information of the circumstances, secured his lease, and other leases were given.

The lease under which plaintiff claims contains no forfeiture clause, nor provision making the time of rental payments of the essence of the contract. Plaintiff's interest in the premises was a substantial one; it was not based on a mere unilateral option, subject to the strictest construction, and forfeitable for the slightest deviation. The failure to pay at the precise time due was a pure accident or mistake. It was not intentional, nor in conscious disregard of the rights of the lessors or their grantees. The injury to the latter was not appreciable. Their position was technical and without substantial equity. Moreover, the change of the place of payment from Oklahoma to Kansas was at their instance and for their accommodation. The lease did not require plaintiff to assent to it, and had he continued making payments to the bank in Oklahoma its long familiarity with the transaction might well have resulted in a timely discovery of the mistake.

A point is made that plaintiff had no right to pay by draft. That was for the bank to determine, and it made no objection on that account. The lessors or their grantees were concerned with the credit on the bank's books, not as to how the funds were sent. Besides, the medium employed at the time in question was in accord with the prior custom.

The decree is affirmed.

EASTERDAY et al. v. McCARTHY, United States Marshal.
(Circuit Court of Appeals, Second Circuit. February 13, 1919.)

No. 162.

1. CRIMINAL LAW ⇨108(1)—CONSPIRACY—VENUE—OVERT ACT.

The venue of conspiracy may be laid wherever an overt act is committed, under Criminal Code, § 37 (Comp. St. § 10201), making the commission of an overt act necessary to the offense, as well as at common law, though some of the indicted defendants were never in that district.

2. DISTRICT OF COLUMBIA ⇨4—APPLICATION OF CRIMINAL CODE.

The Criminal Code is a general act, and is coextensive with federal jurisdiction, unless otherwise specifically directed, and applies to the District of Columbia.

3. CONSPIRACY ⇨28—VIOLATION OF CODE OF DISTRICT OF COLUMBIA—"OFFENSE AGAINST UNITED STATES."

A conspiracy to violate Code of Law D. C. §§ 869a, 869b, enacted by Congress March 1, 1909, is a conspiracy to commit an offense against the United States, within Criminal Code, § 37 (Comp. St. § 10201).

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Offense against the United States.]

4. CRIMINAL LAW ⇨242(2)—FEDERAL PRACTICE—REMOVAL OF ACCUSED.

Rev. St. § 1014 (Comp. St. § 1674), authorizing the removal of persons indicted for offenses to the district where trial is to be held, authorizes removal to the District of Columbia.

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

Petition by Wilen W. Easterday and others against Thomas D. McCarthy, as United States Marshal, for writs of habeas corpus. From orders of the District Court (250 Fed. 800), discharging writs previously issued, petitioners appeal. Affirmed.

Geo. A. Knobloch, of New York City, for appellant Vause.

Walter E. Warner, of New York City, for appellants Easterday, Wheeler, and Kinnier.

Francis G. Caffey, U. S. Atty., and Benjamin P. De Witt, Asst. U. S. Atty., both of New York City, for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. By the Code of Law of the District of Columbia, §§ 869a, 869b, enacted by Congress March 1, 1909 (35 Stat. 670, c. 233), it is a criminal offense to keep a "bucket shop" within the District. No statute, applicable solely to the District creates or defines the offense of conspiracy. The relators appellants may (for purpose of argument) be assumed never at any time to have been within said District.

The Criminal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1088), does create and define the crime of conspiracy in its section 37 (Comp. St. § 10201), and therein declares two or more persons guilty of the crime, if they "conspire * * * to commit any offense against the United States."

The grand jury of the District found indictment against those four appellants for a conspiracy to keep a bucket shop in Washington, setting forth as overt acts transactions occurring in that city, and constituting "bucketing," as defined or described in *Joslyn v. Downing*, 150 Fed. 318, 80 C. C. A. 205, and *Bailey v. Phillips* (C. C.) 159 Fed. 537.

The accused were arrested in New York on warrants charging a violation of Criminal Code, § 37, and held under section 1014, Revised Statutes (Comp. St. § 1674), for removal to the District of Columbia, whereupon they applied for these writs, because (1) they had never been in the District, (2) the indictment charged no crime against the United States, and (3) therefore section 1014 Revised Statutes was not applicable. These propositions evince more boldness than merit.

[1] 1. The doctrine of *Rex v. Bresac*, 4 East, 164, to the effect that venue in conspiracy may be laid wherever an overt act is committed, has long received general acquiescence (*Bishop New Criminal Procedure*, vol. 1, § 61; *Wharton Criminal Law* [10th Ed.] vol. 2, § 1397), and the decision was approved in *Hyde v. United States*, 225 U. S. 365, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614. The construction of the conspiracy section (37) there announced, making the commission of an overt act necessary to constitute the statutory offense, does not impugn the rule of common law, and does make it (if possible) clearer than before that one who, with others like minded, causes an overt act to be committed in any jurisdiction, is liable to indictment for conspiracy in that jurisdiction. See, also, *Ex parte Hoffstot* (C. C.) 180 Fed. 240, affirmed 218 U. S. 665, 31 Sup. Ct. 222, 54 L. Ed. 1201.

[2] 2. The assertion that no offense is charged against the United States demands assent to at least one of two propositions: Either keeping a bucket shop in Washington is not a federal crime, or the Criminal Code, and therefore section 37, has no application to the District of Columbia.

The District is and always has been a part of the United States (*Downes v. Bidwell*, 182 U. S. 260, 21 Sup. Ct. 770, 45 L. Ed. 1088), under the exclusive jurisdiction of Congress (*Shoemaker v. United States*, 147 U. S. 298, 13 Sup. Ct. 361, 37 L. Ed. 170). Any and every criminal offense is a violation of sovereignty, and there is no other sovereign in or over the District, except the United States.

The Criminal Code is a general act, and is therefore coextensive with federal jurisdiction, unless otherwise specifically directed. It is therefore plainly applicable to the District, as was assumed in the *Hyde Case*, supra. And as to the preceding statute—Revised Statutes, § 5440 (Comp. St. § 10201)—see *Crawford v. United States*, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392.

[3] That an offense against the District Code of Law is an offense against the United States necessarily flows from the fact that it was the nation through its Congress that made the law and denounced the crime.

[4] 3. That Revised Statutes, § 1014, is applicable to removals to the District of Columbia, is too well settled to justify discussion. *Benson v. Henkel*, 198 U. S. 1, 25 Sup. Ct. 569, 49 L. Ed. 919; *United*

States v. Campbell (D. C.) 179 Fed. 762; United States v. Wimsatt (D. C.) 161 Fed. 586. Anything to the contrary—In re Dana (D. C.) 68 Fed. 886—must be regarded as error.

Orders affirmed.

In re WALSH.

(Circuit Court of Appeals, Seventh Circuit. February 19, 1919.)

No. 2692.

1. BANKRUPTCY ⇔413(½), 418(1)—DISCHARGE—OBJECTION BY STRANGERS.
As a discharge in bankruptcy operates merely to extinguish creditors' claims, no one other than a creditor can be a party in interest, and, under well-recognized rules, strangers to the proceeding cannot be heard to object, particularly in view of Bankruptcy Act, § 14b (Comp. St. § 9598) and General Orders in Bankruptcy, rule 32 (18 Sup. Ct. ix).
2. BANKRUPTCY ⇔415(2)—DISCHARGES—POWER OF REFEREE—STATUTE.
Under Bankruptcy Act, § 38 (Comp. St. § 9622), the referee in bankruptcy has no power to interfere in regard to the discharge of the bankrupt, though the court, notwithstanding the section, may refer matters arising out of the bankrupt's application for discharge to the referee as a special master.
3. BANKRUPTCY ⇔415(3)—DISCHARGE—OBJECTIONS BY COURT.
The District Court should not on its own motion interpose objections to a bankrupt's discharge, since it sits to try, not to create, the issue.
4. BANKRUPTCY ⇔404(1)—DISCHARGE—RIGHT OF BANKRUPT.
Discharges in bankruptcy should follow as a matter of right, where no objections are filed by the creditors or trustee, the parties in interest, to application seasonably made.

Appeal from the District Court of the United States for the Eastern District of Wisconsin; Ferdinand A. Geiger, Judge.

In the matter of Frank E. Walsh, bankrupt. From an order denying his application for discharge, the bankrupt appeals. Order reversed, with directions to enter order granting discharge.

Frank P. Burke, of Milwaukee, Wis., for appellant.

Before BAKER and EVANS, Circuit Judges, and FITZHENRY, District Judge.

EVANS, Circuit Judge. The order denying bankrupt's application for a discharge of debts was made without any objection from any creditor. This is assigned as error.

The referee, pursuant to the requirements of a rule in force in the district wherein these proceedings arose, filed a certificate, the material part of which reads as follows:

"He [bankrupt] has committed none of the offenses and done none of the acts prohibited in subdivision "b" of section 14 of said act [Act July 1, 1898, c. 541, 30 Stat. 544 (Comp. St. § 9598)] except that he has committed an offense punishable by imprisonment as in said Bankruptcy Act provided, to wit: He knowingly and fraudulently made a false oath in this proceeding on the 27th day of April, 1918, swearing that Schedule B attached to his petition herein was a true statement of all his estate; whereas such schedule

was false, in that it did not mention a diamond ring of the value of \$94 owned by him, and knowingly and fraudulently omitted therefrom."

Upon this certificate, and without other hearing, bankrupt was denied a discharge.

[1] As a discharge operates merely to extinguish creditors' claims, no one other than a creditor can be a party in interest. Under well-recognized rules of pleadings, strangers to the proceeding cannot be heard to object. This theory finds support in the statute. Section 14b reads:

"The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant, unless," etc.

The right of the trustee to file objections is further limited by a later clause in the same subdivision reading as follows:

"Provided, that a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose."

This conclusion is further confirmed by an examination of rule 32 of the General Orders in Bankruptcy (18 Sup. Ct. ix) announced by the Supreme Court, and which we think inferentially limits the right to file objections to creditors.

The foregoing citations would seem to deny to referees the right to interpose objections to discharges, as well as clearly recognizing the right of a bankrupt to a discharge, except in those cases where objections are filed and after full hearing the court determines that one of the six specified grounds for refusing a discharge exists.

[2] But any doubt as to the power of the referee to interfere in matters of discharge is removed by section 38 of the act (Comp. St. § 9622), which reads:

"Referees respectively are hereby invested * * * with jurisdiction to * * * (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy," etc.

While the court may, notwithstanding this section, refer matters arising out of bankrupt's application for discharge to the referee, the latter acts only as a special master in such instances and not as referee. Supreme Court rule 12, subd. 3 (32 Sup. Ct. viii).

[3] Nor should the court on its own motion interpose objections to the discharge; for courts do not create issues. They sit to try and determine them upon presentation of the evidence by the parties interested.

[4] We conclude that in all applications seasonably made, where no objections are filed, the discharges should follow as a matter of right.

The order denying bankrupt's application for a discharge is reversed, with directions to enter an order granting the discharge.

INTERSTATE COMPRESS CO. v. AGNEW.

(Circuit Court of Appeals, Eighth Circuit. March 29, 1919.)

No. 5012.

APPEAL AND ERROR ⇄ 169—SCOPE OF REVIEW—ISSUES NOT HEARD BELOW.

On writ of error an appellate court can only review those issues which were heard in the court below.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Action at law by J. W. Agnew against the Interstate Compress Company. Judgment for plaintiff, which on error was reversed. 255 Fed. 508, — C. C. A. —. On petition for rehearing. Denied.

James R. Keaton, of Oklahoma City, Okl. (Frank Wells and David I. Johnston, both of Oklahoma City, Okl., on the brief), for plaintiff in error.

Everett Petry, of Tulsa, Okl., for defendant in error.

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

TRIEBER, District Judge. Defendant in error in his petition for rehearing calls our attention to the act of the state of Oklahoma, known as the Uniform Warehouse Receipts Act, of March 30, 1915 (Laws 1915, c. 288), and the fact that a number of the bales of cotton destroyed had been delivered to the plaintiff in error for storage thereafter.

We did not overlook that fact, but the effect of this act of 1915 was not raised at the trial in the court below. There was no reference to it in the charge to the jury, nor did either party request any instructions as to the liability of the plaintiff in error under that act. The court in its charge declared the conditions in the warehouse receipts void as being against the public policy of the state, evidently in deference to the opinion of the Supreme Court of Oklahoma in *Inland Compress Co. v. Simmons*, 159 Pac. 262. The decision in that case was not based on the statute now invoked, but on a general proposition of law.

On writ of error an appellate court can only review those issues which were heard in the court below. It is not permissible for one to ask the appellate court to dispose of the case on a theory different entirely from that on which the case was tried in the trial court.

Counsel in their brief only called attention to the act of 1915 for the purpose of showing what the public policy of the state is. He stated in his brief:

"As further evidence of the tendency of public policy, a large number of the states of the Union, including Oklahoma, have adopted what is known as the 'Uniform Warehouse Receipts Act,' prepared by the American Bar Association, which is an effort to codify the common law thereon, and adopt the best and soundest rule in the event of variance of the authorities."

Nothing that was said in our opinion prevents the defendant in error from raising that question by proper pleadings when the cause is

retried. The reversal by this court was "with instructions to grant a new trial and proceed in conformity with this opinion."

In order that there may be no doubt as to what we have decided, we now state that the question of the liability of the plaintiff in error for the loss of cotton delivered for storage to the plaintiff in error after March 30, 1915, is not foreclosed by anything said in our opinion.

The motion for rehearing is denied.

STRYKER DEFLECTOR CO., Inc., v. PERRIN MFG. CO. et al.

(Circuit Court of Appeals, Second Circuit. February 13, 1919.)

No. 146.

1. PATENTS ⇄288—JURISDICTION—PATENT INFRINGEMENT—AGENCY.

Evidence *held* insufficient to show that a jobber handling defendant's article, which it was claimed infringed plaintiff's patent, was the defendant's agent within Judicial Code, § 48 (Comp. St. § 1030), authorizing service upon the infringer's agent in certain cases.

2. PATENTS ⇄288—INFRINGEMENT—JURISDICTION.

If jobbers forwarded orders to their principal in another state and the goods were shipped direct by the principal, the sale is consummated outside the state, and there is no patent infringement within the district under Judicial Code, § 48 (Comp. St. § 1030), conferring jurisdiction in districts where the infringement is committed.

3. COURTS ⇄276—JURISDICTION—WAIVING OBJECTION.

Where a preliminary motion raising the question of jurisdiction was denied, an answer, specifically reserving the objections previously made to the court's jurisdiction, does not waive the objection to the venue.

4. PATENTS ⇄328—VALIDITY—INFRINGEMENT.

Stryker patent, No. 1,148,128, claims 1 and 2, for incandescent electric light deflectors, *held* valid and infringed.

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

Suit by the Stryker Deflector Company, Incorporated, against the Perrin Manufacturing Company, Nelson J. Quinn, E. L. Allen, and Asch & Co., Incorporated. Decree reversed, and complaint dismissed as to the first three named defendants, and affirmed as to Asch & Co., Incorporated.

This appeal comes here from a decree of the District Court for the Southern District of New York sustaining patent No. 1,148,128, for a deflector for electric lamps; patent granted July 27, 1915. Appellee is the assignor of the patent. It is designed for use in automobile headlights. Below, there was a decree for appellee sustaining the validity of the patent, finding infringement, and the decree provided for an injunction and an accounting. Defendants appeal.

Goldsmith & Fraenkel, of New York City (Lucius E. Varney, of New York City, of counsel), for appellants.

Martin B. Cohn, of New York City (Thomas E. Boyd, of Buffalo, N. Y., of counsel), for appellee.

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

MANTON, Circuit Judge. At the hearing, the appellants appeared and sought an adjournment, which was refused. The appellants thus defaulted, and the trial proceeded. Appellee put in its proof, and a decree was entered, from which this appeal is taken. At the outset, the appellants challenge the jurisdiction of the District Court for the Southern District of New York as to the appellants Perrin Manufacturing Company, Nelson J. Quinn, and E. L. Allen. Quinn and Allen traded as a copartnership under the name of Perrin Manufacturing Company. The former resides in Ohio and the latter in Michigan. Section 48 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1100 [Comp. St. § 1030]), re-enacting the act of March 3, 1897, c. 395, 29 Stat. 695, provides:

"In suits brought for the infringement of letters patent" in the District Courts of the United States, "the District Courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought."

[1, 2] It is asserted that neither Quinn nor Allen fall within the provisions of the above section of the Judicial Code. Service was made upon the appellants named by serving P. M. Asch, secretary of Asch & Co., Incorporated, at No. 16 West Sixty-First Street in New York City. The marshal's return to the subpoena shows that the service was made upon Asch as representative for the said appellants. The act of infringement in the Southern district consists of a sale by Asch & Co., Incorporated, at its place of business No. 16 West Sixty-First street. Unless Asch or Asch & Co., Incorporated, is in fact and in law the agent of the copartnership, the District Court had no jurisdiction *Westinghouse Electric Co. v. Stanley Electric Co.* [C. C.] 116 Fed. 641. It appears, when Mr. Boyd entered the office of Asch & Co., Incorporated, and purchased the device which is said to infringe the Stryker patent, he asked the clerk in charge if Asch & Co., Incorporated, were the New York representatives of the Perrin Manufacturing Company of Detroit, Mich., and the man in charge stated that they were. Apart from this, there is the correspondence in the record between it and Taylor & Co. of Buffalo. There were three letters signed by Asch & Co., Incorporated, and a fourth by the Perrin Manufacturing Company, the latter dated at Detroit on a letter head indicating a New York address, as well as one in San Francisco, Dallas, and Toronto. The New York address appears to be the former address of Asch & Co., Incorporated, but the most these letters suggest was that Taylor & Co. were handling headlights of the Perrin Manufacturing Company, which were purchased through Asch & Co., and dealt with a question

of freight allowance. They also contained an assurance that the Perrin Manufacturing Company would protect Asch & Co., Incorporated and their customers on the sales of the Perrin "No-Glare"; in other words, that the Perrin Manufacturing Company was standing behind Asch & Co., Incorporated, the jobber, in handling the Perrin "No-Glare."

We do not think that this circumstance of the manufacturer protecting the jobber or a prospective customer can by any stretch create a presumption that the manufacturer and jobber are one and the same person or firm. While the record contains only the appellee's proof, and we must examine this question in light of the record, we believe that the proofs indicate that Asch & Co., Incorporated, was not the agent of the Perrin Manufacturing Company. Asch & Co., Incorporated's, letter heads indicate no relation of agency for the Perrin Manufacturing Company, nor was there any indication by sign on the office door or otherwise, at the place where Mr. Boyd made his purchase. Therefore the testimony as to agency depends upon the information furnished by the clerk in charge of Asch & Co., Incorporated, at the time of the purchase. The language of the clerk is not inconsistent with a relationship of that of manufacturer and jobber handling the product of the Perrin Manufacturing Company. The guaranty to protect against charges of infringement contained in the correspondence is consistent with the relationship of principal and agent. The burden of proof was upon the appellee before it was entitled to a decree as against these appellants to establish the necessary jurisdictional facts. We are not satisfied it has proven that the act of the single sale of Asch & Co., Incorporated, of the Perrin "No-Glare" shade is sufficient to confer jurisdiction of the District Court as against Quinn and Allen. Indeed, if Asch & Co., Incorporated, were the representatives of the Perrin Manufacturing Company in New York, it may only have meant that they solicited orders and forwarded them to its principal at its home office in another state, and that the goods were shipped direct by the principal. Thus the sale would have been consummated in another jurisdiction, and it would not constitute an infringement of patent within the district so as to confer jurisdiction. *Tyler Co. v. Ludlow-Saylor Co.*, 236 U. S. 723, 35 Sup. Ct. 458, 59 L. Ed. 808.

[3] The question of jurisdiction was raised on a preliminary motion and denied. An answer was filed by the appellants "reserving to themselves the benefit of the objections heretofore taken by them to the sufficiency of process upon them and to the jurisdiction of the court over their persons." By this they reserved the right to urge this objection to the venue, and the objection has not been waived. *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237; *Southern Pacific v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942.

[4] As to Asch & Co., Incorporated, we are of the opinion that the decree below should be affirmed. In concluding thus, we hold that the patent in suit is valid and infringed.

The invention relates to a deflector which is designed most particularly on incandescent electric lights of automobile headlights. Its

object is the production of a deflector, simple and inexpensive in construction, which can readily be applied to and removed from incandescent lights of the types of headlights now in general use. So that only the roadway ahead of the automobile is illuminated to the waist line of a person standing in the street or riding in a car, leaving the space above this line in darkness, thus avoiding dazzling or blinding the eyes of persons by the glare of the headlights. This deflector, which is applied to the lamp bulb, comprises a rear shield of sheet metal having a degree of flexibility and of semiglobular form, so as to embrace and cover parts of the rear side and under side of the globular bulb. It also provides in its rear part an opening which is adapted to receive the shank of the lamp. The front part of the rear shield is so constructed as to form jaws which extend forwardly upwardly beyond the axis of the lamp bulb on diametrically opposite sides thereof, thus causing the rear shield section to grip and embrace slightly more than one-half of the globular form of the lamp. The upper front portions or jaws engage frictionally with the lamp bulb for holding the rear shield section securely on the bulb. In addition to this rear shield section, there may be employed a front shield which is constructed in the form of a cap which engages the central part of the front side of the lamp bulb and fits over the tip projecting forwardly from this part of the bulb. The front shield section is retained in place on the lamp bulb by connecting its rear edge with the front edge of the rear shield section by means of longitudinal springs arranged on diametrically opposite sides of the shield sections and adapted to engage on the horizontally opposite sides with the lamp bulb. In placing this deflector on the electric light bulb, it is necessary to first slip the rear shield with its opening over the shank of the bulb and spring the foremost parts or jaws over the bulging sides of the bulb and stretch the spring sufficiently to permit of the engagement of the front shield section over the tip of the lamp, after which they are reliably held in place and prevented from becoming detached. This provides for a removable shade as occasion requires. The effect is to provide for the control of the rays of light as above indicated, the head of the automobile is illuminated high enough for all practical purposes to insure safety of travel, while the space above the axis of the lamp is maintained in substantial darkness, thereby avoiding the dazzling glare on the eyes of persons in front of the automobile.

Claims 1 and 2 of the patent in suit, which are relied upon principally by appellee, are as follows:

"1. A deflector for incandescent electric lamp bulbs comprising a rear shield section adapted to cover parts of the rear and underside of the bulb and an independent front section adapted to cover the central part of the front side of the bulb and connected with said rear section.

"2. A deflector for incandescent electric lamp bulbs comprising a rear shield section adapted to cover parts of the rear and underside of the bulb and a front section adapted to cover the central part of the front side of the bulb, and a flexible connection between said front and rear shield sections."

In the effort to defeat the appellee, we are referred to the prior art, Lennon's patent No. 1,137,221 and the McLean patent, No. 1,146,269. These patents were not part of the prior art when Stryker filed his

application on March 29, 1915. Both the Lennon and McLean applications were pending at the time, but we think that the test of priority of application does not apply, for the reason that we are of the opinion that Stryker has discovered a different invention from either Lennon or McLean, and that they are therefore not rival inventors. The Lennon patent, No. 1,130,180, was part of the prior art when Stryker filed his application, but we do think that there is a difference and an improvement in the Stryker patent, for the cap on the end effected a change, and some of the rays of the lower hemisphere were allowed to reach the road. The Lennon patent, No. 1,130,180, provides for a deflector where the body portion is made of one piece, and not of two pieces which are connected with each other and which engage the front and rear sides of the bulb. It does not present two distinct sections as does the patent in suit.

In the McLean shield deflector, the shading is done by applying light-intercepting elements permanently to the bulb, and in the patent in suit the shading is done by two interconnecting shades which are removable from the bulb.

We are of the opinion that the prior art does not invalidate the patent in suit; also that claims 1 and 2 are infringed. The active infringement being proven by the sale of Asch & Co., Incorporated, we shall affirm as to it. The decree will therefore be modified by reversing as to Perrin Manufacturing Company, Quinn and Allen, and the complaint dismissed and affirmed as to Asch & Co., Incorporated.

GENERAL ELECTRIC CO. v. CONTINENTAL FIBRE CO.

(Circuit Court of Appeals, Second Circuit. February 13, 1919.)

No. 174.

1. PATENTS ⇨75—PRIOR PUBLIC USE—EXPERIMENTAL USE.

The use of a number of gears made of compressed cotton fibers in a plant where the inventor of such gears was employed for experiment, and to convince skeptical superiors of their merit, is not a public use which will defeat the right to a patent on an application filed more than two years after the first gear was constructed, but less than one year after such gears were on the market.

2. PATENTS ⇨110—APPLICATION—CONTINUANCE OF FORMER APPLICATION.

An application for a patent for gears made of compressed textile material, the specific material used being cotton batting, describes the same invention as a prior pending application describing the material as compact layers of textile fibers; and, there being no showing of their intention to abandon the original invention, the subsequent application can be treated as a continuation of the former.

3. PATENTS ⇨69—ANTICIPATION—VAGUE PUBLICATION.

A publication that another firm had sent out a catalogue of a silent gear made of fiber of prepared cotton is too vague to enable an expert to carry the device into practical use, and does not invalidate a subsequent patent for a gear made of compressed cotton fibers.

4. PATENTS ⇄323—CONSTRUCTION—LIMITATION OF CLAIMS—NOVEL INVENTION.

The use of compressed textile fabrics, unchanged by vulcanizing, for gears, was fundamentally new in the gear art, though a similar use had been made in other arts. and the Miller patent No. 1,061,770, for gear composed of that material, is entitled to the advantages of broad equivalence flowing from absolute novelty of invention.

5. PATENTS ⇄328—INFRINGEMENT—COMPRESSED FIBER GEARS.

The Miller patent, No. 1,061,770, for a gear of compressed textile fabrics and means for holding the material in a compressed state, is infringed by a gear composed of fibers held in place by the patented composition bakelite; since the fundamental merit of the patented gear is the resistance of a large number of fibers within a small space, which is also the fundamental merit of the infringing article.

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

Suit by the General Electric Company against the Continental Fibre Company for infringement of patent. Decree for defendant, and complainant appeals. Reversed and remanded.

Action is upon claims 1, 2, 3, 5, and 6 of patent to Miller dated May 13, 1913, No. 1,061,770.

The subject-matter of the patent is a "gear wheel." Claim 3 is as follows: "A gear composed of compressed spinnable textile fibers and means for holding said material in compressed state."

This claim is typical of all those in suit except No. 6, which is as follows: "A gear having its toothed body portion composed of layers of textile fabric made of spun yarn."

The thing invented by Miller, described in the specification and sold by the plaintiff company, is a gear or cogwheel made of cotton highly compressed and held under compression by metallic end-plates secured by rivets passing through the compressed cotton which provides the teeth. A disc or blank is made in this manner and teeth cut to suit, as has long been the custom in respect of metal cogs.

Miller was in 1908, and long had been, the master millwright of the plaintiff; he recognized, as had many other machinists and inventors, that the desirable qualities of a gear were that it should be strong, durable, tough, elastic, oil and water proof, not subject to atmospheric or thermal changes, not attractive to vermin, and as noiseless as possible.

It was part of his work to watch and overhaul (among others) a machine known as a punch and shear, capable of shearing boiler plates up to 1¼ inches in thickness. He tried every type of gear wheel known, and finally thought of attempting to make one out "of cloth—one morning while I was pulling my clothes on." He thereupon made a gear blank out of a worn-out buffing wheel, a tool composed of layers of cotton or linen canvas; tried it on a small machine; and shortly, out of similar rag-bag material, made a cog which actually drove the above-mentioned punch and shear for several years. Miller communicated what he had done to his superior officer, Mr. Riddell, himself an inventor in this line of mechanics. Plaintiff, as Miller's assignee, filed application for a patent on February 12, 1909.

Contemporaneously Miller made more wheels. They were placed in increasing numbers on tools in plaintiff's factories, and experiments were conducted with textile materials other than woven cotton cloth, with the result that what is commonly known as cotton batting came to be used; and, the value of Miller's gears having been experimentally demonstrated, plaintiff offered them for sale in the latter part of 1910. The public appreciation of the product is sufficiently shown by the growth of sales from 1,570 gears in the year 1911 to annual sales of slightly under 200,000 immediately before

the trial of this cause. It is admitted that Miller's gear possesses all of the desirable qualities hereinabove enumerated.

It is rare that the history and development of any invention is shown so clearly and without any contradiction whatever.

When application was filed in 1909, Miller had not made gears of cotton batting, and, while he fully disclosed the advance embodied in his cotton cogs, he described his new component as consisting of "layers" or "piles" of "textile fabric," and propounded as a typical claim "a gear having a toothed part composed of compacted layers of textile fabric." His application was rejected on references upon which no reliance is now placed. Indeed, it is difficult to understand the office attitude displayed by the file wrapper contents.

On July 26, 1910, the word "fabric" was in some instances amended to "material." But on June 27, 1911, a new application was filed specifically as a continuation of the application of 1909. In all of the claims propounded and finally allowed (except the sixth), the body of the gear was described as of "textile material"; but the sixth claim has from the beginning adhered to the phrase "textile fabric." The words "spinnable textile fibers" came in by amendment as a concession to office opposition which was finally overcome only by appeal to the examiners in chief.

The application of 1911 was filed within a year of the last office action on that of 1909.

Defendant does not manufacture gears, but makes and sells discs capable of being cut into gears by any trained mechanic, which discs are composed of layers of cotton duck impregnated with and surrounded by a substance commercially known as "bakelite." The content of each gear is approximately 60 per cent. cotton duck and 40 per cent. bakelite, which latter is an invention of Mr. L. H. Baekeland, consisting of a mixture of "phenol, or its homologues, and formaldehyde, or its polymers." This mixture, when sufficiently heated, is transformed into "a hard body unaffected by moisture, insoluble by alcohol or acetone, infusible and resistant to acids, alkalies and almost all ordinary reagents." Baekeland patents, Nos. 942,699, 942,852, 949,671, 1,019,406. The production of this hard, infusible, and indecomposable bakelite is hastened, and improved by adding pressure to heat, because pressure hastens the process of hardening and avoids air bubbles. But pressure is not necessary to make bakelite; heat applied to the aforesaid mixture will do it in time. And it is in result the same substance with or without pressure added to the heat.

It is not doubted or denied that defendant's compound of cotton duck and bakelite makes a gear functioning exactly as does Miller's. It is denied that this result is obtained in the same way, for the same reasons, or by substantially the same means.

The court below held the Miller patent valid but not infringed by a cog wheel made of defendant's product. From decree accordingly plaintiff appeals.

Charles Neave, of Boston, Mass., and L. F. H. Betts, of New York City, for appellant.

Kerr, Page, Cooper & Hayward, of New York City (Thomas B. Kerr, of New York City, Vernon E. Hodges, of Washington, D. C., and John C. Kerr, of New York City, of counsel), for appellee.

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

HOUGH, Circuit Judge (after stating the facts as above). In this court some measure of invention in Miller's patent is no longer denied. Nor is it doubted that a cotton-rag gear wheel was made and used in August, 1908, as above set forth.

It is contended:

(1) That a claim for a gear of "spinnable textile fibers," if construed to cover one made of cotton duck, is invalid; because there were

two years of public use prior to the application of June 27, 1911, of Miller's original cotton gear which was composed of a "textile fabric"—a phrase plainly covering cotton duck.

(2) Even if Miller's date of invention be allowed as August, 1908, certain English publications, as early as March 20, 1908, regarding "Unica silent gears made of fiber of prepared cotton," are sufficient evidence of anticipation. And

(3) There is no infringement even of the sixth claim, because defendant's product is not composed of layers of textile fabric, but of bakelite reinforced by such layers, and the completed gear disc is a "solid, hardened, homogeneous mass" wholly different "in nature and attributes" from Miller's collection of fibers held together "by pressure applied externally."

[1] 1. We incline to think that the record does not show two years of public use before June 27, 1911. Any use, public or otherwise, of Miller's reduction to practice largely depended upon the favor with which his device was received by his superior, Mr. Riddell. That gentleman had the conservatism of one who had himself taken out a patent in the same field of art (No. 464,896); and it was not until June of 1909 that he said of Miller's gear:

"We have the goods here (i. e., in the General Electric Works) running every day, giving a practical demonstration, some giving the hardest kind of service."

There were then some 70 or 80 wheels in use, and Mr. Riddell said of them:

"Some of our own engineers and others with whom I have spoken have been inclined to poke fun at the idea. I was myself inclined to be a little skeptical when the matter was first brought to my attention."

Indeed, the general attitude of practical men toward the new departure is well illustrated by a facetious proposal for a "catalogue cover" for Miller's "new process rag pinion," whereby it is stated (with appropriate illustrations) that the raw material is to be obtained from the family wash line, and a branch office established at "Bellevue." We do not think that Miller's invention passed beyond the stage of daring experiment until this attitude of satirical disbelief had been forgotten and the commercial article was offered for sale—an event which did not occur until the fall of 1910.

[2] But irrespective of the foregoing finding, we hold that as matter of law Miller was justified in calling his application of 1911 a continuation of that of 1909. There never was any allowance under the earlier specification. Such decisions as *Weston v. Empire, etc., Co.*, 136 Fed. 599, 69 C. C. A. 329, do not apply. It is not doubted that one application may, under certain circumstances, be a continuation of a prior application (*Model Bottling Co. v. Anheuser*, 190 Fed. 573, 111 C. C. A. 389) and it is not asserted in this instance that there was any abandonment of invention, which is a different thing from abandonment of application (*Western Elec. Co. v. Sperry*, 58 Fed. at page 191, 7 C. C. A. 164.; *Hayes-Young, etc., v. St. Louis, etc., Co.*, 137 Fed. 80, 70 C. C. A. 1).

We doubt not that Miller filed his second application in order to add or insert language apt for describing his use of cotton in a cruder state than that of woven cloth; but he abandoned nothing by intent. His applications were co-pending, and the matter is far within our decision in *Victor, etc., Co. v. American, etc., Co.*, 145 Fed. 350, 76 C. C. A. 180; and *Corrington v. Westinghouse* (C. C.) 173 Fed. 69. Where an intent to continue is manifest (as it is here), or is proven, the question is (as put in the *Victor Case*, supra) whether the specification of the earlier application was sufficient as a basis for the claims ultimately founded on the later application. Or as put in *Field v. Colman*, 40 App. D. C. 598, the doctrine of continuity "broadly depends upon whether the substituted application is for the same invention as that disclosed in the original application."

Applying these rules, the queries in this case, concretely put, are these: Could the claims in suit have been properly issued on the original specification; or, if all the claims had used the words "textile material" or "textile fabric," would it have been an infringement to make gears not differing from Miller's first embodiment otherwise than by substituting cotton batting for cotton rags?

We answer both these questions in the affirmative for reasons largely depending upon the nature and importance of Miller's invention, as hereinafter set forth. We therefore hold the patentee's date of invention to be August, 1908.

[3] 2. The defense based upon publications regarding the English "Unica" gears rests upon extracts from the periodicals "Engineering," and "The Practical Engineer" of London, dated March 20 and November 27, 1908.

Assuming the invention date above awarded Miller, only the earliest publication requires attention, and that consists in a statement that—

Certain manufacturers "have sent out a catalogue of their Unica silent gears made of fiber of prepared cotton. These, it is stated, are unaffected by oil. * * *

The later publications speak, one, of the pinions, as "made of compressed cotton"; the other uses the words "prepared cotton."

While the evidence is persuasive that the Unica gears were merely a variety of vulcanized fiber gears, we reject the publication of March 20, 1908, and would reject the subsequent publications, if they were relevant, on the ground stated fully in *Baedische v. Kalle, etc.*, 104 Fed. 802, 44 C. C. A. 201. The vague statements of result contained in the newspaper articles offered in evidence would not have given in 1908, to even the most skilled, any information enabling an expert to carry into practical use Unica gear, or any other mechanical device. Therefore any or all of them are insufficient to invalidate the patent in suit, or even to limit or modify its scope.

[4] 3. Whether infringement exists is a question depending largely on the importance attached to Miller's invention. If the art of producing silent, waterproof, vermin-proof, tough, durable, and elastic gears be considered as an art by itself, there is no prior art detracting from or limiting Miller's inventive conception. Noiseless gears had long since been a desideratum, and nonmetallic substances, i. e., wood,

rawhide, leather, papier-mâché, and vulcanized fiber, had all been tried and found wanting. The use of textile fibers unchanged by vulcanization was fundamentally new in the gear art; and prior patents for buffing rolls (Poole, 188,670) and friction wheels (Rockwood, 300,013) are entirely irrelevant.

Whatever advantages, therefore, in respect of breadth of equivalents flow from an absolute novelty of inventive thought—are justly due to Miller.

[5] Whether the bakelite gear produces Miller's result in substantially Miller's way depends fundamentally on ascertaining the reasons why the original cotton-rag cog wheel worked and kept on working for several years.

We find that by compression of spinnable fibers, whether contained in cotton batting or in cotton cloth, the patentee obtains an enormous number of these fibers in frictional contact contained in a very small space.

The initial pressure exerted in the process of manufacture depends upon the original looseness of fiber in the raw material. Cotton batting requires more pressure than cotton cloth.

But when the requisite number of fibers have been compressed into the requisite dimension, a considerable part of such compression is permanent, and the back-pressure or expansive tendency of what is held between Miller's containing plates is (in respect of cloth gears) sometimes as low as 500 pounds and (in the case of a cotton batting gear) never higher than 2,500 pounds. Thus, the merit or working virtue of the patented gear consists solely in the presence within a given space of a relatively enormous number of vegetable fibers in frictional contact with each other. The only function of the metal sides and rivets is to keep these fibers in place.

Defendant's product, size for size, has, we are convinced, substantially the same number of fibers, which are also in frictional contact, and held in place, not by metal sides, but by the interstitial permeation of bakelite—a substance in itself and its attributes most remarkable, but which in relation to gears has no other relation to the cotton fibers that enable the gear to do its work, than has the metal container of Miller. The whole contention on the question of infringement is summed up in the inquiry whether defendant's product is cloth reinforced with bakelite instead of metal, or whether it is composed of bakelite reinforced with cloth.

It being plainly true that for gear purposes the only strength in defendant's article is that of the cloth, it must follow that defendant's is a cloth gear held together by bakelite. This remarkable substance is as brittle as it is hard and unchangeable. A pure bakelite gear would be worthless for the lightest machinery. There is no chemical change wrought by the mechanical union between cloth and bakelite; the cloth remains cloth, and the bakelite remains bakelite. The sole function of the bakelite in defendant's gear disc is the same function as that of the rivets and metal sides in Miller's original device.

The fact that it requires no more than 750 pounds initial pressure to drive defendant's cotton cloth into desired contiguity, fiber to fiber,

is much dwelt upon in defense. This may well be a manufacturing advantage on defendant's side. The pressure is substantially the same as the ultimate pressure or back pressure in Miller's cloth gear. But bakelite is neither compressible, ductile, nor elastic; and when bakelite is the holder, container, or restrainer of pressure, whatever shape is given by the initial compression remains absolutely fixed as soon as the bakelite hardens.

For these reasons we consider that defendant's product responds to all the claims in suit; that the claims cover a basic and wholly novel idea, viz., the attainment of a strength sufficient to drive heavy machinery by juxtaposing a sufficient number of feeble textile fibers within a given space; and that this thought, which vitalizes the patent in suit, is the same thought which enables defendant's gears to do their work. It may well be that in attractiveness of appearance, and lightness of weight, defendant's bakelite retainer of compression is superior to Miller's metal sides. But what makes the gear a gear is the same thing in both products. Therefore infringement exists.

It is said that bakelite gear is "self-sustaining." This is only true in the sense heretofore pointed out, viz., that no plates or rivets are required because the bakelite itself, by coating or permeation, is a fair and indeed an exact mechanical equivalent to the end-plates and the rivets of plaintiff's gear wheels.

As defendant does not make or sell completed gears, but a material which when in discs makes gear making easy, and when in other forms may have other uses not related to machine driving, the injunction to issue under this decision may require careful drafting; but this record enables us to do no more than call attention to a question that may be important—and may amount to nothing.

We may say (but for lack of evidence this is not a holding) that we perceive no reason, on this record, why defendant's product cannot be used, if suitable, for any purpose not amounting to a gear; that being the sole subject of Miller's patent.

Decree reversed with costs, and cause remanded for further proceedings not inconsistent herewith.

STANDARD SCALE & SUPPLY CO. v. CROPP CONCRETE MACHINERY CO. et al.

CROPP CONCRETE MACHINERY CO. et al. v. STANDARD SCALE & SUPPLY CO.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1919. Rehearing Denied March 4, 1919.)

Nos. 2526, 2527.

1. PATENTS ☞155—EFFECT OF DISCLAIMER.

A claimant of a generic invention does not lose his right by declining to claim some other person's subsequently devised form.

2. PATENTS ☞328—INFRINGEMENT.

Cropp patent, No. 947,196, dated January 18, 1910, claims 1, 2, 3, 4, 7, 9, 12, 13, 14, and 16, for a concrete mixer, *held* valid and infringed; patents

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

to Ransome, No. 322,006, No. 804,803, and No. 870,797, to Burns, No. 661,487, and to Roberts No. 845,435, not being pertinent.

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

Proceedings between the Standard Scale & Supply Company and the Cropp Concrete Machinery Company and Andrew J. Cropp concerning patent rights. There was a decree in favor of the former as to one claim, and in favor of the latter as to other claims, and they both appeal. Decree in favor of the former reversed, and that in favor of the latter affirmed.

George L. Wilkinson and Percival H. Truman, both of Chicago, Ill., for appellant.

Franklin M. Warden, of Chicago, Ill., for appellee.

Before BAKER and EVANS, Circuit Judges.

BAKER, Circuit Judge. Cropp Company and Cropp obtained a decree that claims 1, 2, 3, 4, 7, 12, 13, 14, and 16 of patent No. 947,196, January 18, 1910, to the company as assignee of Cropp, for a concrete mixer, were valid and infringed by the Standard Company's machine. No. 2526 is the Standard Company's appeal from that finding. In the same suit a complaint based on claim 9 was dismissed on the ground of noninfringement, and the appeal in No. 2527 assails that ruling.

Claim 9, which relates to the charging means, reads as follows:

"9. The rotary mixing receptacle having at its receiving end a charging device consisting of a centrally apertured disk secured to the receptacle, and a series of blades extended at their outer ends from the disk inwardly and diagonally with respect to the receptacle for a short distance from the disk for the purpose of directing the material into the receptacle, said blades having their portions adjacent to the disk of substantially the same width as said disk from the opening therein to its periphery and their inner portions widened."

Portable machines, of rotary drum type, for mixing batches of concrete, are used in situ in various building operations. In prior machines the opening at the receiving end was so high from the ground that the workmen in bringing the materials had to wheel their barrows up a staging. In the structure of claim 9 this difficulty is obviated by reason of the large size of the aperture in the disk; and at the same time the mixing capacity of the rotary drum is preserved by the action of the peculiarly formed and arranged diagonal blades. Utility is manifest. Nothing in the prior art gives any hint of the idea embodied in claim 9. Invalidity is predicated solely upon Patent Office proceedings which resulted in Cropp's inserting the following disclaimer in his application:

"I hereby disclaim the following claim, to wit: In a mixer, in combination, a revoluble drum, means therein to agitate and mix the material, a continuous series of circularly arranged charging pockets located at one end of the drum within its cylindrical wall and closed at their outer ends, the open inlets of the pockets being turned toward the axis of the drum, a circular head having its periphery contacting with the tops of the pocket walls and set in from the adjacent end of the drum, and means to introduce material to the inlets of the pockets outside of said head."

[1] In *Reed v. Cropp Concrete Machinery Co.*, 239 Fed. 869, 152 C. C. A. 653, the history of the three-cornered interference between Cropp, Reed, and Sanborn and the relation of the disclaimer to Cropp's claim 9 were fully considered. Though the decree in that case may not be *res adjudicata*, we find no reason in the present record for hesitating to say *stare decisis*. Cropp's application described two forms of the "low-charging" structure. His claim 9 was aptly worded to cover the genus exemplified by his two forms. Later Sanborn disclosed another form and claimed it in the words subsequently copied by Cropp in his disclaimer. When Cropp was invited to interfere, he replied that he was not the inventor of the Sanborn species. Manifestly neither Cropp nor the Patent Office understood that he was thereby confessing that he was not the inventor of the genus, for otherwise Cropp would not have continued to prosecute, and the Patent Office would not have allowed, claim 9. Indeed, the Standard Company does not seriously dispute the legal principle involved in the Reed case, namely, that a claimant of a generic invention does not lose his right by declining to claim some other person's subsequently devised form.

Nevertheless it was open to the Standard Company to defend on the ground that Sanborn or Reed had been the first to devise any form of "low-charging" mixer, and that Cropp consequently was not entitled to hold his generic claim. In the Reed Case, the burden of proving priority was on Cropp; here it is on the Standard Company. Though there is some additional testimony, it relates in the main to the development of the second form described in Cropp's application. Respecting Cropp's creation of the first form, and therefore of the genus, the evidence which led us before to an affirmative finding in Cropp's favor is now considered sufficient to repel the Standard Company's attack upon the *prima facie* validity of the claim.

In the claim the charging blades are described as "having their portions adjacent to the disk of substantially the same width as said disk from the opening therein to its periphery." In the Standard Company's machine the outer portions of the charging blades are of slightly less width than the "disk from the opening therein to its periphery." But the proofs leave it sufficiently clear that the Standard Company obtains the full result of Cropp's "low-charging" machine by charging blades formed, arranged, and operating according to the principle disclosed by Cropp. The proven departure was therefore not sufficiently "substantial."

Claim 13 is a fair statement of Cropp's invention of discharging means:

"13. The rotary mixing receptacle having an opening in its discharging end, a chute located in said opening and extended into the receptacle, a door pivotally mounted within the receptacle and adapted to open and close the chute and to assist in guiding the material thereto, a plate secured to the receptacle at its discharging end and extended radially thereinto within the path of the door, and another plate diagonally disposed from the last-named plate partially across the inner surface of the receptacle."

Through an opening at the discharging end a chute extends into the drum. This chute is rigidly secured to and revolves with the drum.

During the mixing process a door, pivotally mounted within the drum, covers the opening of the chute. This door-covered chute and the two plates mentioned in the claim assist in the mixing process. When it is desired to discharge the mixture, the door is thrown open by means of a lever outside the drum, and the door then bears against the radial plate. A flange along the inner edge of the door co-operates with the door, the radial plate and the diagonal plate in guiding the material into the chute. These parts obviously may be, and in practice are, so related to the capacity of the drum and the capacity of a barrow that at each revolution one barrow load is discharged, and so the workmen in file wheel away the mixed batch.

In the prior art we find nothing that denies the patentable novelty of this combination of means. Patents to Ransome, No. 322,006, No. 804,803, and No. 870,797, to Burns, No. 661,487, and to Roberts, No. 845,435, are not pertinent, because the discharge spouts are not attached to and do not revolve with the drum. McKelvey's patent, No. 751,541, is for a rotary feeding device for concrete mixers. This contains a chute which is rigidly attached to and revolves with the drum of the feeder and extends from the interior of that drum into the "high-charging" opening of a mixing drum of the prior art. The mouth of the chute is the full width of the feeder. Along one edge of the chute within the feeder a door is pivotally mounted. This door is rectangular in shape, and extends axially from side to side of the feeder and radially from its hinge to the periphery of the feeder. While the concrete materials are being dumped into the "low-charging" opening of the revolving feeder, the door is held over the mouth of the chute by means of a lever that extends outside the feeder. When the materials are to be fed into the mixer, the door is thrown open till it bears against lugs on the interior of the feeder's periphery. As the feeder revolves, the door lifts and throws the materials into the chute and thence into the mixer. McKelvey's feeder, as he suggests, could itself be used as a mixer by providing it with the customary mixing plows and blades. Granting full weight to the Standard Company's assertion that McKelvey, therefore, shows a concrete mixer embodying a combination of a revolving drum, a chute attached to and revolving with the drum, and a door pivotally mounted within the drum, and adapted to open and close the chute and to guide the material into the chute, we agree with the trial judge that the McKelvey disclosure does not forestall the Cropp concept. Cropp's claims, read in the light of his description and drawings, call for a chute that extends but a little way into the drum, and is so associated with the door, the flange, the radial plate, and the diagonal plate that the combination constituting the discharging means does not impede or interfere with the charging and mixing means at the other end of the drum, but, on the contrary, co-operates in the final stages of the mixing, does not form a dam across the stream, but only a wing dam, and does not lift up and expel the entire contents at a single throw, but is so proportioned to the capacity of the drum that only a predetermined fraction is discharged in one revolution; and inasmuch as the conception of this result and of the mechanical combination to produce it is not found in the prior

art, there is no basis for rejecting the Patent Office's attribution of this achievement to the creative imagination of an inventor.

[2] The question of infringement is really narrowed to claim 1. In Cropp's drawings and description, and in his commercial structure, the chute is segmental in cross section and is tapered inwardly; the door has its free end cut to match the taper of the chute; and the radial plate is tapered to correspond with the tapered end of the door. Claim 1 calls for the tapered chute and door. In the Standard Company's machine the chute is tapered, but the door is rectangular and more than covers the mouth of the chute. With the use of a rectangular door a large part of the radial stop plate may be and is dispensed with; and the flange along the inner edge of the door has been taken off and fastened to the edge of the chute. When the Standard Company's door is shut, all the Cropp functions are performed. When it is opened, the superfluous metal of the rectangular door does service for the omitted portion of the radial stop plate; the diagonal plate performs its regular office; the flange operates in the same way; and all together, the chute, door, flange, stop plate, and diagonal plate constitute a wing dam, that divides, directs, and discharges the mixture in substantially the same way as does Cropp's wing dam. Even claim 1 is entitled to a range of equivalency that embraces such colorable changes.

In No. 2526 the decree is affirmed; in No. 2527, the decree is reversed, with the direction to enter a decree for an injunction and an accounting with respect to claim 9.

GEOGHEGAN et al. v. ERNST.

(Circuit Court of Appeals, Second Circuit. February 13, 1919.)

No. 176.

1. PATENTS ⇨226—INFRINGEMENT—WHAT CONSTITUTES.

If a patent claim reads upon an offending apparatus infringement is suggested, although not proved, but there is no infringement if the claim will not read upon that which is said to infringe.

2. PATENTS ⇨328—VALIDITY—INFRINGEMENT—HOISTING APPARATUS.

Rutan patent, No. 1,170,193, claims 1, 2, and 3, for hoisting apparatus, *held* valid, but not infringed.

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

Suit by Charles A. Geoghegan and others against Charles K. Ernst. Decree for defendant, and plaintiffs appeal. Affirmed.

Appeal from decree in equity entered in the District Court for the Western District of New York.

Action is upon claims 1, 2, and 3 of patent to Rutan, dated February 1, 1916, No. 1,170,193. Of these claims the first is most general, and is as follows:

"1. In a device of the character set forth, a hoistway, hoisting apparatus therein having a vertically movable standard, means for elevating said standard, vertically swinging doors covering such hoistway, means depend-

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

ing within the hoistway and means pivotally supported thereon and pivotally connected with each other and with said doors and co-operating with said standard for automatically operating the doors."

The object of invention (as stated in the disclosure) is to provide means whereby a hoisting apparatus in a cellar may be extended upward above the sidewalk level, automatically opening the cellar door when it rises, and securely closing the door upon its descent. The invention is said to consist in "certain novel features of construction and arrangement by which" the foregoing objects are attained.

In practical application the inventor has produced an ash hoist which opens and closes the door in a city sidewalk through which it appears to do its work.

It is not asserted that any invention lies in the hoist. Any kind of hoist actuated in any manner may be used; but the specification dwells upon the connection, interrelation, and co-ordination of any hoist capable of ascending through the sidewalk aperture and the door or doors which normally cover the hole in the pavement, and indeed form a portion of that pavement.

The disclosed and described connection between hoist and door consists essentially in a downward extension of the frame surrounding the open hoistway, to which extension is attached a lever raised and lowered by the ascending or descending hoist, or some portion thereof, to which lever is pivoted a link, which link is also pivoted to an appropriate extension of the door.

Thus the upward or downward movement of the lever, when actuated by the ascending or descending hoist, communicates the energy of the hoisting apparatus through the link (connecting the lever and door) to the door itself, and moves it in accord with the vertical movements of the hoist.

The disclosure of the patent is confined to a hoistway with two doors; and that word is in the plural throughout all the claims in suit. But it may be assumed with the plaintiffs that, with no other modification than would occur to any competent mechanic, the device is applicable to a single door.

Defendant's alleged infringement is a simple hand hoist whose rising standard is connected with a single cellar door by a link pivoted at one end to the hoist and at the other to the door. It is mechanically operable but crude, and, if the standard should ever get "out of plumb," would become mathematically impossible.

The lower court overruled the defense of anticipation, sustained that of non-infringement, and dismissed the bill. Plaintiffs bring this appeal.

W. P. Preble, of New York City, for appellants.

Wilhelm & Parker, of Buffalo, N. Y. (Charles W. Parker, of Buffalo, N. Y., of counsel), for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). Whenever defendant's machine works it opens the door, through which the telescopic ash hoist is to project itself, by a straight thrust. It has no lever and nothing wherewith to exert leverage. This is a fundamental difference between the two pieces of apparatus.

If it be attempted to read the first claim of Rutan's patent upon Ernst's device, the latter is found to have no "means depending within the hoistway" upon which other means are "pivotally supported," which latter means are "connected * * * with said door's." Consequently Ernst has not "depending means" and "pivotally supported means" co-operating with a standard in order to automatically operate a door.

[1] If (as has been often said) a claim reads upon an offending apparatus, that fact suggests but does not prove infringement; but

if a claim will not read upon that which is said to infringe, there can be no infringement.

There are many reported instances of most benevolent reading of claims to bring that which really copies a man's invention within the scope of an inartificially drawn definition, i. e., claim.

[2] But in this instance the claims are accurate, and assumed their present shape after applicant had demanded as his most general claim the following:

"In a device of the character set forth, a hoistway, hoisting apparatus therein having a vertically movable standard, means for elevating such standard, doors covering such hoistway, and mechanism actuated by such elevating means for automatically operating said doors."

In other words, Rutan thought himself entitled to prevent any one else from opening a door or doors over a telescopic hoist by means of any mechanism obtaining its power from the rising hoist itself.

He had no right to such claim, and was told by the examiner that "claims should be limited to what applicant has actually invented." He did invent, and was entitled to a patent for, the embodiment of the idea of opening the door by means of a link actuated by a lever, which in turn was driven by the rising hoist. But the general idea of pushing up a cellar door by a rising standard was old with Berry & Gale No. 740,080, and the same idea, for the specific purposes of an ash hoist, had been shown by Sundh No. 955,922. If Rutan had obtained and been entitled to the claim he asked for but did not get, Ernst would have infringed; as it is, he does not.

We therefore agree with the court below that within the scope of the very precise claims in suit, the Rutan patent is valid; but no infringement is shown.

Decree affirmed with costs.

CONDROU CO. v. CORRUGATED BAR CO.

(District Court, N. D. Illinois, E. D. April 16, 1919.)

No. 649.

1. PATENTS ⇨42—IMPROVEMENT OF PRIOR ART BY ENGINEERING SKILL.

Though a patentee might have made a better flat slab or shallow beam concrete floor construction than prior inventors, where the patent itself, apart from simplifying computation of stresses, simply proceeded along lines suggested by engineering skill, it was invalid.

2. PATENTS ⇨328—PATENT FOR CONCRETE FLOORS—ENGINEERING SKILL.

Sinks patent, of October 10, 1911, No. 1,005,756, relating to concrete floors for buildings, *held* invalid, as merely proceeding along lines suggested by engineering skill.

In Equity. Suit for infringement of patent by the Condron Company against the Corrugated Bar Company. Bill dismissed.

Arthur M. Hood, of Indianapolis, Ind., and Melville Church, of Washington, D. C., for plaintiff.

James A. Carr, of St. Louis, Mo., and Wallace R. Lane, of Chicago, Ill., for defendant.

SANBORN, District Judge. Infringement suit on the Sinks patent of October 10, 1911, No. 1,005,756, relating to concrete floors for buildings. The patentee thus states the object of his invention:

"It has heretofore been proposed to produce a monolithic building construction comprising reinforced concrete walls, supporting columns, and floors, and many different arrangements of the reinforcing metallic members have been provided, many of them with well-recognized fundamental expectation of introducing such reinforcing metallic members into those regions of the concrete which will, because of the load of the structure, either the weight of the structure or the applied load, be subjected to tension stresses, but, so far as I am aware, with perhaps one or two exceptions, the floor portions of such monolithic structures have comprised supporting beams having a depth materially exceeding their thickness, and these beams have, of course, formed downwardly projecting ridges below the ceiling surface, or lower surface of the floor, in such a way as to cast shadows upon the ceiling and thus materially reduce the intensity of light in the room. There have been few exceptions to this general practice, where a floor slab of uniform thickness, without beams of any kind, has been produced; but, so far as I am aware, the manner of placing proposed reinforcements in the floors of such constructions, as well as the manner of placing reinforcements in the floors and beams of the other structures to which I have referred, has been such as to make a careful analysis of the stresses due to the dead weight and to the applied loads practically impossible and a computation of the stresses difficult and inaccurate.

"The object of my present invention, therefore, is to produce a monolithic building structure, in which there shall be no supporting beams having a vertical depth exceeding the horizontal width, and in which the floor reinforcement and the supporting columns shall be so relatively arranged and proportioned that the stresses due to weight and applied load may be accurately analyzed and computed."

Like most patents for reinforced concrete, and practically all engineering computation, the aim was to simplify engineering analysis in placing the steel rods in regions of tension, in accordance with the well known property of concrete to be weak in tension and strong in compression. The patentee describes four "inclosing slabs" or shallow beams extending from column to column, supporting an "inclosed slab" in the center of the space bounded by the four columns.

Norcross (April 29, 1902, No. 698,542), to whose assignee both parties to this suit pay royalty, was first in the field with a flat floor slab construction, which is described by the Circuit Court of Appeals of the Eighth Circuit, in *Drum v. Turner*, 219 Fed. 188, 135 C. C. A. 74:

"The purpose of the invention patented to Norcross was to make in one panel or piece, extending throughout a building, however large, a monolithic flooring composed of a metallic network imbedded in concrete which would sustain itself and its load upon separated posts without the use of girders, floor beams, or other horizontal supports. The principle or mode of operation of the device by which this object was attained was to embed in a concrete flooring a metallic network consisting of strips of heavy wire netting which were laid lengthwise of the building, crosswise of the building, and diagonally over the tops of and supported by the columns, so that a strip lengthwise, a strip crosswise, and a strip laid diagonally would lie on or under each other over the top of each post in cobhouse fashion, and leave only small triangular spaces in any rectangular space between four posts free from this metallic network."

Three claims of the Norcross patent were sustained and held infringed by the structure of the Turner patents, Nos. 985,119 and

1,003,384. And in *Turner v. Lauter* (D. C.) 236 Fed. 252, Judge Orr followed the Drum Case, and decided that six claims of the Turner patent, No. 1,003,384, were anticipated by Norcross, as well as two claims of the Turner patent, No. 985,119. Other decisions along the same line are *Turner v. Moore*, 211 Fed. 466, 128 C. C. A. 138, and *Turner v. Deere & Webber Co.* (D. C.) 238 Fed. 377.

The gist of the Sinks invention, as expressed by him, is that in the Norcross and Turner constructions it was practically impossible to make careful analysis of weights, and to make a computation of stresses difficult and inaccurate. These defects he proposes to supply by so arranging the reinforcement and columns that the stresses due to weight and applied load might be accurately analyzed and computed. It seems that this computation process is a growing one, developing and changing from day to day. Mr. Condron says in his testimony that it must be varied to meet changing conditions of span, load, etc.

"One day we conformed to our original practice and modified [it] the next. We have modified our practice with growing knowledge of the art from 1903, when we began using reinforced concrete, until day before yesterday. We are learning more and more all the time, and conforming our practice to what we learn as we go along, up to this morning. We do not act in conformity to the Sinks computation; that teaches nothing in the sense of computing or computation."

Mr. Condron further testified:

"Q. Do you mean, if you were to be employed as an engineer to put in the Akme system on a building, where the spacing of the columns was different from any spacing that you had occasion to use before, that you would have reason to redesign that thing? A. I certainly would.

"Q. You would have to design it, and how would you begin? A. I would design in an intelligent engineering manner, using my training and my knowledge of the art, my knowledge of mathematics or the knowledge of mathematics of the men in my employ.

"Q. You mean mathematics in the sense of computation? A. Yes; as to computing it.

"Q. You do not act in conformity to the Sinks computation? A. No, sir.

"Q. Never in the sense of computation; that teaches nothing about computing? A. Nothing in the sense of computing or computation.

"Q. So that, so far as I understand, it is very largely a matter of judgment on the part of the engineer as to what he is going to use, how deep he is going to make his girder spans, or inclosing slabs or beams, whatever you call them, on any particular job, isn't it? A. It is."

The witness further testified that—

"Sinks did not attempt, in connection with his invention, to propose and to invent how it should be calculated. That was a thing any engineer might do who was intelligent enough to do it."

This case, therefore, presents the same condition as in *Luten v. Washburn* (Sept. 1918, Eighth Circuit) 253 Fed. 950, — C. C. A. —, where the court said:

"Neither the specifications, claims, nor drawings of the patents in suit give any specific directions as to where the reinforcing steel should be placed."

In December, 1909, at a meeting of the Western Society of Engineers, it seems to have been the general opinion of the engineers there present that the Sinks patent did actually simplify engineering prob-

lems. It appears that it is easier to compute stresses in a reinforced concrete construction, where the iron rods are placed at right angles to each other and to the column lines, than when they are diagonally placed, as in Norcross and Turner.

At that meeting Mr. Condon read the principal paper, which was then discussed by some of the engineers present. In this paper Mr. Condon claimed as one of the advantages of the Sinks construction that the stresses due to dead weight and all applied loads can be there-by accurately determined. This statement seems to have impressed his hearers, and several of them asked him to explain it. It was suggested that he explain the method of figuring the load at the edge of the enclosing slabs or wide beams. One of the speakers said:

"I believe quite a service has been done the profession in getting out a flat plate floor that permits of exact analysis. It is simply an extension of the beam and girder system of constructing reinforced concrete floors, because he uses wide shallow beams, and the broad panel surface is certainly pleasing and something that all owners want."

Another speaker said:

"I think the advantages of the girderless floor have been so well appreciated by the people who have been putting up these buildings that the principal thing in this paper is the fact that Mr. Condon and Mr. Sinks have given us something we can figure."

Another said:

"The most important thing of all, I think, is the fact that they are seeking to reduce the methods of computation to a more exact science than these have been in the past. There has been from the beginning so much mystery in reinforced concrete, and there has been so much made of the mysterious part of the thing in a commercial way, that in some places the use of the material has fallen into disrepute, because of being exploited by people who were not strictly honorable. If the design which Mr. Condon has shown to-night could be spread broadcast, and if it could be made perfectly clear that the methods of designing are precise and accurate, there is little doubt but that the use of flat ceilings, at any rate as he has shown them, would become very general. I think the best part of this paper will probably be a reply which Mr. Condon may be asked to make to the discussion to-night in the shape of giving us a little more exact details as to how his computations have been made. For instance, I think it would be very important for us to know how he provides for uniform distribution of load through his very wide girders, as his intersecting slabs are, of course, nothing but girders. It would also be interesting to know how he arranges for the distribution of the stresses through the central panel, and I trust that he will take pains to give us an answer in the discussion this evening, along these lines."

Mr. Luten, who has had many patent cases on his concrete bridge construction, also said in the discussion:

"The system which Mr. Condon has shown has developed from the slab and beam systems which we do not know how to compute, but the wide, flat, shallow beams, have extremely eccentric loadings, which is exactly the difficulty in the Turner system. It is due largely to the eccentricity of loadings that the computation of that system is so difficult, and it would interest me greatly if Mr. Condon could give us some additional details as to the exact difference between the two systems in methods of computation. If the loads are carried to the columns in two directions at right angles to each other, and in that way can be computed, could not that panel, or slab, then, be turned through 45 degrees, so that the lines of reinforcement and stress

run directly to the column, and thus assure us that the slab would have exactly the same strength as the other system? In other words, if Mr. Condrón's method of construction is analyzable, does not that at once give a solution to Mr. Turner's system?"

Mr. Woodman:

"Mr. Chairman, I think that can be answered right here. While I am not very conversant with the details of the Turner system, it is my recollection of it that the girders that are within the slab are diagonal, running from column to column, crossing diagonally to the square of the rectangle. That being the case, there are two girders which are intersecting at the center, and there is therefore an indeterminacy which it is impossible to clear up, simply due to workmanship, if nothing else."

Another speaker said:

"But the principal thing that Messrs. Condrón and Sinks should be commended for is that they have at last given engineers something tangible to work on, something that engineers can go to their clients with and tell them we have at last a floor of the kind that is a favorite with owners of buildings, capable of exact calculation, and that can be checked by any capable designer, and can also be tested, and the results will be as predicted."

After this discussion, Mr. Condrón replied to the various points which had been raised. As to the questions in respect to methods of calculation, the report gives a synopsis of his remarks as follows:

"Regarding details of calculation, the speaker did not attempt to go into these, not considering it necessary. He said the entire design met the requirements of the Chicago building ordinance. When one describes a plate girder, and says it was designed in accordance with the specifications of the Maintenance of Way Association, engineers at once fully understand what was done. There is nothing peculiar or strange involved in this. It is an ordinary engineering problem of moments and stresses, and has been calculated just as you figure any moments and stresses, with the spans as they are given and the loads as they are required, and the moments resulting from these. The usual straight line formula was used for determining the sections of concrete and steel."

[1] In this situation the patent must be regarded in the light of any addition it may have made to the art, and nothing more. The purpose of the inventor is unimportant, except to aid in patent construction, or the presumption of its validity. The patent law has nothing to do with reasons or motives, but only with some art, machine, manufacture, or composition of matter. *Fond du Lac Co. v. May*, 137 U. S. 395, 11 Sup. Ct. 98, 34 L. Ed. 714. The patentee may have made a better flat slab or shallow beam construction than prior inventors, but the patent itself, apart from simplifying computation, simply proceeded along lines suggested by engineering skill.

[2] I think the patent is invalid, and that the bill should be dismissed.

WIRE ROPE APPLIANCE CO. v. EUREKA TOOL CO. OF KANSAS.

(District Court, D. Kansas, Second Division. March 6, 1919.)

No. 78-N.

1. PATENTS ⇨326(2)—INJUNCTION AGAINST INFRINGEMENT—VIOLATION.

Where a defendant was adjudged to have infringed a patent, and an injunction was issued, he was guilty of contempt in continuing to make similar articles, although there was a change, where the change made from the original infringing device was merely colorable, and not substantial, and the court could clearly see the obvious intent to further infringe upon the rights protected by the decree.

2. PATENTS ⇨326(2)—VIOLATION OF DECREE AGAINST INFRINGEMENT—COLORABLE CHANGE.

One who had been enjoined from infringing a patented swivel jar socket was guilty of contempt in continuing to make a stiff line jar socket, which could be readily converted to a swivel jar socket by the mere removal of a pin, or by failure to insert the pin in practical operation; the change being merely colorable, and not substantial.

In Equity. Suit by the Wire Rope Appliance Company against the Eureka Tool Company of Kansas. Decree for plaintiff. On motion to show cause why defendant and its president, Charles A. Towne, should not be punished for contempt. Defendant and its president adjudged guilty of contempt.

R. W. Kellough and Franklin H. Griggs, both of Tulsa, Okl., and Darwin S. Wolcott, of Pittsburgh, Pa., for plaintiff.

Vernon E. Hodges, of Washington, D. C., and Winfield Freeman, of Kansas City, Kan., for defendant.

POLLOCK, District Judge. On due consideration, after hearing heretofore had, the court did on November 30, 1917, enter a final decree herein finding defendant guilty of infringement, and enjoining it, its officers, agents, servants, and employes, from further infringing upon rights owned by plaintiff under letters patent No. 1,045,883, granted to one John Edwin Prosser December 3, 1912, and commonly known as the Prosser patent, covering an appliance called a wire rope swivel jar socket employed in the drilling of oil and gas wells. Thereafter, and on October 25, 1918, said decree was, on due notice and hearing, amended in certain respects. Thereafter the plaintiff, in due form, applied to the court for a rule to show cause against defendant company and its president, one Charles A. Towne, if any they had, why they should not be adjudged guilty of contempt in failing and refusing to abide by and obey the injunctive decree of this court heretofore rendered in this cause, and desist from longer infringing against the rights of plaintiff, under said letters patent. The matter has now been fully heard and considered, and comes on for judgment and order.

The Prosser letters patent, declared to have been by defendant infringed upon, covered what is commonly called in oil-drilling operations a swivel jar socket, as fully described in a copy of said let-

ters patent filed herewith. The two distinctive features of this socket were the jar allowed in drilling operations, and the swivel to which the wire rope was attached turning in the socket head. After the entry of decree herein defendant company, through its president, Charles A. Towne, conceived the idea, if the swivel head turning within the socket should be flattened on one of its sides by a groove cut therein, and a hole bored through the socket, and a pin inserted therein, thus making the socket a stiff wire rope socket in operation, instead of a swivel jar socket, infringement of plaintiff's rights would be avoided, and the injunctive order in this case not violated. This was done, and defendant pursued the business of manufacturing its drilling sockets in substantial conformity with the Prosser patent save and except with the added slot cut in the swivel and pin passing through the socket. This addition in fact did, so long as the pin remained inserted through the socket, convert the former Prosser swivel or turning jar socket into one that did not act as a swivel in its operation. However, the proofs disclose, that which is on its face self-evident, if the inserted pin be by the workman using the tool withdrawn from its place, or in operation should become worn out or broken at times, the socket became in its operation a Prosser swivel jar socket.

In this condition of the record defendant and its president, now being proceeded against as for a civil contempt, in their brief and argument state the issue involved to be as follows:

"While contempt is alleged for violation of the injunction of this court, the fundamental question presented is not one of contempt, but one of infringement, pure and simple."

With this contention, however, I cannot agree. The entire question of infringement in this case has passed to final decree absolute; hence no such issue is here raised, or may be determined. True, if the defendant and its officer here proceeded against are, and since the decree herein entered against them have been, engaged in good faith in making and vending a socket so different in its character and nature from the infringing device defendant was enjoined from making, vending, and using by the final decree herein as not to fall within the issues of the case in which the decree was entered, in such case it would be the duty of plaintiff to file a new bill to have such determination made, and the application for contempt denied. *Howard v. Mast, Buford & Burwell Co.* (C. C.) 33 Fed. 867; *Temple Pump Co. v. Goss Pump & Rubber Bucket Manuf'g. Co.* (C. C.) 31 Fed. 292; *Crown Cork & Seal Co. v. American Cork Specialty Co.*, 211 Fed. 650, 128 C. C. A. 154; *Kelsey Heating Co. v. James Spear Stove & Heating Co.* (C. C.) 158 Fed. 414; *Bonsack Mach. Co. v. National Cigarette Co.* (C. C.) 64 Fed. 858.

[1] On the other hand, if the change made from the original infringing device is merely colorable, and not substantial, and a court can clearly see the obvious intent of those enjoined from infringement was to further infringe upon the rights protected by the decree and thus escape punishment for wrongdoing, contempt will be adjudged. *Frank F. Smith Metal Window Hardware Co. v. Yates,*

(256 F.)

244 Fed. 793, 157 C. C. A. 241; Davis v. Perry, 120 Fed. 941, 57 C. C. A. 231; New York Scaffolding Co. v. Whitney, 224 Fed. 452, 140 C. C. A. 138; Leeds & Catlin v. Victor Talk. Mch. (No. 2) 213 U. S. 325, 29 Sup. Ct. 503, 53 L. Ed. 816; Parsons Non-Skid Co. v. Atlas Chain Co., 198 Fed. 399, 117 C. C. A. 286.

[2] The question thus raised is this: Do the appliances themselves in evidence in this case and the proofs adduced on this hearing clearly show the change made by defendant and its president, Towne, to be such a mere colorable mechanical equivalent as will be disregarded in this proceeding for contempt? A mere glance at the models in evidence suffice to show the appliance now being manufactured by defendant company is in every respect the Prosser wire rope swivel jar socket, with the addition of the slot in the side of the swivel and the inserted pin; that by the removal of the pin the socket becomes at once in all respects a Prosser swivel jar socket. True, so long as the inserted pin remains in place, in operation, it is not a swivel socket, as is the Prosser, but is for the time being a stiff line jar socket. But the readiness of its conversion to the swivel jar socket by the mere removal of the pin, or by the failure to insert the pin in practical operation, or to make the addition of the slot and pin in the Prosser socket, taken in connection with the persistence shown by the officers of defendant corporation in infringing upon the rights guaranteed to plaintiff by the Prosser patent, convinces me the defendant and its president did, in the making, sale, and use of the present wire rope socket, violate the former decree of this court.

As shown by the proofs, the amount expended by the plaintiff in its investigation and preparation for presenting this contempt matter to this court has been in the neighborhood of \$1,500, exclusive of all solicitor or counsel fees. As a result of the entire matter, it is adjudged the defendant corporation and its president, Towne, are guilty of violation of the decree of the court heretofore entered in this suit.

It is therefore ordered the defendant and Charles A. Towne, its president, shall pay into court, for the purpose of first defraying the costs of this contempt matter and a reasonable portion of the money expended by the plaintiff in this contempt proceeding, the sum of \$2,000, for which execution shall issue against the defendant company as in civil actions at law. However, if said sum of \$2,000 be not paid within 30 days from the date of the entry of this order, and judgment herein imposed upon the defendant and its president, Charles A. Towne, then and in that event Charles A. Towne, the president of the defendant company, for his contempt, shall be committed to the jail of Sedgwick county, Kan., for a period not to exceed 6 months, or until said judgment against him for contempt is paid and satisfied.

It is so ordered.

AMERICAN EXCH. NAT. BANK v. PALMER, Alien Property Custodian, et al.

(District Court, S. D. New York. March 5, 1919. On Reargument, May 10, 1919.)

1. INTERPLEADER ⇄11—RIGHTS WHICH MAY BE SUBJECT OF INTERPLEADER—TRADING WITH THE ENEMY ACT.

An American bank, indebted to a depositor, an American citizen, which has been served with notice by the Alien Property Custodian that the deposit is the property of an alien enemy and required to pay the indebtedness to the custodian, where the depositor also claims it, may maintain a bill of interpleader in a federal District Court against the depositor and the custodian to have their respective rights determined.

2. WAR ⇄12—TRADING WITH THE ENEMY—"PROPERTY."

The word "property," as used in Trading with the Enemy Act Oct. 6, 1917, § 7c (Comp. St. 1918, § 3115½d), requiring money or property owing by, on account of, on behalf of, or for the benefit of enemies to be conveyed or paid over to the Alien Property Custodian, refers to a tangible res, or some evidence of debt, or share in property.

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

3. WAR ⇄12—TRADING WITH THE ENEMY—"MONEY."

Where the relation of bank depositor and bank exists, an ordinary deposit is not "money," within Trading with the Enemy Act Oct. 6, 1917, § 7c (Comp. St. 1918, § 3115½d), requiring money or property owing by, on account of, on behalf of, or for the benefit of enemies to be conveyed or paid over to the Alien Property Custodian.

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

In Equity. Bill by the American Exchange National Bank against A. Mitchell Palmer, Alien Property Custodian, and John Simon. On motion to dismiss bill. Denied.

White & Case, of New York City (J. Du Pratt White and Robert Forsyth Little, both of New York City, of counsel), for plaintiff.

Francis G. Caffey, U. S. Atty., of New York City (Earl B. Barnes, Asst. U. S. Atty., of New York City, of counsel), for defendant Palmer.

Bigelow & Wise, of New York City (Ernest A. Bigelow, of New York City, of counsel), for defendant Simon.

MAYER, District Judge. This is a motion by defendant Palmer, Alien Property Custodian (hereinafter referred to as the Custodian), for an order dismissing the complaint herein—

"upon the ground of insufficiency of fact to constitute a valid cause of action in equity, it being manifest therefrom that the fund mentioned in the bill of complaint has not passed into the possession of the defendant as Alien Property Custodian, and that the complainant has not taken the jurisdictional steps provided in section 9 of the Trading with the Enemy Act, approved October 6, 1917, as amended."

The complaint alleges:

"(a) That the defendant Simon deposited with the complainant bank, hereinafter referred to as the bank, certain sums of money, and by reason of such deposits the bank is now indebted to Simon in the sum of \$358,830.86.

"(b) That the Custodian has informed the bank of his determination, made after an alleged investigation, that said sum of money is owing, belonging to, and held for, by, on account of and on behalf of and for the benefit of Heinrich Frederick Albert (an enemy).'

"(c) That by reason of such determination the Custodian has required of the bank that it 'convey, transfer, assign, deliver, and pay over' said sum to the Custodian.

"(d) That defendant Simon has warned the bank that, if it complies with the Custodian's demand (requirement), said defendant will nevertheless look to the bank for the payment to him of said debt, and he has called upon the bank to resist the demand (requirement), which he has termed to be unwarranted."

The complaint alleges the bank's freedom from any collusion with either of the defendants and contains the bank's offer to pay the amount of its debt into this court, to the end that the defendant lawfully entitled may receive payment. The bank has filed with the complaint the usual affidavit that it has not colluded with either defendant.

Defendant Simon has appeared and filed an answer, which in substance admits the allegations of the complaint, asserts title to the bank's indebtedness, and prays that this court interplead the defendants, so that their adverse demands and their rights in respect of said indebtedness owing by the bank may be judicially settled and decreed. The custodian has appeared generally in the action.

[1] The first question is whether a bill of interpleader will lie. From the pleadings as thus far developed there is no doubt that the bill is brought in good faith, in a sincere desire on the part of plaintiff, an American banking institution, to protect itself in its rights. The plaintiff bank is in this position: If payment is made to the Custodian, the bank must stand suit of Simon to recover his deposit, and in such an action Simon will prevail if the bank fails to establish the validity of the demand as made by the Custodian, his power to make such demand, and the validity of the acquittance received by the bank on paying over the amount of the Simon deposit.

On the other hand, if payment is made to Simon, the officers of the plaintiff bank run the risk of fine and imprisonment for disobeying the Custodian's demand. In such circumstances, the bank is in a parlous position.

The case is well within the principles set forth by Chancellor Kent in *Richards v. Salter*, 6 John. Ch. (N. Y.) 445, and not at all like *Bartlett v. His Imperial Majesty the Sultan* (C. C.) 23 Fed. 257. The broad principles of interpleader (although in a case arising under the New York Code) are briefly stated by Mr. Justice Hatch in *Helene v. Corn Exchange Bank*, 96 App. Div. at page 395, 89 N. Y. Supp. at page 312:

"The moving party is required to show that two persons have preferred a claim against him, that the defendant has no beneficial interest in the thing claimed, and cannot determine without hazard to itself to whom the debt should be paid, and that there is no collusion with any party to the action."

It is unnecessary to cite or analyze other cases on this point mentioned in the briefs in opposition to the motion.

In considering the relations of the parties, it may be pointed out, at the outset, that the Custodian is in error in regarding the amount here

in controversy as a "fund." The bank has not in its hands a fund, as that term is understood in law. The bank is a debtor, and its depositor is a creditor, and, in the event of some action or proceeding involving insolvency, the depositor would be a general creditor, sharing pro rata with others similarly situated. It could not, in such circumstances, obtain the precise amount on deposit, because that amount has not been earmarked, segregated, or in any manner specifically set aside.

The Custodian, in his demand, determined that the deposit was a "special deposit." The complaint, whose allegations must be accepted, shows, however, that the deposit was not in any way a "special" deposit, in the sense of a trust, or a segregated or earmarked fund.

All that Simon has, as against the bank, is a chose in action, and the enemy could at best have no more, if he had the right to stand in the place of Simon. The state of facts in *Salamandra Ins. Co. v. New York Life Ins. & Trust Co.* (D. C.) 254 Fed. 852, was quite different. In that case the court proceeded on the theory that there was a fund—in other words, a res—segregated for certain purposes.

Bearing in mind the facts in the case at bar, the question, for the purposes of this case, can be disposed of within narrow limits, and without any necessity of questioning the constitutionality of the act in any particular. It may be assumed, for the purpose of the argument, that, if Simon had in his possession property belonging to an enemy, the Custodian could take the steps provided for by the statute to bring that property into his (the Custodian's) possession; but that is not the situation. It is sought here by *ex parte* proceedings to compel an American citizen to pay a debt claimed by the Custodian to be owing to an enemy by that American citizen, notwithstanding that another American citizen claims that the debt is owing to him.

The question then is whether, under the Trading with the Enemy Act (Act Oct. 6, 1917, c. 106, 40 Stat. 411 [Comp. St. 1918, §§ 3115½a-3115½j]), it is provided, in a case such as this, that the mere investigation and determination of the executive that a debt is owing to an enemy, instead of to a citizen, is sufficient.

The broad general purposes of the Trading with the Enemy Act included the prohibition of commercial relations, except in some circumstances under executive license, and the capture and custody of enemy property, so as to prevent the advantage which would come to the enemy of using such resources. In order to carry out the extremely important purposes of the act, rendered necessary by the exigencies of war, the statute has devised a series of steps by which, in the first place, enemy property is laid hold of, and, secondly, then administered. Congress apparently held the view that a preliminary "hearing" would not be practicable; but, to safeguard against acts which in law might be arbitrary, an "investigation" was preliminarily required. In the effort to protect those who, in one form or another, transferred property to the Custodian, Congress included certain provisions intended to safeguard the persons so transferring property to the Custodian. The language of the statute seems to have been carefully selected, with a view, on the one hand, of being comprehensive as to subject-matter, and, on the other, of being particular as to de-

tails of execution. It is provided, under section 7c (section 3115½d) of the act as follows:

"(c) 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."

[2, 3] The question here presented is whether the language, "any money or other property owing * * * by, on account of, or on behalf of, or for the benefit of an enemy, * * *" covers a debt such as the bank here owes. Such a debt is not "property" in the ordinary acceptation of the term. A debt may possibly be designated as property in the sense of the assets of an estate or of a creditor, but as used in this section of the act the word "property" undoubtedly refers to a tangible res, or some evidence of debt, or share in property such, perhaps, as, on the one hand, a note or bill of exchange, and, on the other hand, a certificate of stock or an undivided interest in real property. "Money" undoubtedly, under some circumstances, would have a very broad meaning, but, under this section of the act, whatever else might come under the definition of money, it is plain that, where the relation of bank depositor and bank exists, an ordinary deposit is not money within the meaning of section 7c. That this is not a narrow view may be illustrated by reference to subdivision "d" of section 7, where the phrase "any money or other property" is also used, but is followed by the words "or to whom any obligation or form of liability to such enemy * * * is presented for payment." In other words, if money or other property includes such a debt as that in the case at bar, why use the additional language set forth in section 7, subdivision "d"?

But the reason for concluding that the bank deposit cannot be summarily disposed of goes deeper than a mere collocation of words. Let us start with a case of unliquidated damage. The Custodian in his investigation finds, let us assume, that citizen A, prior to the war, breached his contract for delivery of goods to enemy B. Enemy B had a cause of action against citizen A for damages and would have been entitled to a recovery. Can it be imagined that Congress, disregarding constitutional safeguards, would have empowered the Custodian to determine without a hearing that citizen A owed enemy B \$1,000 because, after investigation, the Custodian regarded that amount as representing the damage to which enemy B would have been entitled as against citizen A?

Let us go a step further, and assume that citizen A had made and delivered his note to enemy B, but insisted that there were defenses to the note, and that he did not owe the sum represented by the note, and was not liable upon the note. Could the Custodian determine, without a hearing, that there was liability from citizen A to enemy B upon the note, and therefore that there was either money or property owing from citizen A to enemy B?

Wherein does the case at bar differ in principle from these illustrations? As between the Custodian and the bank, the Custodian has

assumed to decide the legal liability of the bank; while the amount on deposit is not in dispute, the very vital question as to who the creditor is still remains in controversy. Was it ever intended, in such circumstances, that the ex parte investigation of the Custodian could determine, as against a stranger to the investigation, that that stranger owed enemy B instead of citizen A?

It may be assumed (without deciding) that, as between the Custodian and Simon, section 7c is applicable; but that section does not contain any language which compels a debtor to pay his debt, without a decree of a court of competent jurisdiction. The United States is protected because other provisions of the act prevent the payment by a debtor to the enemy under pain of punishment, and the omission of the word "debt," or some similar expression, in section 7c is manifestly deliberate; for Congress surely never intended that an American citizen should be put in a position where, because of ex parte determination, he might be called upon to pay his debt twice.

The Custodian's certificate required to be given under subdivision "c" of section 7 would not afford the bank any protection; for that certificate is merely designed, under the act, as an acquittance, if the debt owing and paid is to an enemy. The certificate would not avail the bank as against Simon.

Section 9 (section 3115 $\frac{1}{2}$ e) is not applicable. This section was intended to cover and include property the title to which was in an enemy, and which had been transferred or paid to the Custodian, either voluntarily or following a requirement. It is the citizen's right in enemy's property in the Custodian's hands that is being considered. It is to prevent placing enemy property beyond the reach of American citizens or nonenemies, who may have a right or an interest in or a lien upon the property of an enemy in the Custodian's possession.

The section was not intended to include nonenemies owning property in the United States in which no enemy had an interest, and which therefore was not required to be reported or transferred to the Custodian. It is difficult to suppose that Congress intended that our citizens should divest themselves of title to their own property, give to it an enemy character, and then get it back under section 9.

Realizing that it was impossible to foresee all the questions and contingencies which would arise under the act, Congress confided to the United States courts powers of a most comprehensive character in section 17 (section 3115 $\frac{1}{2}$ i), which reads as follows:

"That the District Courts of the United States are hereby given jurisdiction to make and enter * * * all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the act of March third, nineteen hundred and eleven, entitled 'An act to codify, revise, and amend the laws relating to the judiciary.'"

Under this section, this court no doubt could have made a formal rule to cover procedure in just such a case as this, and what can be done by rule obviously can be done by decree. If on facts of the character set forth in this complaint, procedure by bill of interplead-

er is sanctioned, the purposes of the statute are satisfied, and the rights of American citizens safeguarded.

It is suggested in the brief submitted on behalf of the Custodian that the Trading with the Enemy Act—

“is not only to weaken the arm of the enemy by depriving him of resources, but also to strengthen the arm of the captor by furnishing means for the prosecution of the war.”

Nowhere in the act is there evidence of any legislative intent that the purpose of seizing or taking enemy property under the act is to furnish our government with means to prosecute the war. The final disposition of such property as has been or will be taken under the act will be governed by treaty arrangements or congressional legislation or both. In a broad sense, the United States is a trustee to hold enemy property taken under the act, until such time as the United States, in orderly course, shall determine the final disposition thereof. It is fair to assume that any treaty will safeguard the rights of American citizens whose property has been seized in enemy countries, and therefore that the provisions of such treaty will, in this respect, be reciprocal. Undoubtedly resources captured under this act could, as an incident, be used by the United States in the course of its prosecution of the war; but the fundamental purpose of the act was to prevent the enemy from having the advantage of such resources as might be susceptible of capture under the act.

The amount on deposit with the plaintiff bank is in every sense captured. The bank seeks to deposit that amount in court, where it cannot be withdrawn without an appropriate decree of a court of competent jurisdiction. If the court should find that the deposit is enemy-owned, then the amount representing that deposit can never reach the enemy. If the court, on the other hand, should find that the deposit belongs to defendant Simon, an American citizen, the situation will be that Simon, nevertheless, cannot have this fund pending a final decree, and thus the United States will be protected against this resource reaching the enemy.

Finally, by the present procedure, the rights of the plaintiff bank would be fully protected, and a simple litigation would be the means of safeguarding the rights of all concerned. In view of the subject-matter of the litigation, and, to the end that a speedy disposition thereof may be had, a motion to advance on the calendar will be entertained, if counsel are so advised.

The motion to dismiss the bill is denied, and there may be submitted an interlocutory decree directing the payment of the amount of the bank's indebtedness into this court, and providing that upon such payment plaintiff shall be discharged from liability either to defendant Simon or to the Custodian.

. On Reargument.

On reargument the counsel for the Alien Property Custodian calls attention to two points claimed not to have been argued before this court:

1. The proposition is made that this suit is, in effect, against the United States, and will not lie. This point, it is true, was not argued.

2. It is also stated, because the amendment of November 4, 1918, to subdivision "c" of section 7 of the Trading with the Enemy Act was not mentioned in the opinion, that the reasoning in the opinion of the court might have been different, and therefore that some expressions of the court went further than the section as amended justified.

Whether some of the reasons set forth in the opinion were sound or not on the legal status in this case as to the debt of the bank considered in this case, I have no doubt my conclusion was right, and my decision so far as concerns this case covered all questions which were or might have been presented.

So far as expressions isolated from context are concerned, counsel of course are at liberty to make any arguments they may be advised in other litigations between different parties.

LEACH v. KENTUCKY BLOCK CANNEL COAL CO., Inc.

(District Court, S. D. New York. February 5, 1919.)

CONTRACTS §10(4)—**MUTUALITY.**

A contract by which defendant agreed to furnish plaintiff with such coal as should be ordered by him up to 25,000 tons per year, but which did not obligate plaintiff to purchase any quantity, *held* not enforceable by plaintiff for lack of mutuality.

At Law. Action by Francis M. A. Leach against the Kentucky Block Cannel Coal Company, Incorporated. On motion by defendant for judgment on the pleadings. Granted.

Howe, Smith & Sawyer, of New York City (Daniel D. Sherman, of New York City, of counsel), for the motion.

Stetson, Jennings & Russell, of New York City (Thomas Garrett, Jr., of New Brighton, N. Y., and Malcolm S. McN. Watts and Coulter D. Young, both of New York City, of counsel), opposed.

MAYER, District Judge. The complaint alleges, for a first cause of action, that defendant owns and operates a coal mine in Kentucky; that in April, 1915, plaintiff entered into a contract with defendant for the sale and distribution of defendant's products for five years in that territory of the United States and Canada which lies east of the seventy-ninth meridian of longitude; and it is then alleged:

"Sixth. The terms and conditions of said contract were that plaintiff was to introduce defendant's products in the territory in question, and to sell as much thereof as possible, and in consideration for plaintiff's undertaking defendant agreed to sell to plaintiff for delivery within said territory all coal which plaintiff would order up to twenty-five thousand (25,000) tons per annum, provided plaintiff purchased at least two thousand (2,000) tons of coal per annum, the price which plaintiff was to pay for such coal for the year ending March 31, 1916, to be two dollars (\$2.00) per net ton of two thousand pounds free on board cars at the mines, and for year subsequent to March 31,

1916, at the minimum price fixed by the defendant for shipments of its coal to Western points; it being further provided that the quality and preparation of the coal was to be equal to the standard shipments of the defendant, and if special preparation was ordered by the plaintiff, the same was to be paid for at the cost thereof to the defendant, and it was understood and agreed that plaintiff had the right to resell said coal at such profit as he could obtain, and it was further provided that no export shipments were contemplated by said contract, and the defendant agreed to help the plaintiff with advertising and in every other way possible."

The complaint proceeds to set forth that during the year commencing April 1, 1915, and ending March 31, 1916, plaintiff placed orders with defendant for resale to plaintiff's customers for 2,772.15 tons of coal and paid defendant in full for all of such coal; that during the year commencing April 1, 1916, and ending March 31, 1917, plaintiff placed orders with defendant for resale to plaintiff's customers for approximately 7,000 tons, but defendant failed to deliver more than 2,699.25 tons; that on March 20, 1917, there were outstanding orders of the plaintiff for the delivery of coal by defendant equal to about 3,240 tons, which defendant had not delivered to plaintiff in accordance with the terms of plaintiff's orders, and on March 20, 1917, defendant asked plaintiff to cancel said orders, which plaintiff refused to do; that since March 31, 1917, plaintiff has ordered and defendant has accepted orders for delivery of 50 cars, or approximately 2,000 tons, of coal, only 20 cars of which have been delivered to plaintiff, and defendant has failed to deliver the balance; that plaintiff duly ordered during said period 30 additional cars of coal, but defendant wrongfully refused to accept plaintiff's orders for such additional 30 cars of coal.

It is then alleged that on May 24, 1917, defendant notified plaintiff that until further notice defendant would not accept orders for filling in the year ending March 31, 1918, and that plaintiff's orders for coal which had been given prior to April 1, 1918, would not be filled.

Certain details are then set forth, showing the general nature of the damage claimed to have been suffered by plaintiff, and the pleader concludes by alleging that by reason of defendant's conduct in failing to deliver coal to plaintiff or accept his order for the delivery of defendant's products, pursuant to the agreement, plaintiff was obligated to refrain from selling defendant's products, and was deprived of all benefits from an extraordinary market and demand therefor which existed from August, 1916, to July, 1917, during which time plaintiff could have resold at least 20 tons of defendant's products at an average profit of at least \$3 per ton.

For a second cause of action, plaintiff, after repeating various allegations, alleges facts which he asserts constitute overcharges in the aggregate sum of \$2,083.31.

In his third and final cause of action plaintiff alleges that he was unable to perform contracts with his customers by reason of defendant's conduct, all to his damage. The complaint concludes with a demand by plaintiff for judgment against defendant for his damages in the sum of \$75,000, reserving all claims for damages accruing subsequent to the date of the complaint.

The New York practice on such motions is well settled. Such a motion searches the complaint, and "the sufficiency of the complaint must be tested as upon a demurrer." *People v. O'Brien*, 209 N. Y. 366, 103 N. E. 710; *Clark v. Levy*, 130 App. Div. 389, 114 N. Y. Supp. 890.

In a pleading it is immaterial by what name the alleged agreement of the parties is designated; that is, whether by the use of the word "contract" or "agreement." The question is what the agreement sets forth. The essential feature of the agreement, according to paragraph sixth of the complaint, is that defendant agreed to sell to plaintiff, for delivery within the named territory, all coal which plaintiff would order up to 25,000 tons per annum. There is no obligation whatever upon plaintiff to order any coal. If plaintiff had refused or neglected to order coal, defendant would not have had any cause of action against him. The case is not one where one party agrees to supply the requirements of another. See *U. S. v. Republic Bag & Paper Co.*, 250 Fed. 79, — C. C. A. —, where there is a general discussion of this type of agreement, with leading cases cited.

On the contrary, the agreement is in principle, in one aspect, within that class of cases which have come to be known as "will, wish, or want" contracts. It is an agreement clearly lacking in mutuality. *American Cotton Oil Co. v. Kirk*, 68 Fed. 791, 15 C. C. A. 540; *Commercial Wood & Cement Co. v. Northampton*, 115 App. Div. 388, 100 N. Y. Supp. 960; *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.*, 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696.

In any event, because there was no obligation upon plaintiff to order up to 25,000 tons, the case is well within the principle of *Pressed Steel Car Co. v. Union Pacific Railroad (D. C.)* 254 Fed. 316, filed December 17, 1918. There is nothing to the contrary in *Munson S. S. Line v. Grimwood*, 249 Fed. 722, 161 C. C. A. 632. Indeed, in that case the court indicated, in passing, its full agreement with the *Cold Blast Transp. Co. Case*, supra.

For the reasons outlined, the first and third causes of action set forth in the complaint do not state causes of action, and are demurrable.

Where, however, orders under the agreement were accepted, each order so accepted, or sale, may give rise to the cause of action. Such causes of action are attempted to be pleaded in the second cause of action of the complaint; but, by repeating various allegations of the first cause of action, plaintiff has made the second cause of action demurrable. It is quite plain, however, that on the facts indicated in the second cause of action a complaint can be successfully drawn. Therefore an opportunity will be afforded to plaintiff to amend.

Motion for judgment on the pleadings granted, with leave to plaintiff to amend his complaint within 20 days. Submit on one day's notice.

THE WELLS CITY.

(District Court, E. D. New York. March 26, 1919.)

SEAMEN ⇐21—WAGES AND EFFECTS—DESEBTION—WHAT LAW GOVERNS.

A British seaman, who had signed for a voyage on a British ship from England to the United States and return, and who deserted on arrival here before making any demand for wages, forfeited his right to wages and effects under the law of the United Kingdom, and he could not thereafter claim the benefits of Rev. St. § 4530 (Comp. St. § 8322), entitling a seaman to receive at each port half the wages earned, and to recover all wages earned if the master refused to pay the half on demand.

In Admiralty. Libel by Martin MacNamara against the steamship Wells City to recover wages, and effects. Libel dismissed.

Silas B. Axtell, of New York City, for libelant.

Harrington, Bigham & Englar, of New York City, for claimants.

GARVIN, District Judge. This is a libel to recover \$346.50 for wages claimed to have been earned by the libelant while a carpenter on the steamship Wells City, \$66.50, a tool chest, worth \$200, and clothes, worth \$80. Libelant signed regular shipping articles on the steamship Wells City at Liverpool, England, on March 3, 1918, as carpenter, for a voyage to the United States and return at wages of £14 per month. The vessel reached New York April 3, 1918.

Libelant claims that on April 8th he duly demanded of the master of the vessel one-half of the wages he had then earned, under the provisions of section 4530 of the United States Revised Statutes (Comp. St. § 8322), which demand was refused, whereupon he became entitled to a release from his contract of employment and to the full amount of wages earned up to the time of the demand. Libelant claims that he duly demanded the tool chest and clothing, which were and are his property, after making his demand for one-half of wages earned, and that he was not allowed to take either tool chest or clothes.

The claimants contend that before demanding one-half of his wages, libelant had abandoned and deserted the Wells City, thereby forfeiting his rights to his said effects, under section 221 of the Merchants Shipping Act of 1894 of the United Kingdom; libelant and claimants being British subjects and citizens and the Wells City being a British ship.

The testimony establishes to my satisfaction that on Saturday morning, April 6th, before any demand whatever was made for wages, the libelant refused to do any more work and left the ship, with the intention of having her finally sail without him. This amounted to desertion, and therefore, under the Merchants Shipping Act, supra, the libelant has forfeited all his effects and wages. The case comes within the rule laid down in *The Belgier* (D. C.) 246 Fed. 966, which holds that seamen must act in good faith in making demand for wages. Judge Augustus N. Hand in that case says:

"The libel must therefore be dismissed, because these men were engaged in deserting, and were not acting in good faith."

The libel is dismissed.

SOUTHWESTERN TELEGRAPH & TELEPHONE CO. v. CITY OF
HOUSTON et al.

(District Court, S. D. Texas, Houston Division. April 13, 1919.)

No. 108.

1. TELEGRAPHS AND TELEPHONES \Leftrightarrow 26 $\frac{3}{4}$. New, vol. 7A Key-No. Series—REGULATION OF RATES—POWER OF POSTMASTER GENERAL—“POLICE REGULATIONS.”

In Resolution July 16, 1918 (Comp. St. 1918, § 3115 $\frac{3}{4}$ x), authorizing the President to assume control of the telephone and telegraph lines, provided that the existing police regulations of the several states should not be affected, which is the same proviso as used in Railroad Control Act March 21, 1918, c. 25, § 15 (Comp. St. 1918, § 3115 $\frac{3}{4}$ o) which act by section 10 (Comp. St. 1918, § 3115 $\frac{3}{4}$ j), gave the President power to increase rates with the consent of the Interstate Commerce Commission, “police regulations” is used in its narrow sense of regulations affecting the public safety, health, and morals, not in the broad sense of any regulation to promote the general welfare, and does not include regulation of rates, so that the Postmaster General can increase the rates without the consent of the state authorities.

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

2. TELEGRAPHS AND TELEPHONES \Leftrightarrow 26 $\frac{3}{4}$. New, vol. 7A Key-No. Series—CONSTRUCTION OF RESOLUTION—WAR MEASURE.

The resolution of July 16, 1918 (Comp. St. 1918, § 3115 $\frac{3}{4}$ x), authorizing the President to assume control of telegraph and telephone lines, being a war measure, should be liberally construed.

3. STATUTES \Leftrightarrow 228—CONSTRUCTION—PROVISO.

A proviso to a statute should be strictly construed.

4. TELEGRAPHS AND TELEPHONES \Leftrightarrow 26 $\frac{3}{4}$. New, vol. 7A Key-No. Series—DISCRETION OF PRESIDENT—CONTROL BY COURTS.

The compensation to be paid the owners of telegraph and telephone lines was intrusted to the discretion of the President by the resolution of July 16, 1918 (Comp. St. 1918, § 3115 $\frac{3}{4}$ x), authorizing him to assume control of such lines, and the Postmaster General, in making contracts therefor, acts for the President, and his decision cannot be questioned by the courts.

In Equity. Suit by the Southwestern Telegraph & Telephone Company against the City of Houston and others for an injunction. Preliminary writ of injunction ordered.

Joseph D. Frank, of Dallas, Tex., and John Chas. Harris, of Houston, Tex. (D. A. Frank, of St. Louis, Mo., of counsel), for plaintiff.

W. J. Howard and Kenneth Krahl, both of Houston, Tex., for defendants.

JACK, District Judge. The plaintiff, Southwestern Telegraph & Telephone Company, averring that it is operating a telephone system in the city of Houston as an agent and employé of Albert S. Burleson, Postmaster General, brings this suit to enjoin the defendant city of Houston, its mayor, and other officers, from interfering with plaintiff in putting into effect certain increased rates for telephone service, prescribed by the Postmaster General, acting for the President of the United States, who, under resolution of Congress, had taken posses-

sion and assumed control and supervision and was operating the said telephone system in the city of Houston. The case is now before the court on a motion for preliminary writ of injunction.

The proclamation by which the President took over the possession and control of the various telephone and telegraph systems in the United States, embodying the resolution of Congress authorizing such action, is as follows:

By the President of the United States of America.

A Proclamation.

Whereas the Congress of the United States, in the exercise of the constitutional authority vested in them, by joint resolution of the Senate and House of Representatives, bearing date July 16, 1918, resolved:

"That the President, during the continuance of the present war, is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: Provided, that just compensation shall be made for such supervision, possession, control, or operation, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid 75 per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code: Provided further, that nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except where in such laws, powers, or regulations may affect the transmission of government communications, or the issue of stocks and bonds by such system or systems."

And whereas, it is deemed necessary for the national security and defense to supervise and to take possession and assume control of all telegraph and telephone systems and to operate the same in such manner as may be needful or desirable:

Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolution, and by virtue of all other powers thereto me enabling, do hereby take possession and assume control and supervision of each and every telegraph and telephone system, and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies.

It is hereby directed that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster General, Albert S. Burleson. Said Postmaster General may perform the duties hereby and hereunder imposed upon him, so long and to such extent and in such manner as he shall determine, through the owners, managers, boards of directors, receivers, officers, and employes of said telegraph and telephone systems.

Until and except so far as said Postmaster General shall from time to time by general or special orders otherwise provide, the owners, managers, boards of directors, receivers, officers and employes of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the names of their respective companies, associations, organizations, owners, or managers, as the case may be. * * *

(Remainder of proclamation not necessary to quote.)

Affidavits filed show that the telephone system of plaintiff company, hereinafter referred to as the telephone company, has been operated since the date set in the proclamation, July 31, 1918, by the Postmaster General, acting for the President, through the agency of the telephone company, as provided in the President's proclamation; that various orders concerning the management and conduct of the business have, from time to time, been issued by the Postmaster General, under whose direction the company acts, and that all moneys received from the operation of the plant are the moneys of the government; that prior to the government's taking over the property of the plaintiff company at Houston the latter had made application to the city for authority to increase its rates, the hearing on which application was concluded after the government took possession and the request had been refused; that on October 5, 1918, in accordance with the provisions of said proclamation, an agreement was entered into between the Postmaster General and the telephone company, and others constituting the Bell Telephone System, fixing the compensation which should be paid for the use by the government of such properties; that, effective January 1, 1919, the Postmaster General ordered an increase in the rates at Houston.

The city, after an ineffectual protest at a conference held at the office of the solicitor for the Postmaster General, filed suit against the telephone company for an injunction to restrain it from putting such order into effect, and the telephone company then filed the present suit, asking an injunction to prevent interference by the city and to prohibit criminal prosecution of its officers and employes under a drastic ordinance forbidding an increase of rates without authority from the city.

Under the laws of the state of Texas, the power to regulate rates of telephone corporations is delegated by statute to the municipalities in which they operate. The city's contention is that, while Congress might have granted to the President the right to establish intrastate rates, it did not do so, but reserved such right in the states by the proviso to the first section of the act, which reads:

"Provided, further, that nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transmission of government communications, or the issue of stocks and bonds by such system or systems." Comp. St. 1918, § 3115 $\frac{3}{4}$ x.

The authority to fix intrastate rates to be charged by public utility corporations, it is contended, falls within the police power of the states, and is therefore, under the proviso to the act, left in the states; whereas, the plaintiff contends that, while the making of rates falls within the term "police power" in its broadest sense, the term "police regulations," as used in the act, must be construed in the narrower acceptation of the term, as covering regulations affecting the safety, health, and morals of the public.

The right claimed by the Postmaster General to establish rates independent of state or municipal regulations has been challenged in a

number of jurisdictions in suits instituted by various state commissions, or municipalities, seeking injunctions, either against the Postmaster General or the telephone companies acting as his agents.

In the following cases injunctions have been refused, either because the court held that the suits were, in effect, against the government, and it was without jurisdiction, or because, in the opinion of the court, the fixing of rates was a discretionary power vested in the President, and his action in exercising such discretion was not subject to review: State of North Dakota ex rel. Langer, Attorney General, v. Northwestern Telephone Exchange Company and Burleson, Postmaster General, United States District Court, District of North Dakota (oral opinion, not reported); Public Service Commission of Indiana v. American Telegraph & Telephone Company, United States District Court, District of Indiana (no written opinion); State of Florida ex rel. Railroad Commission v. Burleson, Postmaster General, District Court of the United States, Southern District of Florida, 258 Fed. —; Barber v. Burleson et al., United States District Court, District of New Jersey (oral opinion, not reported); Southwestern Bell Telephone Company v. State of Oklahoma ex rel. Freeling, Attorney General, Supreme Court of Oklahoma, 181 Pac. 487; Public Service Commission v. New England Telephone & Telegraph Company, Supreme Court of Massachusetts, 122 N. E. 567; Read et al. v. Central Union Telephone Company, First District Appellate Court of Illinois; Commercial Cable Company v. Burleson, United States District Court, Southern District of New York, 255 Fed. 99; State of Mississippi ex rel. Collins, Attorney General, and Railroad Commission v. Burleson, Director General, Chancery Court, Hinds County, Mississippi; Railroad Commission of Louisiana and Coco, Attorney General, v. Cumberland Telephone & Telegraph Company, and Burleson, Postmaster General, Supreme Court of Louisiana, 82 South. —.

In the following cases cited, injunctions were allowed: Public Utilities Commission v. Southwestern Bell Telephone Company, United States District Court, Kansas, 258 Fed. —; Grosbeck, Attorney General, v. Michigan State Telephone Company, Circuit Court of Ingham County, Michigan, which case the Supreme Court of Michigan refused to review; State ex rel. Payne, Attorney General, v. Dakota Central Tel. Co., Supreme Court of South Dakota, 171 N. W. 277.

The question of jurisdiction is not an issue in the present case, inasmuch as it is the government, through its agent, the telephone company, which seeks relief. Thus there is squarely presented for decision the issue as to the authority of the Postmaster General, under the act of Congress, to establish rates for telephone service.

[1] The term "police power," in its broadest sense, is very difficult to define or accurately to limit. Freund in his work on that subject says:

"In the decisions of the courts we find the term police coupled with internal commerce and domestic trade; health and safety measures are commonly ascribed to it; but it is also made to include the establishment of courts of justice and the punishment of offenses, and the general tendency is to identify it with the whole of internal government and sovereignty and to regard it as an undefined mass of legislation." Page 2.

After thus describing the police power in its broadest sense, Freund defines the term in its primary or narrower sense, the sense in which plaintiff contends Congress used it in the proviso to the Telephone Act :

"The exercise of the police power for the protection of safety, order, and morals, constitutes the police power in the primary or narrower sense of the term. It is a power so vital to the community that it is often conceded to local authorities of limited powers. It is the police power in this narrower sense of the term which the Supreme Court of the United States concedes on principle to the states, even where its exercise affects interstate and foreign commerce." Page 7.

The Supreme Court has recognized this distinction. Thus, in *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, it is said :

"The police power in its broadest sense, includes all legislation and almost every function of civil government."

In the cases of *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187, and *Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 38 Sup. Ct. 438, 62 L. Ed. 1006, the court refers to the police power as "an ambiguous term." It clearly had in mind the term in its broader sense.

In the case of *Manigault v. Springs*, 199 U. S. 481, 26 Sup. Ct. 130, 50 L. Ed. 274, involving the right of a state, in the absence of legislation by Congress, to authorize the construction of dams across interior streams, though previously navigable to the sea, the Supreme Court clearly recognizes this distinction in the police power in its broader sense, and in its primary or narrower sense :

"It only remains to consider," said the court, "in connection with this branch of the case, whether the act of the General Assembly of 1903 was a proper exercise of the police power of the state. Of this we have no doubt. Although it was not an exercise of that power in its ordinarily accepted sense of protecting the health, lives, and morals of the community, it is defensible in its broader meaning of providing for the general welfare of the people."

In determining in which of these senses Congress used the term in the act authorizing the taking over and operation of radio, cable, telegraph, and telephone systems, reference to the previous legislation relative to the taking over and operation by the President of the railroads will be of some assistance.

This authority by which the President took possession of the railroads was a short paragraph in the Army Appropriation Act of August 29, 1916, c. 418, § 1, 39 Stat. 645 (Comp. St. 1918, § 1974a), 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."

This, as stated by the President when he went before Congress in joint session January 4, 1918, was sufficient for all purposes of administration, but it was desired that some guaranty from the government to the owners and creditors of the railroads should be given that their

properties would be maintained in good condition, and that they would receive just compensation for their use.

In order to make proper provision for such compensation, to the railroad companies, and to make certain provisions for the continued operation of the railroads, the supplemental Act of March 21, 1918, c. 25 (Comp. St. 1918, §§ 3115 $\frac{3}{4}$ a-3115 $\frac{3}{4}$ p), known as the Federal Railroad Control Act, was passed.

Section 10 of this act provides that the President, when in his opinion the public interest requires, may initiate rates and fares by filing the same with the Interstate Commerce Commission, leaving to such commission the final right to pass on their justness and reasonableness. This clause added nothing to the President's authority. The right to operate, granted by the first act, necessarily carried with it the right to fix rates, and this provision of the second or supplementary act, so far from broadening the President's authority, placed on it a restriction—the necessity for approval, in case of complaint, of the Interstate Commerce Commission. It will be noted that no distinction is made between interstate rates and intrastate rates. The Interstate Commerce Commission is composed of men, by long training, expert in the technical knowledge needful in rate making, and so Congress very properly provided that this commission, of its own creation, should share with the President the authority and responsibility of initiating new rates, when such rates were charged to be unjust or unreasonable. Congress was not willing, however, to leave to the various state Railroad Commissions the power to regulate intrastate rates.

Section 15 of the act is as follows:

"That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds." Comp. St. 1918, § 3115 $\frac{3}{4}$ o.

This provision of the Railroad Act was copied bodily into the Telephone Act, with only the slight change, substituting for "except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds," the phrase, "except wherein such laws, powers, or regulations, may affect the transmission of government communications or the issue of stocks and bonds by such system or systems."

In the Railroad Act there was a provision for the issuance of bonds and other securities by the railroad companies, with the approval of the President; hence the exception in the proviso contained in section 15, relative to stocks and bonds. In the Telephone Act there is no similar provision relative to bonds; hence, in the Telephone Act, this provision is rather meaningless. It has no connection whatever with the police power, and may be regarded as surplusage.

Inasmuch, then, as a prior section of the Railroad Act expressly recognizes the right of the President to fix rates under the conditions therein named, had it been considered that the fixing of rates fell within "the lawful police regulations of such states," Congress should have

added to the exception in the proviso in section 15, "except as hereinbefore provided," or other phrase to that effect. The absence in the exception to the proviso of any reference whatever to the provision previously incorporated in the act relative to the fixing of rates by the President, suggests the inference that Congress used the term "police regulations" in its primary or narrow, rather than in its broader, sense, and hence that such police power of the states was not encroached upon by vesting in the President such authority to make rates.

It will be noted that practically the same language used in the paragraph in the Army Appropriation Bill of August 26, 1916, c. 418, 39 Stat. 619, authorizing the President to take over and operate the railroads, was incorporated in the resolution authorizing the President to take over and operate the telephone lines, and if the former act carried with it the authority to fix rates, the latter would likewise, unless such authority was withdrawn or excluded by the proviso. This proviso, however, is in the same terms as the corresponding clause in the supplementary railroad legislation, which, it is clear, was not intended to take from the President this power, by implication necessarily included in the original law (Army Appropriation Act), and expressly recognized, with certain limitations, in the supplementary legislation. If, then, it was not intended by the proviso in the Railroad Act to leave to the states the right to fix rates, it naturally follows that neither was such the intention of Congress in including a similar proviso in the Telephone and Telegraph Act.

[2, 3] The act authorizing the taking over of the telegraph and telephone lines, being a war measure, should be liberally construed; whereas, even in times of peace, any proviso to an act, under the general rules of construction, should be strictly construed. Lewis' Sutherland, Stat. Const. vol. 2 (2 Ed.) pp. 670, 671, 674, 675.

In determining the intention of Congress, we should bear in mind its vast power in time of war and public peril. In *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281, the Supreme Court of the United States said:

"Congress has the power, not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander-in-Chief. * * *

"The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authority essential to its due exercise."

Again, in the *Legal Tender Cases*, 12 Wall. 457, 20 L. Ed. 287:

"It is absolutely essential to independent national existence that government should have a firm hold on the two great sovereign instrumentalities of the sword and the purse, and the right to wield them without restriction on occasions of national peril. In certain emergencies government must have at its command, not only the personal services—the bodies and lives—of its citizens, but the lesser, though not less essential, power of absolute control over the resources of the country. Its armies must be filled, and its navies manned, by the citizens in person. Its material of war, its munitions, equipment, and commissary stores, must come from the industry of the country."

Congress, in its declaration of war with Germany and with Austria-Hungary, had declared that the President was authorized and directed to employ the entire naval and military forces of the United States and the resources of the government to carry on the war, and that, to bring the conflict to a successful termination, all of the resources of the country were pledged.

It accordingly had enacted a mass of legislation for the raising and equipping of an army and for the husbanding and marshaling of the resources of the nation. It had authorized the taking over of the railroads, and the President, in his proclamation taking possession, had said:

"This is a war of resources, no less than of men, perhaps even more than of men, and it is necessary for the complete mobilization of our resources that the transportation system of the country should be organized and employed under a single authority and a simplified method of co-ordination which have not proved possible under private management and control."

The signing of the armistice did not terminate the war. We are still at war, although active hostilities have been suspended, and may not be renewed. This Telephone Act, however, must be interpreted in the light of conditions as they existed at the time of its passage by Congress, when the enemy was making a last desperate drive on Paris, when American soldiers were being sent to France as fast as transports could be provided to carry them, and when the vast resources of the nation, pledged by Congress, were being thrown into the balance to insure victory for the Allies. Can it be that at such a time Congress, in authorizing the taking over and operation of the telephone system, intended to hamper and embarrass the President in its operation, by denying to him the right to fix rates?

In the Railroad Control Act, Congress had anticipated the probable necessity for an increase in rates, and had provided that the Interstate Commerce Commission should have the authority to pass on their justness and reasonableness. Was there any less reason for anticipating the fact that there might likewise be need for an increase in telegraph and telephone rates to meet a higher cost of labor and of materials needed in the maintenance and operation of the telegraph and telephone systems? No appropriation was made by Congress to cover such a contingency, and it must therefore be presumed that it intended that the rates should be increased whenever, because of conditions over which the President had no control, the telephone system could not be operated on the then existing rates. If more money is needed to operate the telephone system, it must be furnished, either by Congress or by an increase in the rates. Certainly it was not intended that the government, in such event, should default on its obligation to the telephone companies, nor that the President should return the properties to the owners before such time as he should deem their continued operation by the government no longer necessary for the national security or defense.

[4] It is no answer to say that these lines should be operated by the government at no greater cost than they were operated by the owners, or that in this particular case the compensation agreed on by the Post-

master General and the telephone company was too much. The President, acting through the Postmaster General, may or may not have made a good contract. The authority to enter into such a contract involved the exercise of his own judgment, and where such discretion is vested in the President, the courts have no authority to inquire whether or not he acted wisely or to the best advantage. They may not substitute their judgment for his.

As was said by the Supreme Court as far back as *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60:

"By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

"In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive."

The court, in the same case, recognized the distinction in cases where the representative of the President acts in a matter requiring the exercise of discretion, and where his duties are purely ministerial:

"The conclusion from this reasoning is that, where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."

The latest expression of the Supreme Court on the subject is in *Louisiana v. McAdoo*, 234 U. S. 633, 34 Sup. Ct. 941, 58 L. Ed. 1506, in which the court said:

"There is a class of cases which holds that if a public officer be required by law to do a particular thing, not involving the exercise of either judgment or discretion, he may be required to do that thing upon application of one having a distinct legal interest in the doing of the act. Such an act would be ministerial only. But if the matter in respect to which the action of the official is sought is one in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that of the official intrusted by law with its execution. Interference in such a case would be to interfere with the ordinary functions of government. *Marbury v. Madison*, 1 Cranch, 137 [2 L. Ed. 60], *Kendall v. United States*, 12 Peters, 524, 610 [9 L. Ed. 1181], *United States v. Schurz*, 102 U. S. 378 [26 L. Ed. 167], are examples of instances where the duty was supposed to be ministerial. Cases upon the other side of the line are *Decatur v. Paulding*, 14 Peters, 497, 514, et seq. [10 L. Ed. 559, 609]; *Mississippi v. Johnson*, 4 Wall. 475 [18 L. Ed. 437]; *Cunningham v. Macon, etc., Railroad*, 109 U. S. 446 [3 Sup. Ct. 292, 609, 27 L. Ed. 992]; *United States ex rel. Dunlap v. Black*, 128 U. S. 40 [9 Sup. Ct. 12, 32 L. Ed. 354]; *United States ex rel. v. Lamont*, 155 U. S. 303 [15 Sup. Ct. 97, 39 L. Ed. 160]; *Roberts v. United States*, 176 U. S. 221 [20 Sup. Ct. 376, 44 L. Ed. 443]; *Riverside Oil Company v. Hitchcock*, 190 U. S. 316 [23 Sup. Ct. 698, 47 L. Ed. 1074]; *Ness v. Fisher*, 223 U. S. 683 [32 Sup. Ct. 356, 56 L. Ed. 610]."

It may be true, as contended by counsel, that the various state commissions and city councils claiming authority to regulate intrastate rates might, on proper showing made, authorize the government, as they might previously have authorized the telephone companies, to increase established rates, and that, if the rates as fixed by such bodies were confiscatory, relief might be sought in the courts. It is answered that these state laws authorizing the regulation of rates contemplated private ownership of these utilities, and their purpose was to prevent any advantage being taken of the public.

No such reason would exist, were the operation by the state itself, nor does it exist where the operation of these utilities is by the government. As well might a state commission, which has authority to regulate intrastate rates of express companies, claim the same right to regulate intrastate rates which the Government charges for parcel post service. Neither the parcel post nor the telegraph and telephone lines are being operated for financial gain. The former is for the convenience of the public; the latter as a war measure for the safety of the nation. Congress could not have intended that a state commission or a city council should have the authority to say to the government of the United States what rates it might charge for telephone service. If the city of Houston may do so, then likewise may every town and city in the state of Texas, and every town and city in every other state where the Legislature has delegated such authority to its municipal corporations. Such a condition would cause confusion and chaos, and would make utterly impossible any equality or uniformity of rates. It would be incompatible with the power and dignity of the national government. It is inconceivable that the nation in the conduct of a business taken over and made its own as a war measure, should, before fixing the rates to be charged, have to obtain the permission of any municipal council or state commission. It follows that in the proviso to the Telegraph and Telephone Act Congress used the term "lawful police regulation" in the ordinary sense in which the words are understood, and not in the broad sense which would include the authority to fix rates of public utilities.

The plaintiff is entitled to a preliminary writ of injunction as prayed for; and it is so ordered.

G. RICORDI & CO., Inc., v. COLUMBIA GRAPHOPHONE CO.

(District Court, S. D. New York. March 31, 1919.)

1. COPYRIGHTS ⇨34—MECHANICAL REPRODUCTION OF MUSIC—RIGHTS OF CANADIANS TO PROTECTION.

Since Canada does not grant similar rights to citizens of the United States musical compositions of a Canadian are not protected by the provision of the Copyright Act (Comp. St. §§ 9517-9524, 9530-9584), so far as they secure copyrights controlling the parts of instruments serving to reproduce mechanical musical works.

2. COPYRIGHTS ⇨21—PERSONS ENTITLED TO PROTECTION—DOMICILE.

A Canadian, residing in New York while a British military officer, could not establish a domicile, so as to be protected under the provisions of the

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

Copyright Act (Comp. St. §§ 9517-9524, 9530-9584), so far as they secure copyrights controlling the parts of instruments serving to reproduce mechanical musical works.

3. COPYRIGHTS \Leftrightarrow 34—ACQUISITION OF RIGHT BY CANADIAN—“MUSICAL COPYRIGHT”—“MUSICAL COMPOSITION”—“MUSICAL WORK.”

The terms “musical copyright,” “musical composition,” and “musical work,” as used in the Copyright Act (Comp. St. §§ 9517-9524, 9530-9584), refer to a composition which may be music alone, or words and music; and hence, where a Canadian composes music which cannot be copyrighted in the United States, it adds nothing to his rights that the works published with such music were written by a citizen of the United States.

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

Suit for injunction by G. Ricordi & Co., Incorporated, against the Columbia Graphophone Company. Motion for preliminary injunction denied.

Nathan Burkan, of New York City, for plaintiff.

W. Laird Goldsborough, of New York City, for defendant.

MAYER, District Judge. The suit is brought under subdivision “e” of section 25 of the Copyright Act (Act March 4, 1909, c. 320, 35 Stat. 1081 [Comp. St. § 9546]), which provides:

“Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as discs, * * * for use in mechanical music-producing machines adapted to reproduce the copyrighted music, * * * in a civil action, an injunction may be granted upon such terms as the court may impose.”

Plaintiff seeks an injunction against defendant, the manufacturer of sound records, restraining it from manufacturing and selling sound records for use upon phonographs adapted to reproduce the musical composition duly copyrighted by plaintiff and entitled “Dear Old Pal of Mine.”

According to plaintiff, Lieut. Gitz Rice, in the month of February, 1918, discussed with one Harold Robe the possibilities of a refrain of a song which he had conceived for the purpose of having the same written in the form of a ballad. He played this bit of melody to Robe, who suggested that it would be appropriate for a ballad. Robe wrote the words which now constitute the lyric of “Dear Old Pal of Mine,” and prepared a lead sheet of music containing the form of the rhythm for the verse of the song. Robe submitted these words under the title “Dear Old Pal of Mine,” with the lead sheet, to Rice. The latter adopted the form of rhythm to Robe’s verse; the refrain of the words fitting the melody of the refrain conceived by Rice.

After several days, this song, so originated, was played upon the piano, and the music thereof was taken down in musical notation upon a sheet of paper by one Polla and arranged by him for the piano. This song was thus composed in the month of February, 1918, and the rights to it were duly assigned to the plaintiff. This song was first published in this or in any foreign country by the plaintiff in the usual course of

business on March 8, 1918, and was thereafter duly copyrighted in the name of the plaintiff as proprietor thereof.

Robe is an American citizen, and was such on the 8th day of March, 1918, the date of the first publication of the song. Polla, the arranger of the music, was an American citizen on March 8, 1918. Lieutenant Gitz Rice was born in Canada, and at the outbreak of the war, in August, 1914, enlisted as a private in the First Canadian contingent of the British army. He remained in the service for three years, and secured his commission as first lieutenant in the British army in September, 1916. He was invalided in action and incapacitated for further military duty. He returned from overseas in October, 1917, and was entitled to his discharge from further military service. He came to New York City, and while here was assigned by the British Canadian recruiting mission to render services in the city of New York and elsewhere in the United States to aid in the recruiting of British, Canadians, and Americans. In December, 1918, he was placed upon the reserve list, with the privilege of returning to civil occupation; but he is still a British officer. It is alleged that he has returned to civil occupation, and has remained and taken up his residence in the city of New York, and that he so resided on March 8, 1918, at the time of the first publication of the song, and has continued to reside in New York from that date to the present time.

On September 5, 1918, plaintiff filed a notice of user of such composition for the manufacture of parts of instruments serving to reproduce mechanically such composition, as provided by subdivision "e," § 1, of the Copyright Act (Comp. St. § 9517), which reads:

" * * * That it shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright."

On January 31, 1919, defendant wrote plaintiff a letter stating, *inter alia*:

" * * * We do not concede that the Copyright Act of March 4, 1909, as amended, gives to you the right to control the parts of instruments serving to reproduce mechanically 'Dear Old Pal of Mine,' and we beg to give notice that we shall proceed to manufacture parts of instruments serving to reproduce mechanically 'Dear Old Pal of Mine' without payment of royalty."

Defendant, accordingly, has manufactured a sound record adapted to reproduce upon the phonograph "Dear Old Pal of Mine." This sound record, when played upon a phonograph, reproduces both the words and music of plaintiff's duly copyrighted composition, "Dear Old Pal of Mine." Plaintiff never granted to the defendant any license to reproduce this song upon its sound records, nor did the defendant file a notice of intention to use the work upon sound records, under subdivision "e" of section 25 of the act, which reads:

" * * * That whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the

compulsory license provision of this act, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice. * * *

The contentions of defendant are:

First. Defendant is entitled freely mechanically to reproduce the composition in question, because Rice, the composer of the music of the composition, is and was a Canadian, to whose compositions the provisions of the Copyright Act, so far as they secure copyrights controlling the parts of instruments serving to reproduce mechanically musical works, do not apply, since Canada does not grant similar rights to citizens of the United States.

Second. Defendant is entitled freely mechanically to reproduce the composition in question, because even if the proviso of section 8 of the Copyright Act (Comp. St. § 9524) prevailed over the first proviso of paragraph "e" of section 1 of said act, Rice, the composer of the music of the composition, was not domiciled in the United States at the time of its first publication, within the meaning of paragraph "a" of the proviso of section 8 of the Copyright Act.

Third. Plaintiff is not entitled to exact royalties for the mechanical reproduction of the composition in question because the words were composed by an American citizen. The text of a song, if copyrighted alone, must be copyrighted as a book, and could not be classified as a musical work. The music alone, without the text, would be a musical work. Defendant can mechanically reproduce the text alone, because it is not the text of a drama, or of a dramatic work, within the meaning of subsection "d" of section 1 of the Copyright Act, protecting mechanical reproduction, nor is it a musical composition within the meaning of subdivision "e" of section 1 of the Copyright Act, protecting mechanical reproduction, nor is it a musical composition within the meaning of subsection "e" of section 1 of the Copyright Act, protecting mechanical reproduction. In other words, the portion of the composition which constitutes it a musical work, and would give it protection when mechanically reproduced, if composed by a citizen, is the music.

The facts have been assumed as set forth by plaintiff, because, when so considered, questions of law only are presented, the disposition of which may end the suit.

[1] That defendant is right as to its first contention is too clear to require discussion. Until the Dominion of Canada grants similar rights to our citizens, the protective features of the statute in this respect cannot, under the statute, be extended to her citizens.

[2] That defendant, in any event, is correct as to its second contention, is apparent, because Rice, while a British officer, cannot here establish a domicile as distinguished from physical residence. *Carey v. Collier*, Fed. Cas. No. 2400; *Mitchell v. United States*, 21 Wall. 350, 22 L. Ed. 584.

[3] Finally, "musical copyright," "musical composition," and "musical work" obviously refer to a composition which may be music alone, or words and music. Here the music was plainly the composition of Rice. The part which Robe and Polla played was purely incidental.

The music as a product was the product of Rice's brain. What Robe's rights might have been, if the words alone had been reproduced, and whether defendant's contention in that regard is sound, are questions not here for decision. In the published music sheet, the announcement is "Words by Harold Robe" and "Music by Lieutenant Gitz Rice, First Canadian Contingent."

As the musical composition of Rice (without the words) could not have been copyrighted for the reasons stated supra, it adds nothing to the rights of the parties that the words were written by a citizen of the United States, for it is the music which counts in invoking the rights accorded by the statute.

A different question might have been presented, and a different disposition might have followed, if the music had been composed by the American citizen and the words had been written by the Canadian citizen, or if, for instance, an American citizen had set to music some poem, verse, or other literary composition which was in the public domain.

Motion denied.

UNITED STATES v. PENNSYLVANIA CENTRAL COAL CO. et al.

(District Court, W. D. Pennsylvania. June 29, 1918.)

No. 35.

1. WAR \Leftrightarrow 4—POWERS OF CONGRESS—PRICE OF COAL.

Act Cong. Aug. 10, 1917, c. 53, § 25 (Comp. St. 1918, § 3115 $\frac{1}{8}$ q), authorizing the President to fix the maximum price for coal and to make it an offense to demand more than the price fixed, is a measure necessary for the efficient prosecution of war and within the constitutional powers of Congress, though it imposes restrictions which in time of peace might be unlawful.

2. CONSPIRACY \Leftrightarrow 43(5)—INDICTMENT—DESCRIPTION OF OBJECT.

An indictment under Act Cong. Aug. 10, 1917, c. 53, § 25 (Comp. St. 1918, § 3115 $\frac{1}{8}$ q), authorizing the fixing of the price of coal by the President, which charges that defendants with full knowledge that the price had been fixed conspired to demand a greater price with allegation of overt acts, is sufficient, though an indictment for the specific offense would have had to allege both the price fixed and the price demanded.

3. CONSPIRACY \Leftrightarrow 43(5)—INDICTMENT—OVERT ACTS.

An indictment for conspiracy need not allege in what manner the overt acts tended to effect the purpose of the conspiracy, it being sufficient to allege that the overt acts were done to effect the object of the conspiracy.

4. CONSPIRACY \Leftrightarrow 43(6)—INDICTMENT—REQUISITE.

An indictment for conspiracy, which sets forth the names of the conspirators and alleges that the conspiracy was to commit an offense against the United States, the nature of the offense, the time and place, and the overt acts committed to execute the conspiracy, is sufficient.

The Pennsylvania Central Coal Company and others were indicted for conspiracy. On demurrers to the indictment. Demurrers overruled.

R. L. Crawford, U. S. Atty., of Pittsburgh, Pa.
Nash Rockwood, of New York City, for Thos. F. Barrett, Pennsylvania Coal Co., and Cambria & Eastern Coal Co.
Diamond & Zacharias, of Pittsburgh, Pa., for J. Harper Adams.

THOMSON, District Judge. The Pennsylvania Central Coal Company, the Cambria & Eastern Coal Company, and Thomas F. Barrett, have been indicted at the above number and term, with others, for conspiracy to violate section 25 of the act of Congress, approved August 10, 1917 (40 Stat. 284, c. 53 [Comp. St. 1918, § 3115 $\frac{1}{8}$ q]). These three defendants have demurred, filing very numerous reasons in support thereof. The indictment contains three counts, which differ only in the several overt acts charged to have been committed in execution of the conspiracy. The indictment charges that the defendants conspired together to commit an offense against the United States, to wit, to violate the provisions of section 25 of an act of Congress approved August 10, 1917, entitled "An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," and the regulations issued thereunder by Woodrow Wilson, President of the United States, and Harry A. Garfield, United States Fuel Administrator. That is, that the defendant corporations engaged in the business of jobbers of coal, Thomas F. Barrett, president of the Pennsylvania Central Coal Company, and John Harper Adams, secretary and treasurer of the Tri-State Coal & Coke Company, with full knowledge that Woodrow Wilson, President of the United States, had fixed, pursuant to the authority conferred by the said act of Congress, a maximum price for the sale of bituminous coal, did unlawfully conspire to ask, demand, and receive from certain persons therein named, and many others, a higher price per ton for bituminous coal at the mine than the maximum price fixed by the President of the United States in pursuance of the power upon him conferred by the said act of Congress. This is the substance of the charge in each count, followed in each count by certain overt acts charged to be in execution of the conspiracy.

The demurrer alleges: That the acts charged do not constitute a crime. That the facts constituting the alleged crime are not set forth with certainty, as required by law. That the indictment is not direct or certain in the description of the offense charged or attempted to be charged against the defendants. That, under the twenty-fifth section of the said act of Congress, the authority to fix and publish maximum prices was vested solely in the Federal Trade Commission, and the indictment does not aver that a maximum price for the sale of bituminous coal was at any time fixed or published by the Federal Trade Commission. That the indictment does not charge that any maximum price was fixed for the particular locality in which the several shipments of coal specified in the indictment were purchased. That it does not charge that the defendants demanded or received a higher price for the sale of the coal than they were permitted to do under said act, and that said section of the act of Congress is not within the power of

Congress to enact, and is violative of the fourth amendment of the Constitution. That it unlawfully deprives the citizen of his right to freely contract. That it attempts unlawfully to empower the federal authorities to regulate and govern intrastate traffic, thus illegally interfering with the property right of the citizen to freely contract within the state. That it deprives the defendants of the just and equal protection of the law. That it creates an unjust discrimination in the sale of commodities. And lastly that, the crime attempted to be charged being a felony, the alleged conspiracy is merged therein upon the completion of the alleged felonious offense.

[1] As to the constitutionality of the act: We are engaged in a great war, involving not only the fundamental rights of the nation and her people, but, in case of an adverse issue, the very existence of the republic itself. This war, constitutionally declared by Congress, requires the raising, equipping, and supporting of armies and navies, of which the President of the United States is the commander in chief. That the safety of the republic is the first law, is as true now as when the Romans so declared. To the high office of commander in chief necessarily belong many inherent powers. He has authority, without any act of Congress, to exercise all belligerent rights. He may institute a blockade, levy contributions on the enemy, and authorize the military commanders to form a civil and military government in the conquered territory. He may establish there courts of justice. When a state of war exists, the whole nation is pledged to its successful prosecution. Its resources must be controlled and conserved, that large armies may be maintained in the field. Restrictions which in times of peace would be oppressive and unlawful become in times of war a legal necessity. Prices must be regulated and controlled, that the strong may not oppress the weak, nor be permitted to extort unreasonable profits through the stress and exigencies of war. The section of the act of Congress here in question, seeking to regulate the prices of coal and coke, is clearly a measure necessary for the efficient prosecution of the war; and, as the welfare of the nation is higher than the rights of any state, I cannot doubt that it is well within the constitutional power of Congress to enact.

[2] To constitute an indictment under this section, it is, of course, necessary to charge that the conspiracy was to do an act made a crime by the laws of the United States, the offense under section 37 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. § 10201]), consisting of the unlawful combination and the doing of some act in furtherance of it. The offense which the defendants are charged with conspiring to commit, to wit, "to violate the provisions of section 25 of the act of Congress approved August 10, 1917, entitled 'An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' and the regulations issued thereunder by Woodrow Wilson, President of the United States, and Harry A. Garfield, United States Fuel Administrator."

The manner of its violation is set forth to be that the defendants, engaged in the business of jobbers of coal, with full knowledge that the

President had fixed a maximum price for the sale of coal, unlawfully combined to demand and receive from certain parties named a higher price per ton than the maximum price fixed by the President. Under the act, it is the President of the United States who is authorized to fix the price, and to establish rules for the regulation of and to regulate the production, sale, shipment, and so forth. "Said authority and power may be exercised by him in each case through the agency of the Federal Trade Commission during the war or for such part of said time as in his judgment may be necessary." That portion of the indictment which avers a violation of the regulations issued by the President and the Fuel Administrator may be rejected as surplusage, in view of the specific definition of the offense which follows these words. If the charge was the commission of a substantive offense, namely, the sale of coal above the price fixed, it would be necessary in the indictment to aver both the fixed price and the price of sale. Not so, however, when the offense is a conspiracy to ask, demand, and receive a higher price than that fixed by the President.

[3] I think the indictment is sufficiently specific to define and identify the offense charged, so as to enable the defendants to prepare their defense thereto. It is not necessary that the offense which is intended to be committed as a result of the conspiracy should be described with the particularity required in an indictment in which such matter is charged as a substantive crime. Certainty to a common intent is all that is required. Neither is it necessary in alleging overt acts in the indictment, committed by one of the conspirators, to set forth in what manner the several overt acts tended to effect the purpose of the conspiracy. It is sufficient to allege that such acts were done to effect its object. *Houston v. United States*, 217 Fed. 854, 133 C. C. A. 562.

It was said in *United States v. McCord* (D. C.) 72 Fed. 163:

"Any overt act, however slight, intended to effectuate the object of the conspiracy, and whatever its character may be, whether it is itself criminal or * * * innocent in its nature, is sufficient to fix the offense and to make it indictable."

[4] The indictment sets forth the names of the alleged conspirators, charged with a conspiracy to commit an offense against the United States, the nature of the offense, the time and place, with the overt acts committed in and for the purpose of executing them. These, in my opinion, are sufficient to sustain the indictment. *Hyde v. United States*, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614.

The demurrers to the indictment are therefore overruled.

UNITED STATES v. HICKS.

(District Court, W. D. Kentucky. April 3, 1919.)

1. STATES ⇨4—CONGRESSIONAL POWERS—POWERS REMAINING IN STATES.

Suppressing disorderly houses, etc., ordinarily comes under the police power reserved to the states by Const. U. S. Amend. 10, and is not within the legislative power of Congress, except in time of war or other great public peril.

2. WAR ⇨33—TERMINATION.

The President's declaration to Congress that the war ended on November 11, 1918, will be accepted as prima facie correct until events show the contrary, so that Act Cong. May 18, 1917, § 13 (Comp. St. 1918, § 2019b), authorizing the suppression of disorderly houses around encampments "during the present war," is inapplicable to an offense committed after November 11, 1918.

3. EVIDENCE ⇨83(1)—PRESUMPTIONS—PRESIDENTIAL DECLARATION.

All citizens may be presumed to have been informed of, and to have relied on, the President's declaration to Congress that the war ended November 11, 1918.

4. CRIMINAL LAW ⇨905, 966—NEW TRIAL—MOTION IN ARREST—TERMINATION OF WAR.

Since events may subsequently prove the President's declaration to Congress that the war ended November 11, 1918, to be inaccurate, one convicted of violating in December, 1918, Act May 18, 1917, § 13 (Comp. St. 1918, § 2019b), authorizing suppression of certain disorderly houses "during the present war," will be granted a new trial, instead of arresting judgment.

Harry Hicks was convicted of operating a house of ill fame. On motions for arrest of judgment and new trial. New trial granted.

Perry B. Miller, Dist. Atty., and S. M. Russell, Asst. Dist. Atty., both of Louisville, Ky., for the United States.

Clem W. Huggins and Joseph E. Conkling, both of Louisville, Ky., for defendant.

WALTER EVANS, District Judge. The indictment in this case charges:

"That heretofore, to wit, on the 7th day of December, in the year of our Lord 1918, at Louisville, in said district and within the jurisdiction of this court, one Harry Hicks, late of said district, unlawfully did then and there receive and permit to be received for immoral purposes certain persons into a place used for the purpose of lewdness, assignation, and prostitution, within the distance of a military cantonment designated by the Secretary of War; that is to say, that said Harry Hicks did then and there receive and permit to be received for immoral purposes both men and women, whose names are to the grand jurors unknown, into a place operated as a house of ill fame, designated as 401 Seventh street, Louisville, Ky., and within five miles of a military cantonment, to wit, Camp Zachary Taylor, and used for the purpose of lewdness, assignation and prostitution, and did then and there keep and set up a house of ill fame as aforesaid, in violation of section 13 of the act of May 18, 1917, and the order, rule, and regulation of the Secretary of War, issued to carry out the object and purpose of said section of said act."

The defendant entered a plea of not guilty and also a plea that he had previously been convicted of the offense charged in this indictment on a similar indictment therefor in a state court in Louisville, and had

paid the fine imposed by the judgment rendered in that case. The latter plea not being regarded as sufficient in law—the jurisdiction of the two courts being conferred by separate governments which had made separate and distinct laws upon the subject—the case came to trial before a jury on the plea of not guilty. The testimony showed that on the 7th day of December, 1918, the defendant had done the things charged in the indictment, and that the place at which those things were done was within five miles of the boundary line of Camp Zachary Taylor adjoining that city. The jury returned a verdict of guilty.

[1] The defendant has moved, first, for a new trial, and, second, that judgment on the verdict be arrested, upon the ground that the facts proved did not show that any offense had been committed against any law of the United States. By the latter motion there is raised an interesting and important question, which has received the very careful consideration of the court, because, however disgusting the conduct of a person may be, the courts of the United States cannot punish that conduct as criminal unless there be some specific statutory law of the United States authorizing and requiring it. Accurately speaking, the conduct of the defendant is of that character which ordinarily could only come under the general police power constitutionally reserved to the states by the Tenth Amendment, and is not within the legislative power of Congress, except in time of war or other great public peril, that might be averted or mitigated under the commerce clause of the Constitution. These phases of the law should not be overlooked in cases like this. In this connection, and to illustrate our meaning, it will suffice to state the general proposition in the language found on page 473 of volume 9 of the Encyclopedia of United States Supreme Court Reports, where it is said:

“The general police power is reserved to the states. The power to protect the public health and the public safety, to preserve good order and the public morals, to protect the lives and property of their citizens, ‘the power to govern men and things’ within the limits of their dominions, by any legislation appropriate to that end and which does not encroach upon the rights guaranteed by the national Constitution, nor come in conflict with the acts of Congress passed in pursuance of that instrument, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States.”

This is supported by a great number of notable cases.

[2, 3] But, without further going into those matters, it will suffice to say that there is no statute of the United States applicable to this case, unless it be the provisions, presently to be inserted, of the act entitled “An act to authorize the President to increase temporarily the military establishment of the United States,” approved May 18, 1917 (Act May 18, 1917, c. 15, 40 Stat. 76).

Under the Constitution of the United States (article 1, § 8, cl. 11), Congress is authorized to declare war, by clause 12 to raise and support armies, by clause 14 to make rules for the government of the land and naval forces, and by clause 18 it is empowered to make all laws which may be “necessary and proper” for carrying into execution the powers given in that article and all other powers vested by the

Constitution in the government of the United States or any department or officer thereof.

We may assume for the purpose of this opinion that section 13 of the act referred to (Comp. St. 1918, § 2019b) covered a legitimate exercise of the powers of Congress. Although there is no express provision in that section which authorizes the Secretary of War to make regulations to meet the exigencies of the section, we may assume (without deciding) not only that such regulations were made, but that they conformed to the provisions of the act. We may also assume that Congress had concluded that the legislation to be referred to was "necessary and proper" to carry into effect the other powers authorized to be exercised in the great emergency of war that had a few days before come upon the country.

By a joint resolution passed by Congress and approved by the President on April 6, 1917, it was resolved:

"That the state of war between the United States and the Imperial German government which has thus been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the government to carry on war against the Imperial German government; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States." 40 Stat. 1, c. 1.

This situation, in the judgment of Congress, required much legislation. Among the acts it passed was that approved May 18, 1917, the thirteenth section of which is as follows:

"That the Secretary of War is hereby authorized, empowered, and directed during the present war to do everything by him deemed necessary to suppress and prevent the keeping or setting up of houses of ill fame, brothels, or bawdy houses within such distance as he may deem needful of any military camp, station, fort, post, cantonment, training, or mobilization place, and any person, corporation, partnership, or association receiving or permitting to be received for immoral purposes any person into any place, structure, or building used for the purpose of lewdness, assignation, or prostitution within such distance of said places as may be designated, or shall permit any such person to remain for immoral purposes in any such place, structure, or building as aforesaid, or who shall violate any order, rule, or regulation issued to carry out the object and purpose of this section shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than \$1,000, or imprisonment for not more than twelve months, or both." 40 Stat. 83.

Events of greatest moment continued to follow, and early in the month of November, 1918, the military power of the enemy collapsed. In no part of our history did anything arouse more universal interest among the people of the United States than did this situation.

Article 2, § 3, of the Constitution provides that the President "shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient." For much the greater part of the existence of our government the method of complying with this constitutional requirement has been by what we are accustomed to call the "messages of the President." The President of to-day (as he law-

fully might) has used another method of giving to the Congress such information as he thought it wise to communicate; his method being to request the two houses of the Congress to meet in joint session, and, when that is done, to make his communication orally, and in this way meet the constitutional provision. In substance both methods are precisely the same. And so on November 11, 1918, Congress, knowing of his wishes, adopted the following joint resolution, viz.:

"Resolved by the House of Representatives (the Senate concurring), that the two houses of Congress assemble in the hall of the House of Representatives on Monday, the 11th of November, 1918, at 1 o'clock in the afternoon, for the purpose of receiving such communication as the President of the United States shall be pleased to make to them."

Accordingly the two houses assembled in joint session in the hall of the House; the President appeared at the Speaker's seat, and gave to Congress information of the state of the Union in respect of the war it had declared on April 6, 1917. Having read to the Congress thus assembled the 34 terms stipulated in the armistice agreement entered into a few hours before and signed by the representatives of the German army, the President said:

"*The war thus comes to an end*; for, having accepted these terms of armistice, it will be impossible for the German command to renew it.

"It is not now possible to assess the consequences of this great consummation. We know only that this tragical war, whose consuming flames swept from one nation to another until all the world was on fire, *is at an end*, and that it was the privilege of our own people to enter it at its most critical juncture in such fashion and in such force as to contribute in a way of which we are all deeply proud to the great result. We know, too, that the object of the war is attained, the object upon which all free men had set their hearts, and attained with a sweeping completeness which even now we do not realize. Armed imperialism, such as the men conceived who were but yesterday the masters of Germany, is at an end, its illicit ambitions engulfed in black disaster." Congressional Record of November 11, 1918, and Official U. S. Bulletin, also of that date.

The question now to be decided is presented in this way: The acts charged in the indictment and claimed to constitute an offense against the United States were committed and done on December 7, 1918, at least 25 days after the President's communication to Congress had been officially and most conspicuously made declaring that the war "*is at an end*." Were the acts of the accused committed "during the present war" within the true meaning of that phrase as used in the section of the act upon which the government seeks to maintain the indictment and the conviction thereunder? Upon the proper answer to that question depends the authority of the court to inflict punishment upon him.

At the hearing it was urged on behalf of the United States that Congress alone can begin war, and consequently that Congress alone can terminate it. But that does not follow, for the Constitution, while in express terms giving Congress the sole power of declaring war, in no way so expresses itself as to give that body any authority itself to terminate it. And so in this instance, while Congress has not itself declared the war to be ended, in its presence the President—also the commander-in-chief of the army—did officially communicate to Cor-

gress the fact that it "is at an end" upon the momentous occasion referred to and in the explicit terms we have given, and information of all the details of which no doubt reached our entire population, including the person now under accusation, and all of whom might act upon the assumption that this official statement of the President was true.

The authoritative publications show that, while war is usually terminated by a treaty of peace, and that such treaty is the best evidence of such termination, history shows many instances in which wars were terminated without any treaty at all. Notably this must be so in domestic wars. So it is also where a complete conquest of the weaker nation leaves no one authorized to make a treaty. The public is oftentimes, perhaps generally, notified of treaties by official proclamation. But there is no prescribed form for such latter documents, and at last they are but official announcements of a state of fact. The President's official communication to Congress met all the conditions of an official proclamation, so far as such documents are designed for giving information. It was made on a notable occasion; it was made upon a theater that attracted the attention of all the people of the United States, and indeed of the civilized world. The purpose of the President's oral message being to communicate information, it, if true, met the requirements of the question before us. Was that information accurate, or were the facts perverted? Does it now lie in the mouth of the government, in this prosecution made in its name, to insist that it was false, even if there is nothing like a technical estoppel?

Undoubtedly, if there be any doubt about it, a completely ratified treaty of peace is the best evidence of the termination of a war; but as we have said such a treaty is not essential to the actual ending of a war, as has many times been demonstrated. Indeed, there is no formal or ceremonious way agreed upon in international law or otherwise for ending a war. Circumstances govern such situations, and here, as we have seen, they raise a most important, if not vital, question of fact, namely: Was the 7th day of December, 1918, "during the present war?"

For reasons more or less publicly known, no treaty of peace has yet been made; but it is claimed that actual war was nevertheless in fact ended last November, and the statement of the President, officially made and acclaimed on the 11th day of that month, and which met with quite universal acceptance by the people, is as effective in showing the fact of the actual termination of real war as would be the case with a treaty. In advance of a treaty it is, of course, possible for the war to break out again; but, if it does not do so, then certainly it was *in fact ended*. If the announcement of the President was true and correct, then the 7th day of December, 1918, came after the war was at an end, and was not "during the present war," as that phrase is used in the statute under which this prosecution was begun. The accuracy of this proposition would seem to be obvious.

Again, the President's official statement was either true or it was mere rhetorical optimism. This court is by no means at liberty to yield to the latter alternative, for it is clearly of opinion, in view of cur-

rent public history, that the President's statement was, in fact, correct when made, even if an agreed upon treaty of peace has been delayed in the making.

Every citizen of the United States, the defendant included, may well be presumed, first, to have been informed of the substance of the declaration made by the president, and, second, to have relied upon it as true. Probably all accepted it as correct, and rightfully acted upon it as being in fact true. Hostilities ceased, not a gun has since been fired, the demobilization of our troops is in active progress, and much acclaimed peace negotiations have been under way. Under these circumstances every person in the country had the right to accept the President's official declaration as true, and to act upon it, and especially if it affected the question of whether certain acts were criminal or the reverse. Here most reprehensible conduct was made criminal only if committed "during the present war." When the war came to "an end," so did the thirteenth section of the act of May 18, 1917, for, if the President's notable declaration was true and correct, the 7th of December, 1918, we repeat, was not "during the present war." That date, in those circumstances, was after that statute had ceased to be a law of the United States, in which case the acts alleged in the indictment could only be punished under the law of the state.

After it had declared war, Congress found it necessary to enact much war legislation, and provided in each act for a more or less extended period for the operation of its provisions, and doubtless undertook to make the length of that existence depend upon what it deemed the necessities of the subject-matter—the limitation fixed in the thirteenth section of the act of May 18, 1917, presumably being based upon the Tenth Amendment of the Constitution. Possibly the most restricted continuance of such legislation was that fixed in the section involved in this case. A more detailed examination and search than is now deemed at all necessary might show in the so-called war legislation a great variety of phraseology used in fixing the circumstances and contingencies upon which its operation would come to an end; but all the while, and in respect to all such legislation, it must be presumed that Congress expressed itself exactly as it preferred in respect to each subject-matter. The extremes of this would probably be shown on the one hand in the phrase "during the present war." used in section 13 of the act of May 18, 1917, and on the other in the quite intensive phraseology of clause 4 of section 1 of the act entitled "An act to enable the Secretary of Agriculture to carry out during the fiscal year ending June thirtieth, nineteen hundred and nineteen, the purposes of the previous act entitled 'An act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products,' and for other purposes" approved November 21, 1918 (40 Stats. 1046, c. 212), which is as follows:

"That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the nation, and to increase efficiency in the production of arms, munitions, food, and clothing for the army and navy, it shall be unlawful to sell for beverage pur-

poses any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export. After May first, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit, or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export. The Commissioner of Internal Revenue is hereby authorized and directed to prescribe rules and regulations, subject to the approval of the Secretary of the Treasury, in regard to the manufacture and sale of distilled spirits and removal of distilled spirits held in bond after June thirtieth, nineteen hundred and nineteen, until this act shall cease to operate, for other than beverage purposes; also in regard to the manufacture, sale, and distribution of wine for sacramental, medicinal, or other than beverage uses. After the approval of this act no distilled, malt, vinous, or other intoxicating liquors shall be imported into the United States during the continuance of the present war and period of demobilization: Provided, that this provision against importation shall not apply to shipments en route to the United States at the time of the passage of this act."

But in no event can the contention made at the argument that section 13 of the act of May 18, 1917, should be so construed as to continue its operation during the demobilization at Camp Zachary Taylor be sustained. No criminal legislation (to which strict rules of construction must be applied) could properly admit of the latitudinous construction thus contended for. The language of section 13 is plain, explicit, and unambiguous, and contains no provision in respect to demobilization nor anything resembling it.

To summarize: The act of May 18, 1917, made criminal certain immoral conduct if committed "during the present war"—of course meaning the war with Germany, which, a few weeks before, had been declared by Congress. The limitation distinctly specified by Congress for the continued operation of this criminal legislation was expressed in the words just stated. This limit thus fixed was not the making of any treaty of peace, nor its ratification, nor the mustering out of the troops making up our army. In fixing the time of continued operation of the act Congress used the words "during the present war." This does not appear to be a case for technicalities, but for facts. If the war in fact had ended on November 11, 1918, it did not continue until the following December 7th. We know the war began on April 6, 1917. When did it end? On November 11th, as we have stated, the President communicated to Congress the express information that this "tragical war * * * is at an end." This status, then ascertained and communicated to the Congress by the chief of the executive and of the military service of the United States government, should, we think, be accepted as accurate and final by the court in this case

[4] In our view the statement made by the President on November 11, 1918, must at the very least be received and treated as prima facie true in the present status of this case, though facts may possibly develop to show the contrary. In view of such possible developments

of fact, we have concluded it to be best to overrule the defendant's motion in arrest of judgment, but to sustain his motion for a new trial. If at the next term a new trial shall be had, an instructed verdict of not guilty can be asked, and the same might be given, if nothing then appeared to demonstrate the inaccuracy of the President's statement. This remark, however, should not be construed as reaching any *ex post facto* legislation that may in the meantime be enacted.

Entries will be made accordingly .

CAUFFIEL v. LAWRENCE.

(District Court, M. D. Tennessee, at Nashville. February 22, 1919.)

No. 60.

COURTS ⇨343—FEDERAL COURT—INTERVENTION—PURPOSE OF INTERVENTION.

An intervention cannot be permitted, for the purpose of contesting complainant's ownership of the cause of action alleged in the bill and having intervener substituted as complainant, especially in view of equity rule 37 (198 Fed. xxviii; 115 C. C. A. xxviii) providing that an intervention "shall be in subordination to, and in recognition of, the propriety of the main proceeding."

In Equity. Suit by Daniel Cauffiel against Rachel Jackson Lawrence. On petition of the United States to be substituted as complainant. Denied without prejudice.

Parks & Bell, of Nashville, Tenn., for plaintiff.

W. L. Granbery, of Nashville, Tenn., for defendant.

SANFORD, District Judge. The request of the United States for leave to intervene in this suit as an interested party was presented orally in open court some two or three months ago. My present recollection is that counsel for the plaintiff and defendant were present at the time, and that it was stated that there was no objection to such intervention, and leave to intervene was granted accordingly, although no order to that effect appears to have been entered of record. So far as I now recall, however, the application to intervene was very general, without stating the Government's precise interest in the litigation, or without stating that it desired to intervene for the purpose of being substituted as the party plaintiff; nor so far as I now recall was any consent given by plaintiff to such substitution, or leave granted to intervene for such specific purpose; this matter not having been then brought to my attention or ruled on by me at the time.

The bill, so far as appears on its face, is filed by Cauffiel in his own right, seeking to obtain the specific performance of an option for the purchase of land alleged to have been executed to him by the defendant, for which he paid at the time a consideration of one hundred dollars, and in pursuance of which he prays that on payment of the purchase price the defendant may be required to execute and deliver a deed to him. The bill does not disclose any interest on the part of

the Government, either in this option or in the land in question, and must, as it stands, be taken as a bill to enforce an option taken in his own right and for his own benefit.

The defendant's answer also treats the matter in issue as one solely between the plaintiff and the defendant and does not disclose any interest on the part of the Government in the transaction.

The petition of intervention filed by the United States, verified in effect merely on information and belief, alleges that in securing this and other options on lands in and near "Hadley's Bend" plaintiff was acting as the agent and representative of the War Department of the United States and under its authority; that these options were taken in the plaintiff's name, according to its directions; that the title to all lands so acquired by him was vested in the United States for its use; that the United States is in fact the real party in interest; and that Cauffiel as an individual had no interest in the litigation: and prays that the United States may be substituted as complainant in the cause, and the control of the litigation, in so far as Cauffiel is connected, transferred to it. No process was prayed or issued under this petition, or order made thereon.

Subsequently the United States and the defendant presented in open court a proposed consent decree, signed by counsel for the United States and for the defendant, reciting that the matters in controversy had been compromised on the authority of the War Department of the United States, on certain terms therein set forth, and asked that such agreed decree be entered as a final disposition of the case. This proposed decree provided for the conveyance of all or part of the lands in controversy to the United States upon the payment of a certain sum, and for a division of the costs; but contained no provision in reference to the \$100.00 alleged to have been paid by Cauffiel.

Since at the time the United States had not been substituted as plaintiff and Cauffiel had not consented to this proposed decree, whereby all the individual rights which he was apparently asserting under his bill would have been disposed of without a hearing, I declined to approve this proposed decree for entry.

Thereupon the United States filed another petition, again alleging, with a similar verification, that Cauffiel had no interest in the litigation and that the United States and the defendant are the only parties in interest, and again praying that it be substituted as plaintiff in lieu of Cauffiel, and that the compromise decree be allowed to be entered as presented.

Upon this second petition an order was made that five days' notice of the application be given to plaintiff's attorneys of record and that unless they consented to such substitution the matter be submitted to the court upon such objections as they might file.

I am advised by the clerk that the required notice has been given by the clerk to plaintiff's attorneys and that they have stated that they had been instructed by Cauffiel not to sign anything without specific instructions from him. They have, however, filed no objections to the proposed substitution or appeared in opposition thereto in Cauffiel's behalf.

The papers have now been transmitted to me by the clerk for action, without any accompanying briefs.

The question presented is novel and interesting, and I have given it careful consideration. It appears to be a question of first impression; no precedent appearing so far as I can ascertain. My conclusions are:

1. Cauffiel's bill must be taken, as it purports to be on its face, one asserting an interest in the controversy in his own right and behalf, and not merely as agent for the Government. So considered the Government's petition of intervention is antagonistic to the bill, since it alleged that Cauffiel in fact has no interest in the litigation and is acting only as its agent. The unrestricted leave given to the Government to file an intervention petition, without knowledge of its scope, was therefore improvidently granted; and no order can now be properly made upon it, in antagonism to Cauffiel, which would in effect deprive him of a hearing upon his asserted individual right in the due and orderly progress of the litigation. I know of no rule or practice, nor of any just principle, which would thus require a plaintiff to submit to a summary procedure for the purpose of depriving him of his right to prosecute his own suit in the matter in which he had elected. The thirty-seventh Equity Rule (198 Fed. xxviii, 115 C. C. A. xxviii) specifically provides that:

"Any one claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention *shall be* in subordination to, and in recognition of, the propriety of the main proceeding."

Here the petition of intervention is not in subordination to the plaintiff's bill, but antagonistic thereto, and seeks to deprive the plaintiff of the entire control of his suit. And see 2 Street's Federal Equity Practice, § 1355, p. 823, and cases cited, showing that while, prior to the promulgation of this rule, new parties occupying a hostile attitude to the plaintiff, or seeking to assert rights superior to those of the parties of record, might sometimes, for strong reasons, be permitted to intervene, they must, if they came in at all, come in as defendants.

2. Furthermore, even if the thirty-seventh Equity Rule otherwise permitted, there is manifestly no necessity in a case of this character for the adoption of a rule of practice permitting one plaintiff to be substituted for another, by a summary and interlocutory proceeding, since if in fact the plaintiff is merely the agent for another, the real party in interest, who has settled all the matters in litigation with the defendant, this for cause shown can, it seems, be brought before the court by supplemental answer and operate as a defense upon the merits, when ascertained and established upon a final hearing—not summarily, but in the due course of procedure—leaving to the parties in interest, if they so desire, to carry out in the meantime, pending the final determination of the cause and adjudication of the costs, such settlement of the controversy as they may have entered into through their duly authorized representatives.

3. It is unnecessary to determine whether, if Cauffiel's bill had shown on its face that he was acting solely as the agent of the War Department and for its benefit, the proposed substitution of the principal for

the agent would, in that event, have been authorized, without the plaintiff's consent, especially in the light of the other specific provision of the thirty-seventh Equity Rule that—

"A party with whom or in whose name a contract has been made for the benefit of another * * * may sue in his own name without joining with him the party for whose benefit the action is brought."

4. The petition of the United States for substitution as the party plaintiff, and for entry of the compromise decree tendered, will accordingly be now denied; but without prejudice.

THE TAMBOV. THE PICKWICK. THE M. MITCHELL DAVIS.

(District Court, D. Maryland. March 21, 1919.)

COLLISION Ⓒ95(2)—**FAULT—STARBOARD HAND RULE.**

Tug with scows in tow, which collided with steamer, which, after signal, was being backed out of slip in Baltimore harbor, preparatory to getting on her definite course, *held* solely at fault in not keeping out of way; the starboard hand rule having no application.

In Admiralty. Libel by Arthur Hopwood, master of the steamship Tambov, against the steamer tugs Pickwick and M. Mitchell Davis. Dismissed as to the M. Mitchell Davis; sustained as to the Pickwick.

George Forbes, of Baltimore, Md., and Chauncey I. Clark, of New York City, for libelant.

Harry N. Abercrombie, of Baltimore, Md., for the M. Mitchell Davis.

Clarence A. Tucker and John B. Deming, both of Baltimore, Md., for the Pickwick.

ROSE, District Judge. Shortly before 6 o'clock on the afternoon of October 3d last, the British steamship Tambov was struck and injured by a scow in tow of the tug Pickwick. The steamship had been lying, bow in, along the northerly side of the Pennsylvania Railroad Company's old coal pier in the Canton section of the Baltimore harbor. She was loaded and ready to go to sea. The tug M. Mitchell Davis was engaged to assist her in getting out of the dock and turning around. The Davis had pulled her directly westward into the stream, until her bow was somewhere from 50 to 200 feet to the west of the head of the pier at which she had been lying. Including her bowsprit, she was about 410 feet long. It is possible that her stern, at the time of the collision, was as much as 610 feet west of the end of the pier, which end, however, was 150 feet east of the pier head line, so that the stern of the steamship was not, at the outside estimate, more than 460 feet to the west of the pier head line, and according to some of the witnesses not more than 360 feet.

The Davis had a line from the port quarter of the steamship to her own stern. While pulling the steamship out in the position indicated,

she had necessarily herself headed westerly. After the steamship was safely clear of the pier, she stopped, and turned towards the north and east for the purpose of drawing the steamship's stern around in these directions, and thereby bringing her stem to the south and west, so that she would be headed on her course to the sea.

According to the engine-room log of the steamship, three minutes before the collision her starboard engine had been put half astern, in another minute her port engine full ahead, and a minute before the collision her starboard engine had been stopped, and at once put full ahead, so that, at the time of the collision, both engines had been going ahead for about a minute, be it more or less.

Before starting out of the dock, the tug had blown one long blast to indicate that she was coming out. The blast was heard and understood by the Pickwick when the latter was at least 1,400 feet from the steamer. The Pickwick was coming down the harbor parallel to the pier head lines, towing three mud-laden scows. The master of the Pickwick knew what the whistle meant, saw the tug pull the steamship out, and kept right down on her. He says he kept going off to starboard rather steadily, but those on the ship thought he did not change his course. He was ordinarily the first officer of the tug, and was in command for that day only. He clearly thought it was a case for the application of the starboard hand rule; that he was the privileged vessel, and it was the business of the steamship to keep out of his way. There was no reason in the world why he should not have gone several hundred feet further to the westward. He thought he had the right not to do so, and he did not. He got by the stern of the steamer and over to its starboard side, but his leading scow struck the port side of the steamer some 35 feet forward of its stern. He says this was because the steamship backed across his towline.

It may possibly be that the steamer was moving backward at the time, although I am by no means sure of it, and I am confident that the movement of the stern westward could not at that time have been at all rapid. After he himself passed the steamer, he says he steadied on his course. Whether that meant he made some slight change in it I do not know. Almost immediately thereafter he stopped.

The wind was in such a direction that whatever force it would exert would tend to throw the scows down towards the ship, and the rearmost one of the scows was down by the head, so that the stern had a considerable freeboard which was exposed to the wind. The possible change of the tug's course and its admitted stopping gave the scows an opportunity to sag down, but I do not think it necessary to go into a minute inquiry as to such difference as there may be as to the circumstances in the last minute or thereabouts before the collision, because, independently of what view may be taken of them, the responsibility for the collision is quite clear. The captain of the Pickwick knew that the steamer was being pulled out, and that she would require at least all the room that she did take for that maneuver. He unnecessarily chose to keep a course which would carry him into danger. The starboard hand rule has no application to a steamship backing out of her slip preparatory to getting on her definite course.

The Bouker No. 2, 254 Fed. 579, — C. C. A. —, and cases therein cited.

The steamer libeled both of the tugs, but clearly the M. Mitchell Davis was not in fault. If anybody but those in command of the Pickwick were to blame, it could only be on the theory that the steamship ought not to have backed on her engines. The captain of the Davis had nothing to do with the engine movements of the steamer, and gave no orders concerning them. Nor do I think that the steamer is to blame. She did nothing except that which she was perfectly justified in doing, nor do I see that she ought reasonably to have anticipated the fault of the Pickwick at a time early enough to have enabled her to have done anything to prevent the collision.

It follows that the libel as against the M. Mitchell Davis must be dismissed, and the Pickwick held solely in fault.

GUZZI v. DELAWARE & HUDSON CO.

(District Court, M. D. Pennsylvania. April 10, 1919.)

No. 978.

1. JUDGMENT \Leftrightarrow 585(2)—CONCLUSIVENESS—MATTERS CONCLUDED—“ILLEGAL MINING.”

Where plaintiff's right to damages caused by defendant's illegal mining under her lot has been adjudicated in an action brought therefor, she cannot bring another suit for failure to afford her property lateral support, since term “illegal mining” in first suit covered damages both from removing vertical and lateral support.

2. JUDGMENT \Leftrightarrow 713(2)—CONCLUSIVENESS—MATTERS CONCLUDED.

A judgment is conclusive upon the merits of every question raised, or which could have been raised, in the proceeding.

At Law. Action by Teresa Guzzi against the Delaware & Hudson Company. On affidavit of defense raising questions of law. Judgment for defendant.

Thos. P. Duffy, of Scranton, Pa., for plaintiff.

Jas. H. Torrey, of Scranton, Pa., for defendant.

WITMER, District Judge. The plaintiff by former suit in equity, brought in the Lackawanna county court, sought to enjoin the defendant from removing the underlying coal support and recovery for injury to the surface right of a certain lot to which she claims title. The case was heard and a decree was entered in favor of the plaintiff. On appeal the judgment was reversed without a venire. 61 Pa. Super. Ct. 48. The present action has since been brought to recover damages for injuries to the lot and the improvements thereon erected. The lot damaged forming the subject-matter of this suit is the same as the one embraced in the equity suit, and the injuries thereto are likewise the same. In the plaintiff's statement of claim, wherein she recites the proceedings in equity, attempt is made to distinguish this action from the former suit in equity, by alleging that the matter of

plaintiff's right to lateral support and of defendant's negligent mining were not raised, considered, or decided in *Guzzi v. Delaware & Hudson Co.*, supra. It is insisted that defendant's failure to provide plaintiff's lot with vertical support was the only cause of complaint brought before the court. It is upon the alleged basis of the defendant's negligent mining and the failure to afford plaintiff's property lateral support that she bases her right of recovery in this suit.

[1, 2] On examination of the proceedings, introduced, it appears that the plaintiff is mistaken in her conclusion that the matter of vertical support was all that was brought into court. The plaintiff in the prayer of her bill, in such suit, asks for an accounting for damage and injury suffered by reason of the illegal mining by defendant under plaintiff's lot. The term "illegal mining" is, it seems, broad enough to embrace, without mistake, all forms or manner of wrongdoing in removing or taking the coal from the premises by the defendant company. However, were it not so, the plaintiff would not be permitted to maintain this action. The subject-matter, the injury, and consequent damages to her lot occasioned by the defendant's negligence or wrongdoing in conducting its mining operation, having been brought into court for settlement by the plaintiff on the former occasion bars her from having the same again adjudicated, though occasioned through want of lateral support and illegal mining, and not by failure merely to furnish vertical support.

Whatever question is properly involved in a former suit, and might have been there raised and determined, is conclusively settled by the decree. *Taylor v. Cornelius*, 60 Pa. 187; *Jenkins v. Scranton*, 205 Pa. 598, 55 Atl. 788. A judgment is conclusive upon the merits of every question raised, or which could have been raised, in the proceedings. *Stearns v. Hewes*, 256 Pa. 577, 100 Atl. 1054; *Hewes v. Miller*, 254 Pa. 57, 98 Atl. 776. "As was said by defendant's counsel, the plaintiff cannot escape the effect of a judgment as *res adjudicata* by a refined exploration of the pleadings, evidence, and decree in a former case, under the claim that that case involved only a question of damages for failure to furnish vertical support, while the present case includes also the failure to furnish lateral support." The subject-matter of the former suit was the damage resulting to plaintiff's property from defendant's mining operation, whether by reason of negligence or otherwise directly under or adjoining plaintiff's lot; and whether plaintiff in her former suit urged any or all of the particular grounds upon which she now bases recovery matters little, if she had the opportunity to do so. However, on examination of the record in the former suit, it does not appear that plaintiff did not succeed in recovering the damages occasioned to her lot by failure of sufficient allegations of a cause, or causes, contributing to its injury. The chancellor found for the plaintiff, and gave her an award sufficient to effect complete reparation. The appellate court reversed upon the ground that she had not established or shown ownership of the locus in quo.

The effect of the judgment is conclusive. Defendant's motion is therefore allowed, and judgment is directed to be entered for the defendant.

SOTELLO v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 8, 1919.)

No. 3235.

1. NEUTRALITY LAWS ↔5—EVIDENCE—SUFFICIENCY.

Evidence that accused was taking some 2,000 rounds of ammunition on a mule toward a river crossing on the Mexican boundary, from which he was some 300 yards distant, etc., held to sustain conviction under Comp. St. §§ 7677, 7678, relating to transporting war munitions for export.

2. CRIMINAL LAW ↔822(16)—INSTRUCTIONS AS A WHOLE—REASONABLE DOUBT.

Instruction in criminal case, defining reasonable doubt as doubt for which sensible man could give good reason, based on evidence or want of evidence, held not erroneous, when construed as a whole; it being stated in the same sentence that it was such doubt as sensible man would act or decline to act upon.

Batts, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of Texas; W. R. Smith, Judge.

Severo Sotello was convicted of transporting munitions of war for export. and brings error Affirmed.

Harry C. Miller, of El Paso, Tex. (G. Volney Howard, of El Paso, Tex., and J. Dean Gauldin, of Dallas, Tex., on the brief), for plaintiff in error.

R. E. Crawford and W. H. Fryer, Asst. U. S. Attys., both of El Paso, Tex.

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

WALKER, Circuit Judge. This is a writ of error to obtain a review of a judgment of conviction on an indictment which charged that the plaintiff in error, "Severo Sotello, did unlawfully, willfully, knowingly, and with intent to export the munitions of war hereinafter described, from said county of Presidio, state of Texas, to and into the United States of Mexico, the exact point in said United States of Mexico being to your grand jurors unknown, and hence not here set forth, make a shipment of certain munitions of war, to wit, about two thousand (2,000) rounds of rifle cartridges, a further and more detailed description thereof being to your grand jurors unknown, and hence not here set forth, by transporting the same from some point in the county of Presidio, in the state of Texas, the exact location of which is to your grand jurors unknown, and hence not here set forth to a point in Presidio county, state of Texas, the exact location of which is to your grand jurors unknown, but which is located at a point about 12 miles northwest of the town of Presidio, in the county of Presidio, and state of Texas, and about five hundred (500) yards from the international boundary line between the United States of America and the United States of Mexico, with the said unknown point in the United

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

States of Mexico as the destination thereof." U. S. Comp. St. §§ 7677, 7678; United States v. Chavez, 228 U. S. 525, 33 Sup. Ct. 595, 57 L. Ed. 950.

[1] An assignment of error based upon the action of the court in overruling a motion that a verdict of not guilty be directed is sought to be supported on the ground that the evidence adduced was insufficient to support a verdict of guilty. Two witnesses testified for the prosecution, John Black, a corporal, and J. D. Marcom, a horse-shoer, in the Sixth Cavalry. The following are extracts from the testimony of the first-mentioned witness:

"I am stationed at Indio, Tex., 22 miles out from Presidio. I recall taking the defendant into arrest about the 21st day of September. The morning of September 21st I was going to Presidio on my own business, and about 10 miles out of camp, at a place where we always look for smugglers, I saw this Mexican coming along. When he saw me he started to take a trail northwest of the river, and I rode on and spoke to him. I turned and held him up, and he didn't want to show me what he had in his bag; but I made him hand it over and then Horse-Shoer Marcom and another special patrol came along, and I delivered him over to be searched. Horse-Shoer Marcom searched him and found the ammunition, a sack full, and also a box. He was traveling on a Spanish mule. He had the ammunition thrown over his saddle in a sack, with his coat thrown over it. I didn't open it myself; there was ammunition in it. * * * This man was about 12 miles from Presidio. It was about 300 to 500 yards from the boundary line the first time I saw him. He was going in a northwestern direction. There is a place near where this man was where the river can be crossed, and he was approaching the crossing. This was in Presidio county. * * * This man was carrying the ammunition on a mule and was riding the mule. * * * There was about 2,000 rounds. * * * He was traveling northwest at that time. It is not a fact, if he was traveling in a northwesterly direction, that it would carry him away from the international boundary; it would carry him right over the border. I don't know that you can cross the river at most any place. They have regular fords, but they are full of quicksand. * * * There are not very many people down in that vicinity. There is some traveling, people going and coming from Mexico. * * * At the time I arrested this man he was not proceeding toward the headquarters of the captain; he was going in the opposite direction. * * * I do not know where the defendant lives. * * * Being right around in there, I know he didn't live anywhere the way he was going, or I would have seen him. I don't know of my own knowledge that this defendant did not live in the direction he was traveling; but, if he had lived in or around there, I would have seen him, as much as I have ridden the border. * * * There were bandits across the river in that vicinity."

In the course of the testimony of the other witness for the prosecution, he stated that he examined the defendant and found some ammunition, Mauser rifle cartridges, on the front of the mule, that he never saw the kind of ammunition he had used for sporting rifles, and that the defendant was about 300 to 500 yards from the boundary line at the time he was arrested. There was testimony to the effect that Mausers are used extensively by the Mexicans. The defendant was examined as a witness in his own behalf. In the course of his examination he stated that he was a farmer, that he lived on Stephen Ochoa's ranch, near Indio, Tex., and had lived there about 8 months; that before that he lived in Mexico, but had not been back there since he crossed over about 8 months before; that he found the ammunition hidden near the river on the side of the road that comes from Mexico;

that it was in a sack and thrown in some brush, right along the side of the road; that at the time he was arrested he was taking the ammunition to Indio camp to deliver it to the chief there; that when the soldiers were coming toward him he didn't take a trail; that he was not going toward the river; that he did not speak any English; that he had friends on the other side of the river; that some friends cross the border and visit him; that he knew one bandit over there, but had not seen him for about a year.

We think circumstances which evidence adduced disclosed were such as to support an inference that the destination of the ammunition which the defendant was carrying was Mexico. It was open to the jury not to credit the defendant's explanation of his possession of the ammunition, and to find from testimony in conflict with his that he was going toward Mexico, and not toward Indio camp. The quantity and kind of ammunition found in the defendant's possession, the place at which he had it, the direction in which he was going, the fact that he had lived in Mexico and had relations with persons living there, his conduct when the presence of the soldiers became known to him, and what he testified to by way of explaining his conduct, were circumstances shedding light on the question whether the destination of the ammunition was or was not Mexico. The conclusion is that there was evidence to support the material averments of the indictment, and that the court did not err in overruling the motion for a directed verdict of not guilty.

[2] It is assigned as error that the court, in charging the jury upon the question of reasonable doubt, said that a reasonable doubt must be a doubt for which a sensible man could give a good reason, which reason must be based upon the evidence or the want of evidence. The following is the part of the court's charge which dealt with the subject of reasonable doubt:

"The defendant in this case is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt, and if you have a reasonable doubt of his guilt you should acquit him. By reasonable doubt you will understand that the court does not mean fanciful conjecture which an imaginative man may conjure up, but the doubt which reasonably flows from the evidence, or the want of evidence, and a doubt for which the sensible man could give a good reason, which reason must be based on the evidence, or the want of evidence, such a doubt as a sensible man would act upon or decline to act upon in his own concerns. If you have such a doubt, the defendant is entitled to the benefit of that doubt and you should acquit him; but if you are satisfied from the evidence that he is shown to have committed the offense with which he is charged, you should find him guilty."

The part of the instruction of which complaint is made was qualified and explained by the language which immediately followed it, forming a part of the same sentence—"such a doubt as a sensible man would act upon or decline to act upon in his own concerns." The instruction as a whole was such as to make it known to the jury that it was their duty to acquit the defendant, if the evidence left them with such a doubt of his guilt as a sensible man would act upon or decline to act upon in his own concerns. The instruction as a whole was such that

the defendant could not have been prejudiced by it. *Hopt v. Utah*, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708.

Of other rulings complained of no more need be said than that no one of them constituted reversible error.

The judgment is affirmed.

BATTS, Circuit Judge (dissenting). The question raised as to the abstract accuracy of the charge upon reasonable doubt should occasion little concern. The errors into which good judges not infrequently fall, disclosed only by minute examination of the language used, and consisting of departures from the verbal niceties, can have little effect in preventing the fair trial the law should insure. A matter of much greater importance is presented in the instant case in a consideration of whether that part of the charge upon reasonable doubt which is unquestionably correct has had a proper application by the jury. The existence of the basic principle that a person accused of crime is presumed to be innocent until his guilt is established beyond a reasonable doubt could hardly be inferred from a consideration of the evidence and verdict. Nor is there anything to indicate that the correct charge upon circumstantial evidence has been given the weight to which experience has shown it to be entitled.

The trial judge charged the jury upon the law of circumstantial evidence as follows:

"In a case depending on circumstantial evidence, you are instructed:

"First, that the hypothesis of guilt of the offense charged in the indictment must flow naturally from the facts proved and be consistent with them all; and

"Second, the evidence must be such as to exclude every reasonable hypothesis but that of guilt of the defendant of the offense imputed to him; or, in other words, the facts proved must all be consistent with, and point to, guilt only, and must be inconsistent with innocence."

The facts have been detailed in the opinion of the court. They do not show that a crime of any kind was committed. Each fact proved is consistent with the nonexistence of crime. Each fact proved is consistent with the innocence of defendant. All the facts, taken together, neither show defendant's complicity in crime nor the existence of crime. Moreover, it is submitted that no person, reading the statement of facts only, could use the standard number of guesses and name the offense of which defendant has been found guilty.

All of the facts from which there is any possibility of inferring crime, or defendant's connection with it, are:

A soldier was going to Presidio on his own business in the morning, and "about 10 miles out of camp," where the soldiers "always look for smugglers," he saw defendant "coming along," going in a northwest direction. The defendant, a Mexican, when he saw him, "started to take a trail northwest of the river." The soldier "rode on and spoke to him, and turned and held him up." He "did not want to show the soldier what he had in the bag." Other soldiers "came along," and the Mexican was searched and some cartridges of different makes were found. The Mexican was on a Spanish mule, and the ammunition was "on the front of the mule," in a sack thrown over the saddle, with a

coat over the sack. There were about 1,500 or 2,000 cartridges, some of them Mauser cartridges of German make. The place was from 300 to 500 yards from the boundary line, which was in a northwest direction. There was a place near where the river could have been crossed. "He did not seem to want to say where he got the ammunition, or where he was going, if he could say." There were bandits across the river in Mexico.

The charge against defendant is not smuggling goods into this country, or receiving stolen goods. It is charged that defendant did, "with intent to export munitions of war from Presidio county, Tex., into the United States of Mexico, make a shipment of certain munitions of war." After proof of the facts foregoing, and of no other pertinent facts, defendant asked for an instructed verdict, which was denied.

The presence, in the daytime, of a Mexican and a mule and some cartridges on a public road hardly evidences a crime. That the Mexican "started to take a trail," "didn't want to show what he had," and did not want to explain where he got the ammunition, "if he could say," could scarcely be held to supply or evidence a criminal motive. Nor would the facts that the cartridges were of German make, and that the road was near, and parallel with, the Rio Grande, beyond which there were bandits, seem to be facts from which "the hypothesis of guilt" "would flow naturally."

The defendant testified in his own behalf, and stated that he was a farmer who had come from Mexico and resided in Presidio county, without returning into Mexico, for about 8 months before his arrest; that the ammunition was in a sack which had been thrown in some bushes along the side of the road where he found it; that he was on the way to visit relatives; that he was going to deliver the cartridges "to the chief at the Indio camp"; that there was nothing to keep him from crossing the river at the point where he found the ammunition; that the river can be crossed at most points; that, while there was quicksand, it was not deep or dangerous; that he was traveling the public road to Indio when arrested; when the soldiers came up he showed the ammunition without objection; he knew some Villistas during the revolution; he knew an outlaw in Mexico by the name of Cano; he could not speak English.

Apparently the jury did not believe the Mexican; possibly he did not tell the truth. If the charge had been theft, a statement by the defendant that the property in his possession had been found by him might not be accepted by the jury; but the statement would not supply the necessary proof that a theft had been committed. The fact that a theft had been committed having been established, and possession having been admitted, and defendant's statement as to the manner of acquisition not being accepted, a verdict of guilty might naturally follow. In the instant case, however, the fact of the crime cannot be inferred from defendant's possession, and, there being no other evidence of crime, neither the possession nor the statement as to the circumstances of acquisition can establish defendant's connection with a crime not shown to have been committed. If the statement were true, guilt could not be predicated of the fact; if it were not true, guilt of the crime

charged would not be a logical conclusion. Accepting as true all the evidence of the government, and as false all the testimony for defendant, there could be no legitimate inference of defendant's guilt, in the absence of proof that a crime has been committed.

If the defendant had been charged with a violation of the law with reference to the importation of goods into this country, the evidence would have made certainly as strong a case against him. Assuming crime from the facts, it is not possible to say whether he was guilty of this offense, or of the offense charged.

Some circumstances strongly suggest the absence of crime of any kind. Shipment of contraband goods into Mexico would not seem to be an industry to be conducted in the daytime, along the established and patrolled public roads. When seen by the soldiers, defendant made no effort to escape. The country abounds in trails, and the river has many crossings. The hours of the night are as available for crime there as elsewhere.

However, the American system of criminal procedure does not place upon the person accused the obligation of establishing his innocence. The underlying principles have in contemplation the double purpose of preventing oppression and punishing crime. There has been no recognition of the fact—at least, no formal recognition—that the fundamental rules formulated to secure American liberty and enforce American law do not extend all the way to the Rio Grande.

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

(Circuit Court of Appeals, Fifth Circuit. April 7, 1919.)

No. 3265.

1. LIBEL AND SLANDER ⇨25, 41—PRIVILEGE—PUBLICATION—LETTER BY INSURER.

A casualty insurer's writing of a letter to a policy holder, setting out the grounds on which his claim was declined, and its delivery of the letter through its local attorney, the letter not being sealed, but open for the attorney's inspection, was privileged, though the contents of the letter were libelous, and there was no publication.

2. ATTORNEY AND CLIENT ⇨102—LIBEL—UNAUTHORIZED PUBLICATION.

Where a casualty insurer sent its local attorney a letter declining to pay a policy holder's claim for loss, which letter was libelous, the insurer was not liable to the policy holder for its attorney's unauthorized act in showing the letter to a third person; the attorney alone being liable.

3. LIBEL AND SLANDER ⇨112(1)—PUBLICATION OF LIBELOUS LETTER—SUFFICIENCY OF EVIDENCE.

In a policy holder's action for libel against a casualty insurer, evidence held not to justify finding that, when the insurer's attorney exhibited to a third person the insurer's libelous letter declining to pay the policy holder's claim, the attorney was interviewing the third person to get his statement in aid of the insurer's defense against the policy holder, so that the attorney's act in disclosing the letter was authorized, and constituted a publication.

Batts, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Suit by J. B. Sullivan against the Metropolitan Casualty Insurance Company of New York. Judgment for defendant, and plaintiff brings error. Affirmed.

William H. Watkins and Garland O. Whitfield, both of Jackson, Miss. (Hilton & Hilton, of Mendenhall, Miss., on the brief), for plaintiff in error.

R. G. Brown, of Memphis, Tenn. (Brown & Anderson, of Memphis, Tenn., on the brief), for defendant in error.

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

GRUBB, District Judge. The plaintiff in error sued the defendant in error for an alleged libel contained in a letter addressed to the plaintiff by the defendant, declining a claim for indemnity under a policy held by plaintiff with the defendant. At the conclusion of the evidence the District Judge directed a verdict for the defendant, and from the judgment thereon this writ of error is taken.

[1] By concession of counsel, the record presents the single question as to whether or not there was a publication of the alleged libel. The letter was dictated by an officer of the defendant who lived in New York. No claim is made that the dictation was a publication. It was inclosed, with a letter to an attorney of defendant, under one cover, addressed to the attorney at his post office, Mendenhall, Miss. The letter to the plaintiff was contained in a separate envelope, which was addressed to the plaintiff, but was not sealed. It is not contended by the plaintiff, as it could not reasonably be, that the transmitting of the letter to plaintiff, through the local attorney, was a publication of it. The transaction declining plaintiff's claim required the tender of a return premium. Proof was necessary of the delivery of the letter, as well as of the tender. The attorney was entitled to read the letter, to enable him to testify to the identity of the letter, delivery of which accompanied the tender. The writing of the letter, setting out the grounds upon which the claim was declined, and its delivery in the method indicated, was privileged, and afforded plaintiff no redress, though the contents of the letter were libelous.

[2] The dispute arises over the conduct of King, the attorney to whom the letter was transmitted for delivery to plaintiff. Plaintiff's evidence tended to show that King, while the letter was in his possession, as yet undelivered, showed and read the letter to one Patterson. This is the act relied upon by the plaintiff as constituting a publication. King denied showing or reading the letter to Patterson. The District Judge directed a verdict upon the idea that, whether King disclosed the contents of the letter to Patterson or not, his doing so, if he did so, was beyond the scope of the authority conferred upon him by the defendant, and did not bind the defendant.

The circumstances, as detailed by Patterson, are these: The letter addressed to Sullivan, the plaintiff, was dated April 19, 1916, and in due course of mail would have reached Mendenhall about April 22d.

Patterson testified the letter was shown him about April 25th or 26th, and before its delivery to the plaintiff by King. His testimony is to the effect that he casually visited King's office, as they were friends, and in the course of a friendly talk the claim of plaintiff against defendant for insurance came up, and incidentally King told Patterson of the receipt of the letter, and, to gratify his curiosity, showed and read it to him. No business reason provoked the act, according to Patterson's evidence. The visit and conversation and the showing of the letter were altogether social, if Patterson is to be believed.

The first question presented is whether, under Patterson's version, the showing of the letter by King to Patterson was within the scope of his authority, and a publication of the alleged libel. The solution of this question depends upon the extent of King's authority. King had made an investigation of plaintiff's claim for the defendant, and had made a report of his investigation to the defendant, before the letter was written. After receipt of his report by the defendant in New York, the letter declining the claim was written to plaintiff, and forwarded to King for delivery to the plaintiff, with the returned premium. King's authority was limited to delivering the letter and making the tender, if the showing of the letter occurred in April, as testified to by Patterson. King was afterwards retained to help prepare and defend the suit which plaintiff brought to recover on his indemnity claim against the defendant. The subsequent employment could not reflect on the extent of his authority in April. One who is employed to make formal delivery of a notice and legal tender of an amount has no duty but to deliver the notice and offer the money. Anything that aids in the performance of those duties is within the scope of his agency, and, though done improperly, binds his principal. Anything done by the agent, which has not and is not intended to have any purpose to accomplish the delivery and tender, is aside from the authority conferred on the agent, and binds the agent only, and not the principal. If King, in delivering the letter to plaintiff, had unnecessarily disclosed its contents to another, his act might be binding on defendant, since he was doing what he was instructed and authorized to do, though doing it improperly. If King showed the letter to Patterson in a spirit of gossip, with no purpose to accomplish its delivery to plaintiff or aid in doing so, then his act was without his authority, not in pursuance of his agency, and fastened responsibility only upon himself.

The fact that his agency required him to have custody of the letter cannot alter the result. If a loss of the letter, resulting from King's negligent custody of it, and the consequent disclosure of its contents, could constitute a publication of it by the defendant, that is not this case. The disclosure in this case was caused by King's act in departing willfully from the performance of the agency intrusted to him, and using the letter for a purpose of his own, disconnected with any duties he owed defendant. It was not negligence on the part of the defendant to intrust King with the letter for delivery to the plaintiff. It is not claimed that King was incompetent or untrustworthy, or that defendant had any reason to suspect him. Intrust-

ing a competent agent with even a dangerous instrument does not make the principal liable to a third person for an injury done him by the agent with the dangerous instrument, willfully and while using it to accomplish his own purposes, and not in the business of his principal. Giving an agent an axe makes the principal liable to third persons, injured by its use by the agent, negligently or willfully, in the performance of his duties as agent. It does not make the principal liable if the agent, in a personal quarrel, not connected with his principal's business, injures another by the use of his principal's axe. If the principal is without fault in intrusting the agent with custody, liability must depend upon the agent's action, complained of, being shown to be constructively the principal's, because done in pursuance of his business. If done aside from the principal's business, for the agent's private and individual purposes exclusively, though done with the principal's instrumentality, it fastens no liability upon him. This follows, whether the instrumentality is dangerous or harmless. In this case, if Patterson is to be credited, King had departed entirely from the course of his agency in showing the letter to Patterson. His act in doing so was his own, and not the defendant's, and did not constitute a publication by the defendant.

[3] The plaintiff contends that Patterson's evidence as to what transpired when he says the letter was shown him should not have been looked to exclusively by the District Judge, and that, taken in connection with King's evidence, the jury might have legitimately inferred that King was interviewing Patterson for the purpose of getting his statement, in aid of the defendant's defense in the indemnity suit, brought or to be brought by plaintiff against it, and that the letter was shown Patterson as an outline of the defendant's proposed defense, and to assist him in making such statement. If the record is open to this construction, a different conclusion might be required. We do not think a fair construction of Patterson's and King's evidence admitted of such a construction. Patterson testified that nothing was said or done indicating that his statement was desired, or that business rather than gossip was responsible for the interview and exhibition of the letter to him. King denies that he ever, at any time, showed Patterson the letter addressed by defendant to the plaintiff. In this respect Patterson and King are in direct conflict. As a possible explanation of what King assumed to be Patterson's mistaken testimony, King testified that, some months after delivery of the letter by him to plaintiff, he had a conversation with Patterson, after King's employment as attorney for defendant in the indemnity suit, in which he showed Patterson a letter from defendant, addressed, not to plaintiff, but to King, and which outlined the defendant's proposed defense to the indemnity suit.

The effect of this evidence of King was not to contradict Patterson's version of the conversation testified to by him, at which the letter to plaintiff was said to have been shown which King denied having had at all, but to put in evidence a different and subsequent conversation, for the purpose only of suggesting a possible source of confusion, which might account for what King considered Patterson's

mistaken testimony. Patterson was not examined in rebuttal as to whether or not he had ever had a conversation of the kind testified to by King, at which a letter from defendant to King was shown him. The interview which King testified he had with Patterson occurred at a different time, concerned a different subject-matter, and involved a different letter, and has no mark of identity with the interview that Patterson testifies to, except that at each a letter, though a different one, was exhibited. Patterson asserted, and King denied, entirely the occurrence of the first interview. King's evidence as to the subsequent interview did not serve to qualify what occurred at the first, because it described a separate and different one, but only to corroborate King's denial of the occurrence of the first, by suggesting the possibility of Patterson's having become confused by the second into mistakenly believing the happening of the first.

In this situation there was a direct contradiction as to whether or not the first interview occurred; there was no contradiction as to what happened at it, if it did occur, since Patterson's testimony was the only testimony that referred to and described it. The jury would not have been authorized to accept Patterson's evidence that the first interview did occur, disregard his evidence as to what transpired at it, and adopt, as having formed part of it, incidents which King testified occurred at another and different interview. The record is susceptible only to the construction that, if an interview occurred at which the letter to plaintiff was exhibited, it occurred as testified to by Patterson, and under circumstances, therefore, which did not make the defendant liable for the showing or reading of the letter alone complained of in the declaration. No charge is made in the declaration based on the publication of a letter written by defendant to King, and it would not justify a recovery, though libelous, for that reason.

Reaching the conclusion that the District Judge rightly directed a verdict for the defendant, the judgment is affirmed, with costs.

BATTS, Circuit Judge (dissenting). The evidence required the submission to the jury of the issue as to whether Attorney King showed the libelous letter to Patterson while discharging the duties and within the scope of his employment.

PASS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. April 7, 1919.)

No. 3242.

1. CRIMINAL LAW ⇨406(2)—EVIDENCE—ADMISSIONS WHILE IN CUSTODY.
In a prosecution for having violated the Selective Service Law (Comp. St. 1918, §§ 2044a-2044k), testimony of a secret service agent as to admissions made by defendant after his arrest *held* admissible; there being no evidence of any substantial character tending to show force or threats against defendant or inducement offered him by government agents.
2. CRIMINAL LAW ⇨371(1)—EVIDENCE—OTHER OFFENSES—LEAFLET CIRCULATED BY DEFENDANT—GOOD FAITH.
In a prosecution for violation of the Selective Service Law (Comp. St. 1918, §§ 2044a-2044k), where defendant testified that he acted in good faith in registering at a place other than his alleged permanent home, a leaflet advocating resistance to conscription was admissible, where there was evidence to show that defendant was one of those directly responsible for its publication.
3. ARMY AND NAVY ⇨20—SELECTIVE SERVICE LAW—REGISTRATION OTHER THAN AT DOMICILE—EVASION OF SERVICE—QUESTION FOR JURY.
In a prosecution for violating the Selective Service Law (Comp. St. 1918, §§ 2044a-2044k), whether defendant, domiciled with his parents in Seattle, Wash., by registering with a local draft board in Idaho while on his way to New York to study, had intended to evade military duty, *held* for the jury under the evidence.
4. ARMY AND NAVY ⇨20—SELECTIVE SERVICE LAW—EVASION—INSTRUCTION.
In a prosecution for violating the Selective Service Law (Comp. St. 1918, §§ 2044a-2044k), instruction *held* fairly to present the main issue whether defendant, domiciled with his parents in Seattle, Wash., intended to evade military service when he registered with a local board in Idaho while on his way to New York to study.

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

Morris Pass was convicted of having violated the Selective Service Law, and he brings error. Affirmed.

Winter S. Martin and Wilson R. Gay, both of Seattle, Wash., for plaintiff in error.

Clarence L. Reames, Sp. Asst. Atty. Gen., Robert C. Saunders, U. S. Atty., and Ben L. Moore, Asst. U. S. Atty., all of Seattle, Wash.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Morris Pass was convicted of having violated sections 5 and 6 of the Selective Service Law, approved May 18, 1917 (40 Stat. 76, c. 15 [Comp. St. 1918, §§ 2044e, 2044f]), in that he willfully failed and refused to present himself for registration at Seattle, his permanent home and actual place of registration, and to submit to registration, on June 5, 1917.

The evidence showed these facts: Pass was 23 years old at the time of the trial in February, 1918, was an unnaturalized alien, born in Russia, and in 1904 came to the United States with his parents. The

family landed at New York and went directly to Columbus, Ohio, where they stayed one year. In 1905 they moved to Cleveland, where they remained until 1913, when the father went to Seattle, Wash., and at the end of a year defendant, together with the rest of the family, joined the father in Seattle. Morris remained in Seattle 7 or 8 months, and then went to New York to study painting, and stayed there about 1 year and 3 months, or until September, 1916, when he returned to Seattle, where he remained with his parents until the latter part of May, 1917.

At that time he and his brother, Joe Pass, left Seattle for New York, and worked their way from place to place. Defendant reached Sand Point, Idaho, on the evening of June 4th or morning of June 5th. He testified that he conferred with the local board of registration at Sand Point and was advised to register there, and that he did so, under the name of Morris Levine; that he left Sand Point on the afternoon of June 5th and went to Montana, going from there to New York, arriving about the middle of September, 1917; that in New York he lived at 16 Christopher street, under the name of Morris Pass, but received his mail at the general delivery; that he remained at Christopher street for about 3 weeks, or until October 13th, when he was arrested; that he did not consider New York as his permanent residence, but merely a place where he would study, and that after leaving Seattle he had not established a permanent residence; that he considered his residence wherever he was, where he slept and was doing his business. "I registered in Sand Point, because I did not consider Seattle my place of residence. I considered myself a migratory worker, which I was."

[1] It is contended that the court erred in permitting a witness to testify to certain admissions made by defendant when in New York. The witness was a United States secret service agent, who met Morris Pass in June, 1917. Counsel for the government asked the witness whether he had heard the defendant make any statement with reference to his registering or failing to register under the Selective Service Act. Counsel for the defendant was given permission to interrogate the witness as to the circumstances under which any admissions or statements were made. The evidence given was to the effect that Pass, after his arrest, stated that he had resided in Seattle; that he had remained there until May, 1917; that he had not registered at any place, and was somewhere in Montana on June 5, 1917; and that he was a conscientious objector. There was no evidence of any substantial character which tended to show force or threats against Pass, or inducement made or offered to him by the agents of the government. The mere fact that Pass was in custody when he made the statements, and that they were answers to questions put by the agents, did not make such admissions involuntary. In *Bram v. United States*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, cited by defendant, the facts were very different. There the accused was in actual custody, was stripped of his clothing, and was nagged and told by the detectives that an eyewitness charged him with guilt, and that if he had an accomplice he should say so, and not have the blame of the "horrible

crime" on his own shoulders. In *Hopt v. Utah*, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262, the court, in discussing the admissibility of a confession, said:

"The admissibility of such evidence so largely depends upon the special circumstances connected with the confession that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed, in the first instance, to the judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forbore to mark with absolute precision the limits of admission and exclusion." *Sparf v. United States*, 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343.

[2] It is said that the court erroneously admitted an exhibit and circular headed, "No Conscription! No Involuntary Servitude! No Slavery!" published on or after May 11, 1917. The circular, after setting forth that slavery was not permitted in the United States, went on:

" * * * Wake up! Stand by us now, for when we have become an army we will have ceased to think, and we will shoot you if told to shoot you. * * * Resist! Refuse! Don't yield the first step toward conscription. Better be imprisoned than to renounce your freedom of conscience. Let the financiers do their own collecting. Seek out those who are subject to the first draft. Tell them that we are refusing to register or to be conscripted, and to stand with us like men and say to the masters: 'Thou shalt not Prussianize America!'"

Below the main printing were the words, "Seattle Branch No Conscription League, P. O. Box 225."

It is doubtful whether exception was taken to the admission of the circular in evidence; but, assuming that the point was saved, there is no merit in it, for the reason that there was evidence which tended to show that Morris Pass was one of those directly responsible for the publication of the leaflet. We quote part of the cross-examination of defendant (Transcript, p. 54):

"Q. Where have you seen it prior to that time? A. Prior to that time I had seen it, I believe, on the streets in Seattle; also one on the porch at our house.

"Q. On the porch at your house? A. Yes sir.

"Q. I will ask you if you did not pay for the printing of that circular? A. No, sir.

"Q. Isn't it a fact that you gave to Hulet M. Wells a sum of money to pay for the printing of this leaflet? A. I didn't pay for them.

"Q. Did you give to Hulet M. Wells money to pay for the printing of this leaflet? A. The money was taken at a collection to pay for this leaflet.

"Q. Who collected that? A. The money was put on a table at a meeting which would pay for that leaflet.

"Q. And who took the money from the table? A. Part of it was taken by Mr. Wells; part of it I taken and gave to Mr. Wells later.

"Q. That was for the publication of this leaflet? A. Yes, sir."

Inasmuch as defendant testified that he acted in good faith in registering at Sand Point, Idaho, there was no error in admitting the circular as tending to negative his evidence of good faith. *Moore v. United States*, 150 U. S. 57, 14 Sup. Ct. 26, 37 L. Ed. 996.

[3, 4] It is contended that there was no evidence to support the verdict of the jury. By the provisions of the Selective Service Law,

and under the executive proclamations and regulations prescribed under the authority thereof, registration was required on June 5, 1917, of every male person who on that date or theretofore should have attained his twenty-first birthday, and who on said date should not have attained his thirty-first birthday, registration to be made at the registration place in the precinct wherein the registrant had his permanent home and orders. The law provided for the benefit of registrants that—

“Those who expect to be absent on the day named from the counties in which they have their permanent home may register by mail, but their mailed registered card must reach the places in which they have their permanent home by the day named herein, June 5, 1917.” Proclamation of the President of the United States, dated May 18, 1917.

There was evidence going to show that defendant had a permanent home and domicile in the city of Seattle on June 5, 1917, and that he had not abandoned it on that date. If, when he was at Sand Point, Idaho, on the night of June 4th or morning of June 5th, he had a plan to move on and migrate through other towns to his ultimate destination, New York, such a floating intention would not conflict with a domicile in Seattle. There is nothing to show that he had established a new residence in Sand Point; on the contrary, it is clear that he intended to move on to New York. The question was one for submission to the jury. The court fully explained the requirements of the law, and among other instructions said:

“ * * * He was in Sand Point on the 5th day of June, and registered, not in his own name, known at his place of domicile, but under the name of Morris Levine, or Levene, stating that he had assumed the name as his traveling cognomen. * * * Now, you are instructed that the regulations further provide that when a man is absent from his domicile or permanent residence—actual residence—that he may register by mailing his registration to the registration board of his domiciliary precinct. The law makes it an offense to willfully fail to register. * * * So, on the morning of the 5th day of June and before, after issuance of the rules and regulations and after the passage of the law, he knew that he could register by presenting himself at the voting precinct within which his domicile is situated, and, if he was absent then, by mailing his registration to his precinct.

“Now the issue for you to determine is raised by this registration in Sand Point, Idaho. I have admitted in evidence the fact of his registration there, and all of the circumstances bearing upon his conduct and his intent which brought about that registration, for the purpose of permitting you to fairly consider all of the evidence that is before you to determine whether this defendant acted honestly at that time, and with an honest purpose and intent of complying with the law, whether his conduct at that time was with the purpose of perpetrating a fraud upon this act and the government, and with a view to evasion, so that he might not be called, or evade the call if he is certified, if his name is called, and still, if discovered, then have some thread upon which to predicate the idea of intention of faithful compliance with the law.”

By this instruction the main issue was fairly presented, and after careful consideration of the whole record we are satisfied that defendant's rights were in no way prejudiced.

The judgment is affirmed.

PASS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. April 7, 1919.)

No. 3243.

ARMY AND NAVY ⇌20—SELECTIVE SERVICE LAW—REGISTRATION IN CITY OF DOMICILE.

A resident of Seattle, Wash., where his parents lived, in so far as he had any domicile, who left his wife in the city and started to work his way to New York to study, by failing to register in Seattle under the Selective Service Law (Comp. St. 1918, §§ 2044a-2044k), violated such law, though he registered at a point in Idaho, and, if his failure to register in Seattle or his evasion of the requirements of the law was willful, he could be convicted.

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

Joseph Pass was convicted of having violated the Selective Service Law, and he brings error. Affirmed.

Winter S. Martin and Wilson R. Gay, both of Seattle, Wash., for plaintiff in error.

Clarence L. Reames, Sp. Asst. Atty. Gen., Robert C. Saunders, U. S. Atty., and Ben L. Moore, Asst. U. S. Atty., all of Seattle, Wash.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. By writ of error Joseph Pass asks reversal of a judgment of conviction under two counts of an indictment for having violated the Selective Service Law of May 18, 1917 (40 Stat. 76, c. 15 [Comp. St. 1918, §§ 2044a-2044k]). The first count charged that he willfully failed and refused to present himself for registration at precinct No. 201, Seattle, on June 5, 1917, "that precinct then being the precinct wherein said Joe Pass then had his permanent home and actual place of legal residence, from which he was not then temporarily absent." By the second count Pass was charged with having willfully evaded the requirements of the Selective Service Law, in that he willfully and knowingly failed to present himself for registration. The defendant is a brother of Morris Pass, whose case we have heretofore decided. *Pass v. United States*, 256 Fed. 731, — C. C. A. —.

The uncontradicted evidence was that Pass, who was 24 years old, was born in Russia and came to the United States with his father about 1904. He lived in Columbus, Ohio, for a year, and then in Cleveland, Ohio, for about 6 years. Pass then went to Seattle, where, in a few months, he was joined by his father's family. After living 5 or 6 months with his parents in Seattle, he went to Alaska, where he remained a little more than 3 years. He then went back to Seattle, where he again lived with his parents for 3 years. In 1915 he lived with a brother on Twelfth avenue, Seattle. In 1916 he lived with his parents at Fifteenth avenue, Seattle, and he continued to live there

until May 31, 1917, when he was married. At the time of his marriage he gave his home as Cleveland, Ohio, although he had not lived there for more than 6 years before his wedding. On May 31st, with his brother Morris, he left Seattle with the plan of working their way to New York. The defendant's wife remained at Seattle. On the night of June 4, 1917, or the morning of June 5, they reached Sand Point, Idaho, and, according to defendant's testimony, after some conversation with the registration officials at Sand Point, and telling them that he had come from Seattle, but did not live in Idaho, and was going to New York, he registered at Sand Point under the name of Joe Levine. He left Sand Point for Montana on the afternoon of June 5th, and his testimony is that he did not live in the county where Sand Point, Idaho, is situated; that he lived at 16 Christopher street, in New York, but that he got his mail at the general delivery; that his purpose in going to New York was to study; that before he left Seattle he made no inquiries about registering, and did not know that he could register by mail; that he took the name Levine because of the manner in which he and his brother were traveling; they did not "look clean enough, and did not care to use the name of Pass"; that, although he was living with his parents in Seattle in 1917, he did not call it his residence or expect to live there; that when he was married he gave Cleveland as his home, "because he had lived there the longest since he had been in this country." Defendant said that he was opposed to the Draft Act.

The question presented is whether the District Court erred in charging the jury that upon the facts "as a matter of law the defendant had not established a domicile in Sand Point, Idaho," and that "the domicile of the defendant continued on the 5th day of June at Seattle and had not been changed," but that it was for the jury to determine whether, considering the conduct of defendant and all the circumstances before and after the registration, he willfully failed to register at the place of his domicile, or willfully evaded the registration law by his act in registering at Sand Point, Idaho; that if the jury believed Pass acted honestly and with bona fide intention of complying with the law, rather than willfully to fail to comply with it or evade its provisions, or if there was a reasonable doubt upon the point, he should be acquitted.

It is not controverted that by the terms of the law and under the proclamation of the President, dated May 18, 1917, the date of registration was fixed for June 5, 1917, and the place of registration for each person was in the precinct wherein such person had his permanent home, or that it was provided that "those who expect to be absent on the day named from the counties in which they have their permanent homes may register by mail, but their mailed registration cards must reach the place in which they have their permanent homes by the day named herein," which was June 5th. But defendant failed to register in person in the precinct in which he was living when he was in Seattle and failed to register therein by mail. His counsel, while admitting that the act and regulations "seem to contemplate that every man will have a permanent domicile," argue that there is a

fault in the law, in that there is "no account of the floater or migratory worker," who "resides where he is, whether his stay be long or short." The error of this position is in ignoring the established fact that when defendant left Seattle he resided there, and that there is no showing that he acquired any other residence or home, or that when in Sand Point he had any purpose other than to stop over temporarily and work his way along, so as to reach New York about September, there to remain to study for a time. He left his wife in Seattle, and his parents were there. In *Mitchell v. United States*, 88 U. S. (21 Wall.) 350, 22 L. Ed. 584, the Supreme Court followed the usual rule that a domicile once acquired is presumed to continue until it is shown to have been changed, and said:

"Where a change of domicile is alleged, the burden of proving it rests upon the person making the allegation. To constitute the new domicile, two things are indispensable: First, residence in the new locality; and, second, the intention to remain there. The change cannot be made except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the animus to change the prior domicile for another. Until the new one is acquired, the old one remains. These principles are axiomatic in the law upon the subject."

Merely calling himself a migratory worker, or saying that he had an indefinite plan to leave Seattle, would not change the fact that defendant had his domicile in Seattle. He surely could not claim Cleveland at his domicile, for he does not show that he had even a floating intention of going there, and there is no proof of any domicile other than Seattle. *Gilbert v. David*, 235 U. S. 561, 35 Sup. Ct. 164, 59 L. Ed. 360.

Our conclusion is that the District Court was correct in its statement of the legal status of defendant, and in defining the issues upon which the jury were to deliberate.

Affirmed.

AMERICAN SMELTING & REFINING CO. v. UNION PAC. R. CO.

(Circuit Court of Appeals, Eighth Circuit. March 13, 1919. Rehearing Denied May 21, 1919.)

No. 5194.

1. RAILROADS ⇨133(1)—LEASE OF LAND—CONSTRUCTION—PRACTICAL CONSTRUCTION BY PARTIES.

In a lease of land by a railroad company to a smelting company as site for a plant, reserving to lessor all tracks thereon, a provision by which lessor agreed to furnish material and lay all further tracks required by lessee, "and do all switching of its cars within its premises necessary in placing the same for loading and unloading freight or material therefor free of charge to said smelting company," *held* not to limit such free switching service to that of cars for actual load hauls from or to the plant, especially in view of a contrary practical construction by the parties during 30 years.

2. CARRIERS ⇨32(2)—INTERSTATE COMMERCE ACT—REBATES.

A provision in a lease of land by an interstate railroad company for a smelter plant site, by which in consideration of the rental, etc., it agreed

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to do intraplant switching of cars, wholly disconnected from their transportation over its road, free of charge, held not invalid as a device to cover the giving of rebates.

In Error to the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Action at law by the Union Pacific Railroad Company against the American Smelting & Refining Company. Judgment for plaintiff, and defendant brings error. Reversed.

F. W. Lehmann, of St. Louis, Mo. (Crofoot, Scott & Fraser, of Omaha, Neb., on the brief), for plaintiff in error.

N. H. Loomis, of Omaha, Neb. (Edson Rich and C. B. Matthai, both of Omaha, Neb., on the brief), for defendant in error.

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

CARLAND, Circuit Judge. The railway company, hereinafter called plaintiff, sued the smelting company, hereinafter called defendant, to recover the reasonable value of a so-called intraplant switching service performed by the plaintiff for defendant since July 26, 1912. The defendant answered the complaint, and the plaintiff filed a general demurrer to the answer.

A stipulation was filed waiving a jury and fixing the reasonable value of the services performed at \$7,129.44, in case the court should decide the defendant to be liable. On the pleadings and the stipulation the case was submitted. The court found for the plaintiff and rendered judgment for the amount stipulated. The defendant assigns such ruling as error.

[1] So far as material to the questions raised, the complaint alleged the following facts:

"That at all the times mentioned herein plaintiff was engaged in the operation of certain lines of railroad extending from Council Bluffs, Iowa, and Kansas City, Mo., through the states of Nebraska, Kansas, Colorado, and Wyoming, to Ogden, Utah, and engaged as a common carrier in the interstate transportation of freight and passengers over said railroad lines.

"That at all the times mentioned herein defendant was engaged in the operation of a smelting plant located in the city of Omaha, Neb., occupying grounds of the extent of approximately 19 acres, connected by spur and switch tracks with the main tracks of plaintiff's railroad line through said city of Omaha, and having within said plant grounds railroad tracks connecting the various buildings and other parts of said plant as means and facilities for the convenient and economical handling of ore, bullion, coal, and other materials from point to point within said plant in the operation thereof.

"That in the prosecution of its said business defendant was at all the times mentioned herein, a large shipper of freight in interstate commerce over the railroad lines of plaintiff, shipping ore and other materials to said Omaha plant from points in states other than Nebraska, and shipping from said Omaha plant the products thereof to points in states other than Nebraska, and that defendant has paid for all said interstate transportation performed for it by the plaintiff the rates prescribed therefor by the tariffs published by the plaintiff and filed with the Interstate Commerce Commission.

"That at the special instance and request of defendant the plaintiff has continuously from the 26th day of July, 1912, to the 30th day of June, 1916, inclusive, rendered and performed for defendant certain work, labor, and services (hereinafter referred to as 'intraplant switching service') consisting of

the switching and movement of cars, both loaded and empty, by means of a switch engine furnished and operated by plaintiff and the labor of an engine crew and yard crew furnished by plaintiff, from point to point within the grounds occupied by said Omaha plant of defendant, as directed by agents of defendant, over the trackage facilities maintained as aforesaid within said plant grounds; said switching and movement of cars being separate and apart from, and in addition to, any services rendered by plaintiff in and about the delivery to or acceptance from said plant of loaded cars in connection with and as a part of the transportation thereof from or to points beyond the plant limits or in and about the delivery to said plant of empty cars for loading or the removal therefrom of empty cars after unloading in connection with transportation to and from said plant.

"That the plaintiff published tariffs or rates and charges applicable to the transportation mentioned in the foregoing paragraph 6 hereof which contained no provisions concerning the aforesaid intraplant switching service, and no tariff published by the plaintiff and on file either with the Interstate Commerce Commission or with the Nebraska State Railway Commission during the times mentioned herein contained any provision concerning said intraplant switching service."

Without setting forth the allegations of the answer, it is sufficient to say that it alleged that the services, the value of which were sued for, were performed by the plaintiff under and pursuant to the terms of a lease entered into between the parties April 23, 1912, a copy of said lease being attached to the answer as an exhibit. By the terms of the lease the plaintiff, "for and in consideration of the covenants and agreements of the smelting company hereinafter written, as well as of the mutual covenants and agreements herein contained" (section 1, art. 2), leased to the defendant a tract of land in the city of Omaha, Neb., containing about 19 acres,

"excepting and reserving to the said Pacific Company the exclusive ownership, possession, right of possession and right to the exclusive use of all of the railroad tracks, side tracks and switches now upon, or which may hereafter, at any time during the term of this lease, be constructed in or upon the said premises, or any part thereof, the said premises and said tracks being further shown and described upon the map hereto annexed, marked Exhibit A and made a part hereof, and excepting and reserving further the exclusive right to said Pacific Company to lay down and construct, and thereafter maintain and operate any additional railroad tracks, side tracks and switch connections within and upon said premises, which the said smelting company may require to be laid or constructed for the hauling of its freight or material in the prosecution of the said business of the said smelting company upon the said premises.

"To have and to hold the same unto the said smelting company for the said term [January 1, 1937] for the purpose of maintaining and operating thereon its buildings and appliances now situated thereon, and any other such buildings and appliances as it may, during the term hereby created, erect thereon, and of conducting thereon the business of handling, smelting and refining ores, and doing such other business pertaining to or connected with the handling, smelting and refining of ores as said smelting company may, during the said term, engage in upon said premises."

Section 2, art. 2, of the lease, reads as follows:

"And for the consideration aforesaid the said Pacific Company covenants and agrees to furnish all material for and to lay upon the grading therefor, as hereinafter set forth, all necessary tracks over and upon said premises, which the said smelting company may require to be laid for the handling of its freight and material in the prosecution of its business and do all switching of its cars within its premises necessary in placing the same for loading and

unloading freight or material therefor free of charge to said smelting company."

The lease also provided that in consideration of the covenants and agreements thereinbefore mentioned on the part of the plaintiff, the defendant would pay the plaintiff, as compensation in respect of its said covenants, an annual rental in the sum of \$5,000 until January 1, 1925; after January 1, 1925, to January 1, 1928, \$6,000; after January 1, 1928, to January 1, 1931, \$7,000; after January 31, 1931, to January 1, 1934, \$8,000; after January 31, 1934, to January 1, 1937, \$9,000. The record also shows that a similar lease so far as the questions now under consideration are concerned, had existed between the parties and their predecessors since April 23, 1886, and no charge had ever been made by the lessors for the intraplant switching service until the present suit was brought.

The plaintiff first contends that section 2, art. 2, above quoted, relates to the original construction of the tracks and the handling of freight and material incidental thereto, or, if this position is untenable, that the switching service must be limited to the switching of cars to actual road hauls; that is, the placing of cars for loading and unloading in connection with shipments beyond the plant. It is conceded that for 30 years, the parties have placed a different construction upon said section; but it is urged that such construction can have no weight because the section is unambiguous. Learned counsel, however, differ about its construction, and it is undoubtedly the cause of this lawsuit. We do not think it is unambiguous to the extent of excluding from our consideration the construction that the parties have placed upon the section during a period of 30 years.

But let us consider the section independent of the acts of the parties under the lease. Section 2, art. 3, of the lease provides that the defendant will pay the cost and expense incurred for the doing of the grading, for the construction of any additional tracks, side tracks, switches, or other railroad betterments in and upon the leased premises, the construction and operation of which may, at any time, be required by it from the plaintiff. By section 1, art. 2, such tracks, betterments and switches were to be and remain the property of the plaintiff. By section 2, art. 2, the plaintiff agreed to furnish all material for and to lay upon the grading above mentioned all necessary tracks over and upon said premises which the defendant might require to be laid for the handling of its freight and material in the prosecution of its business and do all switching of its cars within its premises, necessary in placing the same for loading and unloading freight or material therefor free of charge to the defendant. The furnishing of material, laying of all necessary tracks, and the switching service was to be performed for the "consideration aforesaid." Section 2, art. 2. The consideration thus referred to, is that mentioned in section 1, art. 2, above quoted, namely:

"The covenants and agreements of the smelting company hereinafter written as well as of the mutual covenants and agreements herein contained."

The words "free of charge" simply were added, in our opinion, to place beyond controversy the fact that the services mentioned were to

be without charge other than that specified in the covenants and agreements of the parties. We see no reason to limit the switching service to that required in the original construction of the tracks, as the plaintiff had agreed to furnish the material and lay the tracks and this would include such switching service as should be necessary to furnish the material and lay the tracks. Therefore the plaintiff having agreed to furnish the material and lay the tracks it would not have been necessary to again provide that the plaintiff should do the switching in connection with the laying of the tracks so we conclude the language in regard to switching cannot be confined to the switching required in the original laying of the tracks. Neither do we see any reason for limiting the switching service to the switching of cars for actual load hauls from or to the plant.

We take it that the plaintiff, under the facts disclosed in the record, would deliver to and accept from the defendant loaded cars, and place empty cars for loading, in connection with and as a part of the transportation thereof from or to points beyond the plant limits, without other charge than that embraced in its published tariff. If this be so, it was unnecessary to provide in the lease for that switching service; moreover, the allegations of the plaintiff's complaint absolutely exclude the service in question from any connection with transportation to and from the plant of the defendant in interstate commerce.

[2] We therefore are of the opinion assisted by the practical construction of the parties that section 2, art. 2, cannot be limited as the plaintiff seeks to limit it. The next contention of the plaintiff is that if the switching service, the value of which is sued for, is a service for which the covenants and agreements of the lease are the consideration, then the switching provision of the lease amounts to a device to conceal a rebate or concession and in this respect is void under section 2 of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [Comp. St. § 8564]) and section 1 of the Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847, as amended by Act June 29, 1906, c. 3591, 34 Stat. 587 [Comp. St. § 8597]).

Of course an unlawful rebate or concession is just as much a rebate or concession whether covered or uncovered. It is more difficult to find, if covered. This is the only difference. We do not think the parties to the lease, if the provision in regard to the switching service is an unlawful rebate, intended to cover it, for instead of stopping where they well might have stopped, they proceeded to state just what the fact was. The question then before us is: Does section 2, art. 2, amount to an unlawful rebate or concession? In the consideration of this question it is apparent that this case is much different from those cases where unlawful rebates or concessions are usually considered. It lacks the presence of a competitive shipper complaining of discrimination, or the United States moving at the request of the Interstate Commerce Commission. The complaint of the plaintiff in paragraph 7 of the complaint also alleges:

"Said switching and movement of cars being separate and apart from, and in addition to, any services rendered by plaintiff in and about the delivery to or acceptance from said plant of loaded cars in connection with and

as a part of the transportation thereof from or to points beyond the plant limits or in and about the delivery to said plant of empty cars for loading or the removal therefrom of empty cars after unloading in connection with transportation to and from said plant."

By this allegation of the plaintiff, the switching service in question has no relation to or connection with transportation of passengers or property in interstate commerce and therefore in no view of the case could the provision in regard to the switching service be affected by the act to regulate commerce and the amendments thereto.

With reference to section 2 of the Interstate Commerce Act and section 1 of the Elkins Act, there is no evidence that the plaintiff, by performing the switching service in question, according to the terms of the lease, charges, demands, collects, or receives from the defendant a greater or less compensation for the transportation of passengers or property subject to the provisions of the act to regulate commerce, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. Nor is there any evidence that, by the performance of the switching service in question, the plaintiff offers, grants, or gives any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce, by it, whereby any such property is transported at a less rate than that named in its tariffs published and filed, or whereby any such other advantage is given or discrimination practiced in the transportation of property in interstate commerce.

The switching service in question is performed wholly within the state of Nebraska, and so far as this record is concerned is not connected with interstate commerce at all. Therefore the Interstate Commerce Act and its amendments are not applicable to it. We do not say that this lease between the plaintiff and the defendant may not, in a proper case, be shown to be an unlawful concession or rebate; all we say is that it is not shown in this case.

We are not unmindful that, although published rates may be collected on shipments transported, concessions and offsets may be extended by the carriers or the interests who control the carriers to favored shippers. These concessions and offsets are as pernicious as direct rebates, and it matters little whether they are in the form of cash payments, interest charges, royalty earnings, the use of valuable property at an inadequate rent, the free use of the carrier's funds or credit, or other insidious means, if they confer concessions and advantages which place certain shippers in a position of preference and advantage over competitors who are also customers of these carriers. Rates for Transportation of Anthracite Coal, 35 Interst. Com. Com'n R. 239. No competitor customer appears in this suit. It is true the Elkins Act aims to prohibit, not only discrimination between shippers, but any departure from the tariff rates published irrespective of its actual discriminatory effect. *Vandalia R. Co. v. United States*, 226 Fed. 713, 141 C. C. A. 469. But these tariff rates must be rates prescribed for the transportation of property or passengers in interstate commerce.

We may not stop to review the cases cited by counsel for plaintiff in support of the contention now under consideration. They have all been examined, and in every instance they present a case where a common carrier subject to the act to regulate commerce has done some act whereby the transportation of property or passengers in interstate commerce has violated the Interstate Commerce Act. The cases cited are *Chicago & Alton Ry. Co. v. United States*, 212 U. S. 563, 29 Sup. Ct. 689, 53 L. Ed. 653; *Wight v. United States*, 167 U. S. 512, 17 Sup. Ct. 822, 42 L. Ed. 258; *Chicago & Alton R. R. Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501; *United States v. Union Stockyard Co. of Chicago*, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. 226; *Phillips Co. v. Grand Trunk Western R. R. Co.*, 236 U. S. 667, 35 Sup. Ct. 444, 59 L. Ed. 774; *Indianapolis Freight Bureau v. C., C. & St. L. Ry. Co.*, 16 Interst. Com. Com'n R. 254, 260; *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310; *Moshassuck Valley Railroad, Second Industrial Railways Case*, 37 Interst. Com. Com'n R. 566; *Vandalia Ry. Co. v. United States*, 226 Fed. 713, 141 C. C. A. 469.

Counsel for the plaintiff next contends that the switching service in controversy, while not a common carrier service in the ordinary acceptance of the word, is a special or independent service necessarily rendered by the same crews and equipment as the common carrier switching and is paid from out of operating revenue for which a reasonable charge must be made by the carrier. But here again we are met by the fact that the switching service, so far as the record before us is concerned is separate and apart from any service performed by the plaintiff in interstate commerce.

If this case was before the commission on an application to advance rates, or on the complaint of some shipper that the rates charged by the plaintiff were unreasonable, and it became material to inquire as to the sources of revenue of the plaintiff and the cost of the operation of its business, and the commission found that the service was without charge, it might say, as it often has said, You must make a charge for this service and publish it in your tariffs. But we have no authority to enter into such a discussion and there is no such case before us. We cannot find that the service is without charge when the whole lease is considered.

So far as the record before us is concerned, the subject-matter of the switching service was within the competency of both parties to make and is valid.

The judgment below is therefore reversed, and the case remanded, with instructions to dismiss the complaint.

CALDWELL v. BLODGETT.

(Circuit Court of Appeals, Eighth Circuit. March 5, 1919.)

No. 4997.

1. APPEAL AND ERROR ⇨237(6)—REVIEW—ACTION TRIED TO COURT.

Where an action at law is tried in a federal court without a jury, and the legal effect of the evidence is not challenged by the defeated party, by motion for a finding in his favor or for a declaration of law of the same purport, the sufficiency of evidence to support special findings of fact cannot be considered by the appellate court, and all that can be reviewed is whether the special findings sustain the judgment, and whether during the progress of the trial errors of law occurred to which exceptions were preserved.

2. COVENANTS ⇨121(3)—EVIDENCE—FORMER JUDGMENT—MATTERS CONCLUDED—CONCLUSIVENESS.

A decree in a suit by a grantee of land by an unrecorded deed against his grantor and a subsequent mortgagee of the grantor and an assignee of the mortgage, holding the mortgage void and canceling the same, held conclusive as to the invalidity of the mortgage as between mortgagee and assignee in an action by the latter to recover over on a warranty in the assignment.

In Error to the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Action at law by Alson Blodgett, Jr., against Ida M. Caldwell, executrix of the will of W. A. Caldwell, deceased. Judgment for plaintiff, and defendant brings error. Affirmed.

W. S. Lauder, of Wahpeton, N. D. (T. L. Brouillard, of Ellendale, N. D., on the brief), for plaintiff in error.

E. T. Conmy, of Fargo, N. D. (Watson, Young & Conmy, of Fargo, N. D., on the brief), for defendant in error.

Before HOOK and CARLAND, Circuit Judges.

HOOK, Circuit Judge. Alson Blodgett, Jr., brought an action at law against Ida M. Caldwell, executrix of W. A. Caldwell, deceased, to recover the amount paid the deceased for a note and mortgage upon land in North Dakota, with interest from the time of payment. A jury was waived and the case was tried by the court. The court made special findings of fact and rendered judgment thereon for Blodgett. The executrix prosecuted this writ of error.

[1] At the threshold lies the question of the scope of our power of review. Upon the conclusion of the evidence at the trial the executrix made no motion for a finding, either general or special, in her favor, requested no declaration of law, nor otherwise challenged the legal effect of the evidence. Under such circumstances the sufficiency of the evidence to support the special findings that were made cannot be considered, and all that can be reviewed in an appellate court is whether the special findings, taking them as true, sustain the judgment, and whether during the progress of the trial errors of law occurred to which exceptions were preserved. Section 700, Rev. Stat. (Comp.

St. § 1668); *Keeley v. Mining Co.*, 95 C. C. A. 96, 169 Fed. 598; *Mason v. United States*, 135 C. C. A. 315, 219 Fed. 547.

There are 22 assignments of error in the record. None of them contest the sufficiency of the findings to sustain the judgment, 17 relate to the admission and exclusion of evidence, 2 charge error in making certain findings presumably for insufficiency of proof, and 2 are simply that the court erred in rendering the judgment. The remaining assignment will be discussed presently. The long-established rules of appellate procedure in the courts of the United States prescribe definite requirements as to the character and contents of assignments of error for the record, and also the specifications in the briefs of those that are to be relied on in the appellate court. They have been the subject of very many decisions in this court, other Circuit Courts of Appeals, and the Supreme Court; but it appears that in the case at bar little attempt was made to comply with them. In a liberal view, in the interest of justice, there is but one question presented by an assignment of error that may be consistently considered. It is whether the trial court erred in holding that a judgment in a prior case concluded the executrix as to the matter there decided. A brief outline of the case at bar and the other case, as shown by the pleadings of the parties and the findings of the court before us, is essential to an understanding of the question.

[2] In his lifetime W. A. Caldwell loaned \$4,000 to one Hall, and took his note and a mortgage on certain land, represented as belonging to the mortgagor, to secure it. Shortly afterwards Caldwell sold and assigned the note and mortgage to the plaintiff, Blodgett, for the face amount and accrued interest. The mortgage purported to be a first lien on the land, and Hall so covenanted, and also that the land was otherwise free of all incumbrances. The assignment to Blodgett contained a covenant by Caldwell that there was due upon the note and mortgage the full sum mentioned and interest to that time, and that he (Caldwell) had good right and lawful authority to sell and assign them in the manner adopted. By the terms of the assignment, in connection with those of the mortgage, Caldwell expressly warranted to Blodgett that the mortgage sold him was a first lien. There was also an implied warranty to the same effect growing out of the circumstances of the transaction. Furthermore, Caldwell believed he was selling, and Blodgett believed he was buying, a mortgage that was a first and only lien on the land. If it was not of that character the consideration failed.

It afterwards transpired that, about a year before Hall mortgaged the land to Caldwell, he sold it to one Quaschneck and gave him a contract for a deed, which the latter did not record, but under which he took open and exclusive possession of the property. Before discovering the existence of the mortgage Quaschneck paid Hall and those claiming under him nearly all the purchase price. Quaschneck then brought a suit in a state court of North Dakota to cancel the mortgage and quiet his title. The defendants in that suit were Blodgett, plaintiff here, the executrix, defendant here (Caldwell having died), and the trustee of the estate of Hall, who had been adjudged bankrupt. Both

Blodgett and the executrix filed answers, putting the averments of Quaschneck's complaint in issue, and participated in the trial. The case resulted in a decree for Quaschneck, quieting his title and expressly declaring the mortgage to be void and of no effect as a lien on the land. The executrix was awarded her costs upon the ground that she asked no affirmative relief. The decree was afterwards affirmed by the Supreme Court of the state. In the present case, brought by Blodgett to recover the amount he paid, with interest, the court below held that the decree of the state court estopped the executrix from questioning the invalidity of the mortgage as a lien. That ruling presents the question here.

In most of the cases in which a warrantor, indemnitor, or person in a similar relation has been held bound by the result of a suit involving a matter upon which his obligation to another depends, he was not a record party to the suit, but was either noticed or called in, or had information of its pendency, with opportunity to aid or participate in its conduct. An instance appears in *Chicago v. Robbins*, 2 Black, 418, 17 L. Ed. 298, and *Robbins v. Chicago*, 4 Wall. 657, 18 L. Ed. 427. There one Woodbury had sued and recovered judgment against the city of Chicago for injuries caused by his falling into an excavation in a public street in front of the property of Robbins, made by a contractor of the latter and negligently left unguarded. The city paid the judgment and sued Robbins for its loss. To hold Robbins to the Woodbury judgment, the city showed that he knew of the suit and the approaching trial, and that it had requested him to aid in procuring evidence. It did not expressly notify him to defend the suit, "and never notified him that the city would look to him for indemnity." 2 Black, 422, 17 L. Ed. 418. The Supreme Court, in reversing a judgment below in favor of Robbins, held that an express notice to defend was not necessary in order to charge his liability. It was said:

"He knew that the case was in court, was told of the day of trial, was applied to to assist in procuring testimony, and wrote to a witness, and is as much chargeable with notice as if he had been directly told that he could contest Woodbury's right to recover, and that the city would look to him for indemnity."

Robbins was held not estopped from showing he was under no obligation to keep the street in a safe condition and that the accident was not his fault, but that he was estopped from disputing the particular physical cause of the accident and the amount of the resulting damage or loss to the city, if he knew the suit was pending and could have defended. When the case went back for a retrial the jury were instructed:

"If it was through the fault of Robbins that Woodbury was injured, he is concluded by the judgment recovered against the city, if he knew that the suit was pending and could have defended it. It is not necessary that the city should have given him an express notice to defend the suit, nor is it necessary that the city should have notified him that it would look to him for indemnity." 4 Wall. 661, 662, 18 L. Ed. 427.

At this trial the city recovered from Robbins and the judgment was affirmed. The Supreme Court expressly approved the instructions above quoted. It also said (4 Wall. 674, 18 L. Ed. 427):

"Knowledge of the pendency of the suit in the most authentic form was brought home to him, and the legal presumption is that he knew he was answerable over to the corporation, and, if so, it must also be presumed that he knew he had a right to defend the suit."

We have italicized a part of the above excerpt for its especial relevance to the case at bar. Blodgett was not required to notify the executrix or to plead against her in the Quaschneck suit that the estate would be bound to indemnify him if they lost. The legal presumption is that she knew it, and she should have conducted herself accordingly. The case of *Chicago v. Robbins* was founded on tort, but it is well settled that the principle applies as well to cases where the duty to indemnify or hold harmless arises from contract. In *Burley v. Compagnie de Navigation Francaise*, 115 C. C. A. 199, 194 Fed. 335, the court said that—

"When a person is responsible to another, by operation of law or by express contract, and he is fully informed of the claim and that the action is pending, and has full opportunity to defend or participate in the defense, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not."

See, also, *Wolfe v. Barataria Land Co.*, — C. C. A. —, 255 Fed. 503, in which the doctrine was recently applied by this court.

As already observed, in most of the cases the warrantor or indemnitor was not a record party to the prior suit, but had notice and opportunity. A fortiori should he be bound when, like the executrix here, he was a party and participated in the trial.

The executrix prevailed in the Quaschneck suit and recovered her costs, but that was because, the mortgage having been assigned to Blodgett, she claimed no lien for the estate. She did not prevail against Blodgett, to whom the estate was obligated. The liability of the estate to Blodgett was not in issue in that case, and was not decided. That liability involved other matters besides the invalidity of the mortgage. It is another and different cause of action than that involved in the Quaschneck suit. The decree in her favor against Quaschneck was therefore not conclusive against Blodgett in the case at bar.

"The two suits are for distinct and separate causes of action. If there were any distinct question litigated and settled in the prior suit, the decision of the court upon that question might raise an estoppel in another suit upon the principle stated in *Cromwell v. County of Sac*, 94 U. S. 351 [24 L. Ed. 195]. But, as was held in that case, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Keokuk & Western Railroad v. Missouri*, 152 U. S. 301, 315, 14 Sup. Ct. 592, 597 (38 L. Ed. 450).

It is of no avail to the executrix that she conducted herself as a nominal defendant in the Quaschneck suit and as indifferent to the outcome. She knew all the facts and circumstances of the transaction between her testator and Blodgett, and was charged with knowledge of their effect as matter of law. She also knew that an important factor was the validity or invalidity of the mortgage as a

lien, and that the question was then at issue with Quaschneck their common adversary. Being a party to the suit, her duty was to stand with Blodgett and maintain that the mortgage was a lien as her testator had warranted. Upon that issue Blodgett lost, and she lost as well. The judgment is affirmed.

HALL v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1919.)

No. 1683.

1. CRIMINAL LAW Ⓒ369(1)—VIOLATION OF ESPIONAGE ACT—EVIDENCE—OTHER OFFENSES.

On trial of a defendant for violation of the Espionage Act (Comp. St. 1918, §§ 10212a-10212h), by making false reports and doing other acts with intent to interfere with the prosecution of the war, it was prejudicial error to admit evidence of threats made by him against the President, not connected with the acts with which he was charged.

2. CRIMINAL LAW Ⓒ721½(1)—TRIAL—ARGUMENT OF COUNSEL.

Argument by a district attorney to the jury, based upon his statement that no friend of defendant or citizen had appeared to testify in his behalf, or objected to his prosecution, evidence of which, if offered, would have been incompetent, *held* improper.

In Error to the District Court of the United States for the Western District of South Carolina, at Greenville; Joseph T. Johnson, Judge. Criminal prosecution by the United States against J. K. Hall. Judgment of conviction, and defendant brings error. Reversed.

A. H. Dagnall, of Anderson, S. C., for plaintiff in error.

J. William Thurmond, U. S. Atty., of Edgefield, S. C. (C. G. Wyche, Asst. U. S. Atty., of Greenville, S. C., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. The plaintiff in error (defendant below) was tried in the United States District Court for the Western District of South Carolina on an indictment containing five counts.

In the first count it is charged that the defendant did "unlawfully, willfully, and feloniously make and convey certain false reports and false statements * * * with intent to interfere with the operation and success of the military and naval forces of the United States. * * *"

The second count charged a violation of Act June 15, 1917, c. 30, tit. 1, § 3, 40 Stat. 217 (Comp. St. 1918, § 10212c); it being alleged that defendant "did unlawfully, willfully, knowingly, and feloniously attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States. * * *"

The third count charged a violation of the same act, viz. That defendant "did unlawfully, knowingly, and feloniously obstruct the re-

cruiting and enlistment service of the United States, to the injury of the United States. * * *

In the fourth count a violation of Act May 16, 1918, c. 75, § 1 (Comp. St. 1918, § 10212c), is charged, to wit, that defendant "did unlawfully, willfully, and feloniously make and convey false reports and false statements, with attempt to obstruct the sale by the United States of bonds of the United States. * * *

In the fifth count it is charged that the defendant violated Act Feb. 14, 1917, c. 64, 39 Stat. 919 (Comp. St. 1918, § 10200a), in that he "did willfully, unlawfully, and feloniously make a certain threat to inflict bodily harm upon the President of the United States. * * *

Counsel for the defendant demurred to the indictment and moved to quash the same upon the following grounds:

"Because the indictment contained five counts which were improperly joined, the five counts alleging different offenses, not connected in time, and not being of the same class of offenses, and for the additional reason that the defendant is alleged to have violated counts 1, 2, and 3 on the 15th day of May, 1918, which said counts are based on Act June 15, 1917, known as the 'Espionage Law,' which had not been enacted by Congress, and therefore the defendant would be on trial for having committed an offense prior to the passage of the act creating the offense, as testimony admitted tending to prove one count would be considered by the jury on the other counts, thus in effect trying the defendant for an act which was afterwards made a crime by Congress, but which was not a crime at the time."

While the court overruled the demurrer and the motion to quash, nevertheless it held that there was an improper joinder of the fifth count, and accordingly the fifth count was eliminated.

[1] The second assignment of error is in the following language:

"That the court erred in permitting and allowing witness Floyd, over the objection of the defendant, to testify that he had heard the defendant make threats against the President of the United States and that he had heard the defendant say he would like to get an opportunity of putting a bullet through Woodrow Wilson's heart, this threat not being connected in any way with the offense for which the defendant was being tried, and was incompetent, irrelevant, and highly prejudicial."

The third assignment of error is in practically the same language as the second, with the exception that it relates to the testimony of Metta Batson, in which she was permitted to testify, over the objection of counsel for defendant, that she, too, had heard defendant make threats against the President of the United States, saying, among other things, he would like to shoot the President. The evidence of these witnesses was objected to upon the ground that it tended to prejudice the minds of the jurors against the defendant. Counsel insisted, further, that it did not tend to prove any of the offenses for which defendant was being tried, and that any proof that the defendant had committed other offenses was not only "incompetent, but highly prejudicial."

As we have stated, the fifth count of the indictment, which, among other things, charged that the defendant had threatened to inflict bodily harm on the President of the United States, was eliminated. Therefore any evidence tending to show that the defendant had made threats against the President unconnected with the offenses of which

he was convicted became wholly immaterial to the issues then being tried, and could only create the impression that, in addition to the other offenses charged, defendant was disloyal to the government and he had so far forgotten the rules of propriety as to attack the President. The introduction of this evidence would, of necessity, tend to create a false impression upon the minds of the jury, who would unconsciously reach the conclusion that one guilty of making such an unjustified attack upon the President must naturally be guilty of offenses wherein he was charged with being unmindful of the duty that he owed his country. The Circuit Court of Appeals for the First Circuit in the case of *Thompson v. United States*, 144 Fed. 16, 75 C. C. A. 174, said:

"There is no occasion to question the general rule which excludes all evidence of collateral offenses. Such rule is often called the 'Rule of Logic,' because it is based upon the idea that evidence of the commission of one crime in and of itself has no legitimate tendency to prove the commission of another crime. This general rule in practice is, of course, more absolute when the offenses are of a different nature."

In the case of *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, the court said:

"This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of *Magna Charta*. It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt."

If this were not the rule, there would be no guaranty for the life or liberty of the individual, and this would be especially true in time of war, as in this instance, when the government is involved, or on other occasions when public sentiment might be aroused as to a particular question.

During the war with Germany the people of South Carolina, in common with the people of all other states, were intensely loyal and enthusiastic supporters of the President, who was not only the President of all the people, but also the Commander in Chief of our armies. This spirit was highly commendable. However, where one is charged with an offense even remotely involving his loyalty to the government, the slightest imprudent reference he might make as respects the President or any of the officials of the government would naturally be resented by the people, and the introduction of evidence tending to show that the accused had threatened to kill the President or had spoken of him in a disrespectful manner would be highly prejudicial, and the jurors, as we have stated, would unconsciously be more or less affected thereby in determining the guilt or innocence of the accused.

[2] The fourth assignment of error is as follows, that the court erred in allowing and permitting the United States attorney to say:

"Gentlemen of the jury, is it not a significant fact that defendant has failed to introduce a single witness in his behalf who has ever heard him make a patriotic utterance? Not a single friend or citizen has come here to

testify in his behalf. No man has interceded with the office of the United States attorney in his behalf. Could a man be innocent and be put on his trial without numerous friends and citizens protesting against it?"

It is insisted by counsel for defendant that the language of the district attorney was highly improper, placing as it did an unwarranted burden upon the defendant. In order to relieve the defendant from such burden his counsel requested the court to charge the jury as follows:

"Even if the defendant had offered testimony of patriotic utterances made by him to different persons that said testimony would have been incompetent and inadmissible, and the fact that the defendant had offered no such testimony, must not be taken into consideration by the jury."

The court refused to grant this request. The address of the district attorney to the jury above quoted was manifestly improper for the following reasons:

(a) If it had been offered as evidence, it would have been incompetent. Therefore it was error to permit the district attorney to base his argument upon a false premise, thereby imposing upon the defendant a burden not imposed upon him by law.

(b) The statement that no one had interceded with the office of the district attorney in his (the defendant's) behalf was improper, inasmuch as evidence tending to establish this fact would have been irrelevant and incompetent, if it had been introduced by the government. The fact that he had "been put upon his trial without numerous friends and citizens protesting against it" was wholly immaterial as to the issue then being tried, and if there had been an attempt on the part of the government to establish such alleged fact, no doubt the court below would have sustained the objection to the introduction of such testimony upon the grounds we have stated. Indeed, it is not the custom for citizens to protest against the prosecution of any one who has been indicted by a grand jury and placed upon his trial, even though there should be a general impression in the community that he is innocent. Such proceeding would be highly improper and at variance with the orderly procedure in the trial of cases. In other words, if this policy should ever prevail, it would be tantamount to substituting the judgment of the populace for that of the court and jury. We deem it proper to say, in passing, that a proceeding of this character at a time when we have just emerged from a contest wherein we sought to destroy autocracy and accomplish the freedom of mankind would be inconsistent to say the least.

At the conclusion of the court's charge counsel for the defendant again called attention to what he alleged to be improper argument, and requested the court to say to the jury that such charge was improper, and should not be considered as bearing upon the guilt or innocence of the defendant.

The record does not purport to give the exact language of the court in refusing to charge the jury as requested; however, counsel asserts in his brief that the court said:

"The defendant is being tried only on the testimony which has been introduced in evidence."

This language is not sufficiently broad to negative the statement made by the district attorney.

Where one is charged with a crime, he is presumed to be innocent until the contrary is shown by legal evidence sufficient to satisfy the jury of his guilt beyond a reasonable doubt; and this rule applies to the degraded and debased, as well as to those who possess a good character. The following statement in 12 Cyc. p. 384, is very much in point:

"The accused, however degraded or debased he may be, is presumed to be innocent of the particular offense charged until he is pronounced guilty on evidence which convinces the jury of his guilt beyond a reasonable doubt. The presumption of innocence accompanies the accused until verdict, and does not cease when the case is submitted to the jury."

The following cases sustain this rule: *Agnew v. United States*, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624; *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481.

In the case of *Lowdon et al. v. United States*, 149 Fed. 673, 79 C. C. A. 361, the court said:

"Where accused offered no evidence to prove his good character, and was therefore entitled to rely on a legal presumption that his character was good, it was prejudicial to accused for the prosecuting attorney, in making a strong appeal to the jury, to assume that defendant's character was bad because of his failure to prove the contrary; defendant's objection thereto having been overruled, and the district attorney not having withdrawn the argument."

In 2 *Ruling Case Law*, under title "Argument of Counsel" (page 420, § 17), it is stated:

"Counsel should never in the course of argument state facts that are based on his own personal knowledge only. If he desires to get such facts before the jury, he should take the stand and present them in a legitimate manner; for although, in the heat of argument, fervor and partisanship are to be expected from counsel, this cannot justify a departure from the field of argument and discussion of the facts disclosed by the evidence into the field of testimony to establish other facts."

In a time like this, when patriotism is at a high pitch and many people have to a certain extent lost their mental poise, courts and jurors should be extremely cautious when required to pass upon the rights of an individual charged with an offense affecting the welfare of the government.

In view of what we have said, we do not deem it necessary to discuss the other assignments of error. It follows that the court below should be reversed, and a new trial granted.

Reversed.

WEST HELENA CONSOL. CO. v. McCRAY.*

McCRAY v. WEST HELENA CONSOL. CO.

(Circuit Court of Appeals, Eighth Circuit. March 12, 1919.)

Nos. 5203, 5211.

1. APPEAL AND ERROR ⇔1039(S)—HARMLESS ERROR—RULINGS ON PLEADINGS—MOTION TO MAKE DEFINITE.

Error in denying the motion to make the allegations of negligence in the complaint more definite does not require reversal, where there was no claim that the defendant was surprised at the trial, or unprepared to meet the plaintiff's case, and depositions had been taken, which indicated the acts of negligence relied on.

2. STREET RAILROADS ⇔114(9)—COLLISION WITH AUTOMOBILE—EVIDENCE—NEGLIGENCE OF MOTORMAN.

Evidence held not to warrant a finding that motorman was negligent; it appearing that he had his car under full control when an automobile, which had been running parallel to the car tracks, without warning turned across them in front of the car and was struck.

3. STREET RAILROADS ⇔90(5)—COLLISION WITH AUTOMOBILE—NEGLIGENCE.

Where automobile attempted to cross street car tracks when car was so near that, though motorman had it under control, he could not stop in time to prevent collision, street car company was not negligent.

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

Action by Lora McCray against the West Helena Consolidated Company. Judgment for plaintiff, and defendant brings error, and plaintiff also brings error, from the order refusing a new trial, if plaintiff should remit \$4,000 from the verdict. Judgment reversed, and new trial ordered, and plaintiff's writ of error dismissed.

W. E. Hemingway, of Little Rock, Ark. (Edwin Bevens and Leo J. Mundt, both of Helena, Ark., and G. B. Rose, D. H. Cantrell, and J. F. Loughborough, all of Little Rock, Ark., on the brief), for plaintiff in error.

C. P. Harnwell, of Little Rock, Ark., for defendant in error.

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

CARLAND, Circuit Judge. The defendant in error, hereinafter called plaintiff, sued the railway company and one Prewett to recover damages for personal injuries alleged to have been caused by their negligence. The cause of action arose out of a collision between a car of the railway company and an automobile owned and driven by Prewett at the intersection of Porter and Franklin streets in the city of Helena, Ark. The plaintiff, in stating her only ground of negligence, alleged that the collision would not have occurred, had it not been for the gross negligence of Prewett and the railway company in operating the car and automobile.

The railway company filed a motion for an order requiring the plaintiff to make her complaint more definite and certain, by stating

⇔ For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
256 F.—48 *Certiorari denied 249 U. S. —, 39 Sup. Ct. 494, 63 L. Ed. —.

in what respect the car was negligently operated. This motion was denied, and such ruling is assigned as error. The exercise of a sound discretion would, we think, have required that the motion be granted. Kirby's Dig. §§ 6091, 6147; Little Rock Ry., etc., v. Smith, 66 Ark. 278, 50 S. W. 502; Chicago Ry. v. Smith, 94 Ark. 524, 127 S. W. 715; New York, etc., v. Kistler, 66 Ohio St. 326, 64 N. E. 130.

[1] The plaintiff charged generally that the railway company was negligent in the operation of its car. It was in fairness entitled to know in what respect the car was negligently operated. We are led to believe, however, from an examination of the record, that the railway company was not prejudiced by the denial of its motion. There is no claim or showing that the railway company was surprised at the trial or unprepared to meet the case of the plaintiff. Moreover, it appears that certain depositions had been taken by the plaintiff in the case before the motion was made, and the defendant railway company undoubtedly knew substantially what the claim of the plaintiff was. We therefore refuse to reverse for the error in denying the motion, but deem it proper to say that we may not always be able to act in a similar way in other cases. The motion, if renewed, should be granted.

[2] After issue joined, the case was tried and a verdict returned for the plaintiff against the railway company and in favor of Prewett against the plaintiff. Judgment having been entered upon the verdict, the railway company brings the case here, assigning error. At the close of the evidence the railway company moved the court for a directed verdict in its favor. The motion was denied, and this ruling is assigned as error. The evidence shows substantially the following facts:

Porter street, above mentioned, runs in an east and west direction; Franklin street runs north and south, and intersects Porter street; on the morning of November 13, 1915, at about 7:20 o'clock a. m., the plaintiff was at the house of Mrs. Summers, which is located on the north side of Porter street about 43 feet east of the east line of Franklin street, where it intersects Porter street, and about 75 feet from the center of Franklin street; the railway company's street car line extends along Porter street in front of the house mentioned, and crosses Franklin street at the above-mentioned intersection.

On the morning in question the plaintiff and two other ladies, Miss Venable and Miss Kerr, being desirous of going to the Iron Mountain depot, for the purpose of taking a train for Little Rock, procured the service of Prewett to take them to the depot in an automobile. The automobile reported at the house with the front thereof facing west. The plaintiff seated herself on the back seat of the automobile, on the left side thereof. The other two ladies above mentioned occupied the remainder of the seat to the right. This situation placed the plaintiff next to the street car track. Porter street was of sufficient width to allow the street car and automobile to move along the same together in safety.

Without delay, after the above-named passengers were seated, the automobile was driven west by Prewett. He testified that he drove to

the west side of the intersection of Porter and Franklin streets and turned south across the track of the railway company, and that, as he got very nearly off the street car track, a street car of the railway company going west struck the automobile on the rear fender, on the east side, right over the axle of the rear wheel. The evidence shows that at this collision the plaintiff, being seated as stated, was struck by the car and seriously injured. Prewett further testified that, after the collision, he turned the automobile to the north and subsequently drove it to the stable; that the car was not injured, except the fender was bent; that none of the occupants of the automobile were injured, except the plaintiff; that the automobile was not overthrown, but simply skidded around; that he did not stop, look, or listen for a car, before he started to cross the track, nor did he put his hand out or give any signal that he was about to do so.

All the occupants of the automobile, including Prewett, testified that they saw no street car approaching from the east when they got into the automobile, and saw no street car until the automobile was struck. The undisputed evidence shows that there was an unobstructed clear view from the Summers house, east on Porter street, for three squares, from which direction the street car came. The plaintiff and Miss Venable testified that the curtains on the automobile were up, Miss Kerr that they were on, and the motorman said that they were up—closed. The occupants of the automobile also testified that they heard no gong sounded by the motorman on the street car prior to the accident.

Miss Coward, a witness for the plaintiff, testified that on the morning in question she said good-bye to the girls as they were getting into the automobile, and then proceeded to cross Porter street to the south; that when she had gotten probably 40 feet from the curb where the automobile was standing, she heard the crash of the collision; that she did not see the collision, as her back was turned to the automobile and the street car. She also testified that the motorman did not ring his gong, that she did not notice the street car when it passed her, and did not know that it had passed until she heard the crash of the collision; then she thought how narrowly it had missed her.

Mr. Kelley, a witness for defendant, was a passenger on the street car that collided with the automobile. He testified that there was a trailer attached to the car in which he was seated, that he first saw the automobile about 20 feet before it was struck, traveling directly west, sort of in a circle like, as if it were making a swing in front of the street car crossing the track; that the automobile was not more than 6 or 8 feet from the car when it started across the track; that the motorman was ringing his gong three-fourths of the way across the block.

Mrs. Grace Peacor, a witness for the defendant, testified that she was standing a block west of the intersection of Porter and Franklin, on Porter street, when the collision occurred, and saw it. She was waiting for the street car. She first saw the street car about a block east of the intersection. She heard the gong ring, and supposed it was for a woman who was crossing the street, and who seemed to take no

notice of the car; that the automobile was going at a fair speed, and when it got to the west side of the intersection, it turned rather abruptly, and it looked like it would be a narrow escape. The turn of the automobile was made rather quickly.

The motorman testified that, when he first saw the automobile, it was standing in front of the house of Mrs. Summers. The street car at that time was a block away or more. At this time he saw a lady crossing Porter street. He rang the bell for her, and saw the passengers getting into the automobile. They started up just before he got even with them. When he noticed the car start up, he continued to ring the gong until the automobile cut short across the street. The automobile gave no signal or sign of any kind that it was about to cross the track. When the automobile turned across the track, he reversed the motor and applied the emergency brakes. The rails were slick, and the reverse did not have any effect on it much. The street car and possibly the trailer cleared Franklin street before coming to a full stop. Other testimony showed that it had rained during the previous night, and there was a light rain falling on the morning in question. The motorman further testified that the automobile and street car could travel together upon Porter street in safety; that the automobile was small, and before it started to cross the track was in a place of safety; that he tried his best to stop his car after he saw the automobile start to cross the track.

The facts being as stated, was there substantial evidence to support a verdict against the railway company, based upon negligence in operating the car? So far as the speed of the car is concerned, all the witnesses, except Miss Coward, that testified upon the subject, either testified that the car was moving at a rate of 8 or 9 miles per hour, or that it was moving at ordinary speed. It is urged that the fact that the car and the trailer cleared Franklin Street after the collision indicated excessive speed. We do not think so, as Franklin street, according to the evidence, was 64 feet in width and the collision occurred on the west side thereof, and upon this point we must take into consideration that the automobile was not overturned or injured, except that the fender was bent.

The witness Coward was asked the following question:

"Do you know at what rate of speed the street car was going?"

Answer:

"I don't know the rate, but it must have been running very fast in order to have struck the taxicab 40 or 50 feet east of me after passing me."

This testimony has no probative value, because it was a mere guess, based upon an assumption that was not true in fact. Moreover, she did not know that the car had passed her, as she testified, until she heard the crash of the collision. There is in our judgment no conflict in the evidence as to the speed of the car, and the evidence is to the effect that it was either ordinary speed or 8 or 9 miles an hour; in fact, the trial court so stated in the presence of the jury.

As to the ringing of the gong, no witness testified that it was not rung, except Miss Coward, who, as before stated, did not even know

that the car had passed her. There was abundant testimony that the gong was rung. The occupants of the car say they did not hear the gong, but they also say that they did not hear or see the car, although it must be taken as true, by reason of the physical facts, that the car was traveling almost right beside the automobile. This is not a case where an automobile was proceeding on Franklin street, at right angles with the car, but it is where an automobile was traveling on Porter street, in the same direction as the street car, and they were so near together that a small Ford automobile could not turn and cross the track without being hit by the street car. Such being the physical facts, we doubt very much whether the ringing of the gong would have changed the situation.

[3] The trial court charged the jury as follows:

"Seeing a man in a vehicle about to cross the tracks or driving along the tracks, the motorman may assume that he will turn aside out of the way of the cars, or not attempt to cross in front of them, when the car is so near as to indicate the danger of a collision. * * *

"Now, gentlemen of the jury, it is for you to determine, first, could the accident have been prevented if the street car motorman had exercised ordinary diligence, as I explained to you the law requires? If he could, and didn't do it, then, gentlemen of the jury, the street car company is liable, and your verdict should be against it.

"If, on the other hand, this automobile attempted to cross the tracks, and got on there, when the car was so near that, although he had it under control, he could not stop it in time to prevent the collision, then, gentlemen of the jury, the company was not guilty of any negligence, and it is not liable, and your verdict should be for the street railway company."

Of course, the assumption that the motorman may indulge in, as above stated, does not give him the right to proceed without using ordinary care with reference to the conditions that surround him. He should have his car under such control that he may use all the appliances at hand to stop his car, if he discovers that his assumption is wrong; but this requirement of having his car under control and using ordinary care to insure the safety of the vehicle does not require the motorman to insure the safety of the vehicle in any event, for that requirement would destroy the assumption in which he has a right to indulge, and require him to stop his car and wait until he was certain what the vehicle would do. The court stated the law correctly, as we understand it, in the excerpt from its charge last above quoted. The only testimony as to what the motorman did, after he discovered the automobile was about to cross the track, is the testimony of the motorman himself, and that testimony, in our opinion, would not support a verdict against the railway company.

Briefly stated the case is this: The street car and the automobile were traveling in the same direction on Porter street, so near together that the automobile could not cross the street car track in front of the car without being struck. The automobile abruptly or suddenly, without any warning, turns to cross the track in front of the car, and when the motorman saw what the driver of the automobile was about to do, he, so far as the evidence shows, did all that he could to stop his car. This, in our judgment, does not show negligence in the operation of the car.

In our opinion, the motion for a directed verdict in favor of the defendant railway company ought to have been granted and for the error in not so ruling the judgment below must be reversed, and a new trial ordered. Other errors are assigned which we do not find it necessary to consider.

The writ of error sued out by the plaintiff (case No. 5211) from the order refusing to grant a new trial, if the plaintiff should remit the sum of \$4,000 from the verdict, is dismissed.

In re PERPALL.

(Circuit Court of Appeals, Second Circuit. February 13, 1919.)

No. 115.

1. SALES ⇨218½—CASH SALE—EVIDENCE.
Evidence that the seller's messenger delivered a bond to a broker, and that another messenger called for the purchase price within a few hours after giving the broker time to make the check according to the usual business custom, held to sustain a finding that title did not pass until payment.
2. SALES ⇨202(8)—CASH SALE—WAIVING PAYMENT.
An apparently unrestricted delivery of goods sold for cash presumably waives the condition that payment is necessary to pass title.
3. SALES ⇨218½—JURY QUESTION—WAIVING PAYMENT.
Whether the condition that payment is required to pass title to goods sold has been waived is a jury question, especially where the rights of third parties have not intervened.
4. SALES ⇨202(8)—PASSING TITLE—WAIVING PAYMENT.
The seller of a bond did not waive payment as a condition precedent to passing title, where his messenger delivered the bond to a broker and another messenger, according to the usual business custom, called to receive payment a few hours later, after allowing time for the broker to make entries, execute a check, etc.
5. PAYMENT ⇨22—PAYMENT BY CHECK—RETAKING GOODS.
Accepting a buyer's check does not ordinarily operate as payment, so as to prevent the seller from retaking the goods, if the check is not paid.

Petition to Revise Order of and Appeal from the District Court of the United States for the Southern District of New York.

Petition by Louis R. Hammerslough for reclamation of certain property from Ezra P. Prentice, as receiver in bankruptcy of Clarence C. Perpall. Order for claimant, and said receiver brings a petition to revise and also appeals. Affirmed.

The claimant, Louis R. Hammerslough, brought his petition for the reclamation from the receiver of Clarence C. Perpall, doing business under the name of Clarence C. Perpall & Co., bankrupt, of one first-mortgage 30-year Seattle-Everett 5 per cent. gold bond, due 1939, of the par value of \$1,000, and numbered 1324.

The referee in bankruptcy reported that the claimant was entitled to the bond in controversy, and this report was confirmed by the District Court, which made an appropriate order directing that the claimant recover the said bond with the attached coupons. From the order so made the receiver in bankruptcy brought his petition to revise and also his appeal. The two proceedings have been consolidated in this court.

Prior to his failure the bankrupt was a member of the Consolidated Stock Exchange, while the claimant, who was a dealer in securities, carried on his transactions through the firm of E. Bunge & Co. Upon Saturday, June 29, 1918, the bankrupt had a conversation over the telephone with the claimant, the result of which was that the claimant agreed to sell and the bankrupt agreed to buy the bond in question at the price of 75¼ per cent. plus accrued interest, the transaction to be closed upon the following Monday, July 1st.

In the afternoon of that day the cashier of E. Bunge & Co. gave the bond, together with a memorandum of sale from E. Bunge & Co. to the bankrupt, to one of the Bunge firm's messenger boys. The boy carried the bond, with the memorandum attached, to the office of the bankrupt, where it was delivered to the cashier; the boy continuing on his way for the purpose of making other deliveries of securities. It appears to be the practice in the financial district for deliveries to be made in this manner; the boy again calling at the offices at which he has made deliveries for the purpose of receiving checks in payment for the securities previously delivered. This practice is followed, to the end that business may be expedited, and to permit the firms receiving securities to make comparisons, appropriate book entries, and draw the checks. Accordingly a messenger from E. Bunge & Co. again called at the cashier's window of the bankrupt and received a check drawn by the bankrupt upon the Continental Bank and in favor of E. Bunge & Co. in the sum of \$769.17, the purchase price of the bond plus accrued interest. This check was taken to the office of E. Bunge & Co., and that firm immediately deposited the same to its credit in the Continental Bank. At 2:40 p. m. of July 1, 1918, the suspension of the bankrupt was announced from the rostrum of the Consolidated Stock Exchange. Upon learning of this announcement, E. Bunge & Co. demanded of the Continental Bank the payment of the check or its certification. Neither of the demands was met, and the check was returned by the bank to E. Bunge & Co.

The testimony before the referee established that the Bunge check was the last check drawn and delivered by the Perpall concern prior to its suspension, and the testimony also established that when the check was drawn and delivered the account of Perpall was largely overdrawn. Following the suspension above referred to, an involuntary petition in bankruptcy was filed against Clarence C. Perpall, doing business under the name of Clarence C. Perpall & Co. An adjudication followed in due course, and in the meanwhile Ezra P. Prentice was appointed and qualified as the receiver of the bankrupt, and as such came into the possession of the bond in question as a part of the bankrupt's assets.

Rosenberg & Ball, of New York City (David W. Kahn, of New York City, of counsel), for appellant.

Samuel Fleischman, of New York City, for respondent.

Before ROGERS and MANTON, Circuit Judges, and KNOX, District Judge.

KNOX, District Judge (after stating the facts as above). In the case of Empire State Type Founding Co. v. Grant, 114 N. Y. 40, 21 N. E. 40, it was held that, where a contract for the sale of personal property does not provide, in express terms, that payment shall be made on delivery, or that payment and delivery shall not be concurrent, the intent of the parties must control, and if from the acts of the parties and the surrounding circumstances it can be inferred that it was intended that payment and delivery should be concurrent acts, the title will be deemed to have remained in the vendor until the condition of payment is complied with. The court in that case also concluded that the question of intent in such case is one of fact.

[1] Upon the facts now under consideration, the referee, before:

whom the testimony was taken, has found that the sale of the bond in question was for cash or the equivalent of cash upon delivery; in other words, it has been resolved as a question of fact that before title to the bond should pass to the bankrupt there was the necessity of the performance by him of the condition precedent of payment. We believe this finding of the referee to be entirely justified by the evidence.

[2, 3] It therefore remains to be determined if the delivery of the bond to the cashier of the bankrupt in the manner shown by our recital of the facts constituted a waiver upon the part of the claimant of the condition of payment. Unquestionably it lay within the power of the vendor to waive any condition imposed by him in his original contract, and we also realize that an apparently unrestricted and unconditional delivery of goods sold for cash is presumptive evidence of the waiver of the condition that payment should be made on delivery in order to vest the title in the purchaser. *Scudder v. Bradbury*, 106 Mass. 422; *Hammett v. Linneman*, 48 N. Y. 399; *Smith v. Lynes*, 5 N. Y. 41. Nevertheless, whether or not there has been a waiver of the condition is a question for the jury, and this is particularly true when the rights of third persons have not intervened. *Mechem on Sales*, § 549, and cases referred to in footnote.

[4] The transaction in the case at bar was along lines and in accord with practices well known and understood in the financial district of this community. As has been shown, the bankrupt was a member of the Consolidated Stock Exchange, while the claimant was formerly a member of the New York Stock Exchange, and his agents, E. Bunge & Co., were what are known as "outside brokers"; that is, dealers in securities not listed upon the local stock exchange. It would seem to follow, at least in the absence of any proof to the contrary, that the sale of the Seattle-Everett bond was made subject to the customs and practices obtaining among dealers in securities within the financial district. Now, what happened here was this: The sale of the bond was made upon Saturday, June 29th, and the sale under the custom "carried" until Monday, July 1st; that is to say, the bond was deliverable upon Monday for cash or its equivalent, and upon Monday E. Bunge & Co., through one of their messengers, did deliver the bond to the cashier of the bankrupt. Before drawing a check for the purchase price of the bond, it was necessary for the cashier to make his comparisons and his blotter entries, whereupon he would draw the check and deliver the same to Bunge & Co.'s messenger. Instead of waiting in the office of the bankrupt for these details to be attended to, the messenger occupied the time in making other deliveries, and later another messenger of the Bunge firm called to pick up the check which, when he reached the bankrupt's office, was awaiting him.

In view of the finding of the referee as to terms of sale, we believe that the facts incident to the delivery of the bond fall short of constituting a waiver of the condition of payment. From the circumstances here present, no intent or purpose to extend credit to the bankrupt arises. The claimant is in no worse position than he would have been in, had the messenger idled away his time in the office of the bankrupt while waiting for the details of making the entries and drawing

the check to be completed. Had he remained there, he would have been entitled to receive a check that would be the equivalent of cash, and that was what he was entitled to receive when, in the regular course of business, he or his substitute returned to the bankrupt's office. As is said by Mr. Mechem, at section 551 of his work on Sales:

"There is always an implied understanding that the vendee is acting honestly and that he takes the goods subject to the contract. It is not necessary, therefore, that the vendor shall in express terms declare that he makes the delivery conditional; it is sufficient if the intent of the parties that the delivery is conditional can be inferred from their acts and the circumstances of the case."

The above conclusions, as applicable to the facts before us, we consider to be supported by *Empire State Type Founding Co. v. Grant*, 114 N. Y. 40, 43, 21 N. E. 40; *Sprague Canning Machinery Co. v. Fuller*, 158 Fed. 588, 86 C. C. A. 46, 20 Am. Bankr. Rep. 157; *In re Pittsburgh Industrial Iron Works* (D. C.) 179 Fed. 151, 25 Am. Bankr. Rep. 221, 225. The referee has found upon entirely satisfactory evidence that there was no waiver here.

[5] It has previously been said that when the bankrupt drew his check for the purchase price of the bond his account was largely overdrawn, and the bank dishonored the check upon a demand for its certification or payment. The claimant, therefore, never received that which, as a condition precedent to the passing of title to the bond, the bankrupt had agreed to give him; and taking a check of the buyer does not ordinarily operate as payment, to prevent the seller from retaking the goods if the check is not paid. *Nat. Bank v. Railroad Co.*, 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566. So as to the buyer's note. *Davison v. Davis*, 125 U. S. 90, 8 Sup. Ct. 825, 31 L. Ed. 635. Where such prepayment is the express condition of the sale, there is no doubt that the vendor could retake the goods from the vendee, if the condition is not performed. *Barrett v. Pritchard*, 2 Pick. (Mass.) 512, 13 Am. Dec. 449.

The order appealed from is affirmed.

HUBBARD BROS. & CO. et al. v. SOUTHERN PAC. CO. et al.
SOUTHERN PAC. CO. v. LIQUIDATORS OF OUACHITA NAT. BANK et al.
(Circuit Court of Appeals, Fifth Circuit. March 10, 1919.)

No. 3283.

1. CARRIERS ⇨94(4)—CONVERSION BY CARRIER—DAMAGES—INTEREST.

In an action against a railroad for conversion of cotton, in that the railroad delivered the cotton on a forged bill of lading, interest should be allowed the plaintiff only from judicial demand, and not from date of delivery of the cotton on the forged bill of lading; the conversion not being willful.

2. CARRIERS ⇨57—CONVERSION BY CARRIER—DAMAGES—ASSIGNEE OF BILL OF LADING.

Where a railroad converted a shipment of cotton by delivering it on a forged bill of lading, a bank holding the true bill of lading as collateral

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

may recover from the railroad the entire value of the cotton, with interest.

3. CARRIERS ⇨58—ASSIGNMENT OF BILL OF LADING—DELIVERY ON SHIPPER'S FORGED BILL OF LADING—RIGHTS OF BUYER.

Where a cotton dealer sold cotton and drew on the buyer, placing the true bills of lading as collateral with a bank, and sending to the purchaser a forged bill of lading, which the latter presented, obtaining the cotton, the buyer should be considered an equitable assignee of the seller and is entitled, on recovery by bank of judgment against the railroad for conversion, to any balance after payment of secured debt.

4. BILLS AND NOTES ⇨434—SIGNATURES—NOTICE OF GENUINENESS.

Ordinarily the drawee of a bill of exchange must determine at his peril the genuineness of the signature of the drawer, and, if the ostensible maker of a forged note pays the note, he cannot recover the amount.

5. CARRIERS ⇨71—CONNECTING CARRIERS—SURRENDER OF GOODS ON FORGED BILL OF LADING—REMEDIES OF CARRIER.

A common carrier can recover against one who receives goods upon a forged bill of lading purporting to have been issued by an agent of another carrier; the law fixing liability resulting from such a bill of lading not undertaking to make each of the agents of all the lines an agent of all of the connecting lines.

6. CARRIERS ⇨71—CONNECTING CARRIERS—SURRENDER OF SHIPMENT ON FORGED BILL OF LADING—LIABILITY.

The mere fact that a railroad had previously delivered cotton to a buyer on forged bills of lading does not prevent the railroad from recovering from such buyer the value of the cotton delivered on a forged bill of lading purporting to have been issued by a connecting carrier, on the ground that the buyer was misled by the negligence of the railroad.

7. CARRIERS ⇨56—INDORSEMENT OF DRAFT—EFFECT AS TO BILL OF LADING ATTACHED.

The indorsement of an ordinary draft for collection does not make the indorser a guarantor to the drawee of the genuineness of bills of lading attached, nor of the quantity or quality of the commodity shipped.

8. ASSIGNMENTS ⇨50(1)—DRAFT ON PARTICULAR FUND—OPERATION.

Assuming that the mere insertion of the words "against 214 B/C" in the body of a draft could render it a conditional order on a particular fund, such could not be the case where, for a considerable time prior to the transaction, there was a running account between the drawer and the drawee, and at the date of the draft the drawer had a credit with the drawee, and no accounts were kept of particular shipments of cotton, the drawer having established a credit with his cotton business as a basis, and the drawee was reimbursed by and made a profit out of the cotton.

9. CARRIERS ⇨55—DRAFT AND BILL OF LADING—NEGOTIABILITY.

The insertion of the figures and letters "against 214 B/C" in the face of a draft, to which was attached a bill of lading for 214 bales of cotton, did not destroy its characteristics as a negotiable instrument in Louisiana or New York where the Uniform Negotiable Instruments Law was in force, being merely indicative of a particular fund out of which reimbursement was to be made.

Appeals from the District Court of the United States for the Western District of Louisiana; George W. Jack, Judge.

Suit by Hubbard Bros. & Co. and others against the Southern Pacific Company and the Liquidators of the Ouachita National Bank and Monroe National Bank. The liquidators of the Ouachita National Bank and the Southern Pacific Company file cross-bills. From a judgment in favor of the liquidators of the Ouachita National Bank against the Southern Pacific Company, and in favor of the Southern

Pacific Company against plaintiff, the Southern Pacific Company and the plaintiff appeal. Modified and affirmed.

Hughes, Rounds, Schurman & Dwight, of New York City, and Howe, Fenner, Spencer & Cocke, of New Orleans, La. (Charles Payne Fenner, of New Orleans, La., on the brief), for appellants Hubbard Bros. & Co. and others.

George Denegre, Victor Leovy, and Henry H. Chaffe, all of New Orleans, La., for appellant Southern Pac. Co.

Farrar, Goldberg & Dufour, of New Orleans, La., and Hudson, Potts, Bernstein & Sholars, of Monroe, La. (Abraham Goldberg, of New Orleans, La., and Henry Bernstein, of Monroe, La., on the brief), for appellees liquidators of the Ouachita National Bank and others.

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

BATTS, Circuit Judge. H. L. Bandy, in 1904 and prior thereto, was engaged at Monroe, La., in buying and selling cotton. On August 15, 1904, Bandy discounted at the Monroe National Bank a draft for \$9,000, drawn by him on Hubbard Bros. & Co., of New York. The body of the draft was in this form:

"Pay to the order of T. E. Flourney, cashier, nine thousand dollars, value received, and charge the same to account of against 214 B/C."

To the draft were attached, indorsed in blank, documents, afterwards ascertained to be forgeries, in the form of bills of lading for 214 bales of cotton, issued to Bandy by the Vicksburg, Shreveport & Pacific Railway Company, at Monroe, for shipment to New York via issuing company and Southern Pacific Railroad and steamship lines, consigned "to shipper's order, notify Hubbard Bros.," purporting to be signed by W. G. Wallace, then the agent of issuing company at Monroe. The draft was paid upon presentation.

In September Bandy purchased at New Orleans 214 bales of cotton, which, under his instructions, were shipped, via the Southern Pacific Company steamship line, from New Orleans to New York; a bill of lading being issued "to shipper's order, notify Hubbard Bros.," the cotton having the same identifying marks as in the forged bills of lading for 214 bales. To cover the purchase price of the cotton, the seller drew a draft on Bandy, through the Ouachita National Bank, attaching bills of lading covering the 214 bales of cotton. Bandy gave his check on the bank for the amount; the check being charged to him, and the bills of lading being retained as security. The Southern Pacific Company, upon surrender of the forged bills of lading, delivered to Hubbard Bros. & Co., the 214 bales of cotton shipped from New Orleans.

About August 29, 1904, Bandy forwarded to Hubbard Bros. by registered mail, indorsed in blank, another forged bill of lading of the same character as the other forged instruments, for 100 bales of cotton. Bandy wrote Hubbard Bros. & Co. that he would draw against this bill of lading when he arranged for the shipment of other cotton.

On August 31, 1904, Bandy discounted with the Ouachita National Bank a draft upon Hubbard Bros. & Co. for \$19,700; the draft being in the ordinary form. To the draft were attached bills of lading, covering 301 bales of cotton. This cotton is not involved in this suit. The draft, however, was for a larger sum than would be covered by the 301 bales, and was drawn, also, with reference to the forged bills of lading for 100 bales hereinbefore mentioned. In October, Bandy purchased in New Orleans 100 bales of cotton, which were shipped, via the Southern Pacific Company, to New York; a bill of lading "to shipper's order, notify Hubbard Bros. & Co.," being issued, the cotton being identified by the same marks as were on the forged instrument forwarded Hubbard Bros. & Co. on August 29th. To cover the price of this 100 bales of cotton shipped to New York, the seller drew a draft on Bandy, and attached thereto the bill of lading for the cotton. Bandy gave his check on the Ouachita Bank for the amount, which was charged to him; the bill of lading being retained as collateral security. On October 25th this 100 bales of cotton was delivered by the Southern Pacific Company to Hubbard Bros. upon surrender of the forged bill of lading for 100 bales.

Hubbard Bros. & Co. instituted in the Western district of Louisiana a suit against the Southern Pacific Company, and the two national banks involved, setting up the facts stated, together with other facts to be referred to, and sought an adjudication of the rights of all parties. The several claims may be thus stated:

(1) The Ouachita National Bank, through its liquidators, asked for a judgment against the Southern Pacific Company for the value of the 314 bales of cotton for which it held bills of lading, with interest from the date of its delivery to Hubbard Bros. & Co.

(2) The Southern Pacific Company sought judgment against Hubbard Bros. & Co. for the value of all of the cotton delivered to them on the forged bills of lading. Hubbard Bros. & Co. denied their liability for the cotton so delivered.

(3) Hubbard Bros. & Co. also claimed that, in the event they were to be held liable to the Southern Pacific Company, they should have a judgment against the Monroe National Bank for the amount of the draft for \$9,000 which they paid to that bank, with interest.

Judgment was rendered: In favor of the liquidators of the Ouachita National Bank against the Southern Pacific Company for \$17,232.-42, with interest at 5 per cent. from the respective dates of delivery of the cotton to Hubbard Bros. & Co. until paid; and in favor of the Southern Pacific Company against Hubbard Bros. & Co. for the same amount, with like interest; and against Hubbard Bros. & Co. on their claim against the Monroe National Bank.

[1] The judgment of the Ouachita National Bank against the Southern Pacific Company is not attacked, except that it is contended that interest should be from judicial demand, instead of from the date of the delivery of the cotton by the Southern Pacific Company to Hubbard Bros. & Co. That which the Ouachita National Bank is entitled to recover is its damages; and if interest be calculated from the date the cotton was delivered to Hubbard Bros. & Co., it would

be benefited by the conversion. In November, 1904, the bank made demand on the Southern Pacific Company for the cotton. This date, rather than the date of the legal conversion, or the date of judicial demand, would appear to be the proper date for the interest to begin. By adopting this date, the bank will be made whole. While the Southern Pacific Company, in legal contemplation, converted the cotton when it was delivered to Hubbard Bros. & Co., the circumstance that the conversion was not willful makes a difference the law seems to recognize. 38 Cyc. 2101.

[2, 3] The amount which the Southern Pacific Company must pay to the Ouachita Bank is the measure of the liability of Hubbard Bros. & Co. to the Southern Pacific Company. The Ouachita Bank, holding the bills of lading as collateral, may recover the entire value of the cotton, with interest. Hubbard Bros. & Co., as equitable assignee of Bandy, would be entitled to any balance after the payment of the secured debt; but it appears that the debt, with interest, exceeds the recovery.

Hubbard Bros. & Co. contend that, notwithstanding the cotton was delivered to them on forged bills of lading, the Southern Pacific Company should not recover. Propositions are made: (1) That a concern issuing a bill of lading must be held to know its own signature, and must take the consequences of a mistake; (2) that the prior course of business, by which several shipments of cotton were delivered to Hubbard Bros. & Co. on forged bills of lading, constitutes negligence upon the part of the Southern Pacific Company, estopping them from recovery; (3) that the Southern Pacific Company is estopped by the delay in presenting the claim against Hubbard Bros. & Co.

[4, 5] 1. It is contended that the same rules should be applied to bills of lading as to bills of exchange. Ordinarily the drawee of a bill of exchange must determine at his peril the genuineness of the signature of the drawer. If the ostensible maker of a forged note pays the note, he cannot recover the amount. *United States v. Bank of Georgia*, 10 Wheat. 333, 6 L. Ed. 334; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Cook v. United States*, 91 U. S. 389, 23 L. Ed. 237. The reasoning by analogy cannot be made to control, in the face of definite decisions holding that a common carrier can recover against a person who receives goods upon a forged bill of lading. Among the cases may be cited *N. Y. Central Railroad v. Bank of Holly Springs*, 195 Fed. 456, 115 C. C. A. 358; *L. & N. R. R. Co. v. McKay & Morgan*, 133 Tenn. 503, 182 S. W. 585. The reasoning to which appellant appeals, based on the suggestion that a corporation is better able to know its signature than any one dealing with it, cannot be made to apply to the bills of lading in question. The forged bills of lading appear on their face to have been issued by an agent of the Vicksburg & Shreveport Railroad Company. Under the law this agent had a right to give a bill of lading binding upon its direct and its mediate connections. To bind a connecting carrier, it is not necessary that the agent of the issuing company should be an agent of the connecting company. The law fixes the liability resulting from

such a bill of lading, but does not undertake to make each of the agents of all of the lines an agent of all of the connecting lines. It is quite impossible for a carrier to be familiar with the signatures of all of the agents of all of the carriers in the United States. Any rule, based upon an assumed ability of the company charged with the responsibility to know a signature better than an individual asserting a claim against it, must be held without merit, when the circumstances negative the possibility of such knowledge.

[6] 2. The evidence discloses that, in addition to the bills of lading for 214 bales of cotton, and the bill of lading for 100 bales of cotton, hereinbefore mentioned, forged bills of lading for some hundreds of other bales had been presented by Hubbard Bros. & Co. to the Southern Pacific Company, and cotton delivered on them. It appears, also, that genuine bills of lading were, as to all of this cotton, issued by the Southern Pacific Company or a connecting line, but that these genuine bills have never been presented. These facts suggest the possibility of looseness in the conduct of the business of the Southern Pacific Company, and in that of Hubbard Bros. & Co.; but they do not indicate that Hubbard Bros. & Co. have suffered, or have been misled, by the negligence of the Southern Pacific Company. The fact that Hubbard Bros. & Co. have received several hundred bales of cotton upon forged bills of lading, and have never been made to account for the cotton thus received, is hardly a sufficient basis for demanding that all subsequent forged bills of lading should have the effect of genuine bills.

3. Discovery of the forgery and institution of suit were within a reasonable time, and there is nothing to indicate that Hubbard Bros. & Co. were damaged by delay.

The Claim against Monroe Bank.

[7] The claim of Hubbard Bros. & Co. against the Monroe National Bank is based upon the propositions: (1) That the draft, as drawn, is not a negotiable instrument; (2) that the figures and letters "214 B/C," in the body of the draft, make the attached forged bills of lading for 214 bales of cotton parts of the draft; (3) that the indorsement of the draft by the Monroe Bank made the bank a guarantor in every respect, except as to the signature of the drawer. The indorsement of an ordinary draft for collection does not make the indorser a guarantor to the drawee of the genuineness of the bills of lading attached, nor of the quantity or quality of the commodity shipped.

[8, 9] Whatever question may have existed with reference to the rule, recent decisions have placed the matter beyond doubt. In *Springs v. Hanover National Bank*, 209 N. Y. 224, 103 N. E. 156, 52 L. R. A. (N. S.) 241, the cases are reviewed and this conclusion reached. The opinion refers to the fact that there are decisions in Texas, North Carolina, Mississippi, and Alabama to the contrary. The decisions in conflict in at least three of the states have been overruled. *Blaisdell v. Bank*, 96 Tex. 629, 75 S. W. 292, 62 L. R. A. 968, 97 Am. St. Rep. 944; *Mason v. Nelson*, 148 N. C. 492, 62 S. E. 625, 18 L. R.

A. (N. S.) 1221, 128 Am. St. Rep. 635; *Cosmos Cotton Co. v. Bank*, 171 Ala. 394, 54 South. 621, 32 L. R. A. (N. S.) 1173, Ann. Cas. 1913B, 42. There being no question of good faith on the part of the Monroe Bank involved, the authorities cited leave for determination only whether the insertion of the figures and letters "214 B/C" in the face of the draft destroys its characteristics as a negotiable instrument, with resulting liability on the part of the bank as for money received from the drawee under a mistake of fact.

At the time of the transaction, the Uniform Negotiable Instruments Law was in force both in New York and Louisiana. Therein a bill of exchange is defined:

"A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed and determinable future time, a sum certain of money to order or to bearer." Consol. Laws N. Y. c. 38, § 210; Acts La. 1904, No. 64, § 126.

The act further provides:

"An unqualified order or promise to pay is unconditional within the meaning of this chapter, though coupled with: (1) An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional." Consol. Laws N. Y. c. 38, § 22; Laws La. 1904, No. 64, § 3.

Appellants agree that, under the English cases, the draft in question would be held a negotiable instrument. See *Guaranty Trust Co. v. Hannay*, 210 Fed. 810, 127 C. C. A. 360. But they insist that the law as developed in the United States is different. Appellants cite *Hoffman v. Bank*, 12 Wall. 181, 20 L. Ed. 366; *Goetz v. Bank*, 119 U. S. 551, 7 Sup. Ct. 318, 30 L. Ed. 515; *Varney v. Bank*, 119 La. 943, 44 South. 753, 13 L. R. A. (N. S.) 337; and *Springs v. Bank*, 209 N. Y. 224, 103 N. E. 156, 52 L. R. A. (N. S.) 241. In each of these cases the drawee was held liable. In the opinion in each case was a suggestion that there was no reference in the face of the draft to the bills of lading. The expressions may properly be used in argument, but in neither case was the point now discussed under consideration, and no great weight can be accorded them. Other cases cited by appellant may be differentiated, or, if not, they are against the weight of recent authority.

The following cases apparently put the matter beyond doubt: *Whitney v. Eliot Bank*, 137 Mass. 351, 50 Am. Rep. 316; *Redman v. Adams*, 51 Me. 433; *First Nat. Bank v. Lightner*, 74 Kan. 736, 88 Pac. 59. In the last-named case the authorities are reviewed.

If the mere insertion of the words "against 214 B/C" in the body of the draft, without grammatical connection with the balance of the instrument, could, under any circumstances, render an otherwise ordinary draft a conditional order on a particular fund, that effect could not follow, in view of the facts developed in this case. The evidence discloses that, for a considerable time prior to the transaction here reviewed, there was a running account between Hubbard Bros. & Co. and Bandy, and at the date of the draft Bandy had a credit with Hub-

bard Bros. & Co. No accounts were kept with particular shipments of cotton. With his cotton business as a basis, Bandy had established a credit, and Hubbard Bros. & Co. were reimbursed by, and made a profit out of, the cotton from the sale of which they were reimbursed. The insertion of "214 B/C" cannot be held more than "an indication of a particular fund out of which reimbursement is to be made."

The judgment is so modified that interest on the amount adjudged against the Southern Pacific Company in favor of the Ouachita National Bank, and against Hubbard Bros. & Co. in favor of the Southern Pacific Company, shall run from November 30, 1904, and, as so modified, it is affirmed.

Modified and affirmed.

PANAMA R. CO. v. CURRAN et al.

(Circuit Court of Appeals, Fifth Circuit. March 24, 1919.)

No. 3237.

1. EXCEPTIONS, BILL OF \Leftrightarrow 36(1)—TIME FOR PRESENTING—STATUTE—CANAL ZONE.

The provision of Panama Canal Act Aug. 24, 1912, that the appellate jurisdiction of the Circuit Court of Appeals on appeals from the District Court of the Canal Zone may be exercised in the same manner, as nearly as practicable, as in reviewing judgments of the District Courts of the United States, shows that the earlier provision of the same section, that existing laws of the Canal Zone should be applicable to practice in new courts, was not intended to make applicable to appeals to the Circuit Court of Appeals Code Civ. Proc. Canal Zone, § 136, requiring bills of exception for review by the Supreme Court of the Canal Zone to be presented to trial court within 10 days.

2. APPEAL AND ERROR \Leftrightarrow 709—COSTS \Leftrightarrow 108—SECURITY—DISCRETION OF COURT—RECORD—EVIDENCE.

The executive order of August 14, 1914, relating to the Canal Zone, that plaintiff in any suit may be required to give security for costs, does not require such security whenever moved for by defendant, but confers on the court discretion to exercise the power, and his denial of a motion to compel a resident plaintiff to give security will not be reversed, where the record does not contain the evidence on the hearing of the motion.

3. APPEAL AND ERROR \Leftrightarrow 684(2)—DISCRETION OF TRIAL COURT—MOTION FOR CONTINUANCE.

The overruling of a motion for a second continuance will not be reversed, where the evidence, if any, adduced on the hearing, is not in the record, so that there is no showing that the ruling was improper.

4. RAILROADS \Leftrightarrow 5½. New. vol. 6A Key-No. Series—LIABILITY FOR TORTS—GOVERNMENT AS STOCKHOLDER.

Since Act June 25, 1910, Act Aug. 24, 1912, § 6 (Comp. St. § 10042), and other statutes and regulations and rulings, indicate an intention to preserve the corporate existence of the Panama Railroad Company, though the government owns all its stock, that corporation may be sued by a private individual for all its injuries caused by the negligence of its employes.

5. CORPORATIONS \Leftrightarrow 491—LIABILITY FOR TORTS—ULTRA VIRES ACT.

A corporation cannot escape liability for negligent conduct of a business in which it engages, by showing that it was not authorized to carry on that business.

6. RAILROADS ⇐281(1)—INJURIES TO THIRD PERSON—NEGLIGENCE OF EMPLOYÉS.

Evidence that employés of the Panama Railroad Company oiled the floor of a commissary operated by it, so as to make it dangerously slippery, as a result of which a customer was injured, establishes negligence for which the corporation was liable, under the law of the Canal Zone.

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

Action by Mrs. T. T. Curran and husband against the Panama Railroad Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Frank Feuille, of Ancon, C. Z., and Walter F. Van Dame, of Balboa Heights, C. Z., for plaintiff in error

Stevens Ganson and Theodore C. Hinckley, both of Panama, R. P., for defendants in error.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

WALKER, Circuit Judge. This is a writ of error sued out by the Panama Railroad Company (which will be referred to as the defendant) to obtain a review of a judgment rendered against it in favor of Mrs. T. T. Curran and her husband, T. T. Curran (who will be referred to as the plaintiffs).

[1] The judgment was rendered on the 28th day of November, 1917. By an order entered on the same day the court allowed 20 days for a bill of exceptions. A bill of exceptions was presented and allowed within that time. It was not presented within 10 days after November 28, 1917. The defendants in error move that the bill of exceptions be stricken, on the ground that it was not presented to the judge within 10 days after the court was informed that a bill of exceptions was desired and a memorandum to that effect was entered, as required by section 136 of the Code of Civil Procedure of the Canal Zone with reference to bills of exceptions for the review of final judgments by the Supreme Court of the Canal Zone. The claim that the statute just referred to is applicable is based upon the provision of section 9 of the Panama Canal Act of August 24, 1912 (37 Stat. 565, c. 390 [Comp. St. § 10045]), that "all existing laws in the Canal Zone governing practice and procedure in existing courts shall be applicable and adapted to the practice in the new courts." The same section of the statute which contains the just-quoted provision contains also the provision which confers on this court appellate jurisdiction to review final judgments of the District Court of the Canal Zone in the classes of cases stated. A part of the latter provision is that such appellate jurisdiction "may be exercised by said Circuit Court of Appeals in the same manner, under the same regulations, and by the same procedure as nearly as practicable as is done in reviewing the final judgments and decrees of the District Courts of the United States." The last-quoted provision makes it quite plain that the first-quoted one does not include the manner of bringing cases from the District Court

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

of the Canal Zone to this court. The explicit statement that the appellate jurisdiction conferred may be exercised "in the same manner, under the same regulations, and by the same procedure as nearly as practicable as is done in reviewing the final judgments and decrees of the district courts of the United States," shows that existing laws of the Canal Zone were not intended to be made applicable to anything done after judgment looking to a review by this court. *Hudson v. Parker*, 156 U. S. 277, 15 Sup. Ct. 450, 39 L. Ed. 424; *Detroit United Railway v. Nichols*, 165 Fed. 289, 91 C. C. A. 257. The bill of exceptions is not subject to be stricken on the ground stated in the motion made to that end.

[2] The court overruled a motion of the defendants that the plaintiffs be required to deposit security for the costs of the suit. The motion was based upon the following provision of an executive order of the President issued on August 14, 1914:

"Section 1. The plaintiff in any civil suit, or special proceedings, may be ruled to give security for the costs upon motion of the defendant, or of any officer of the court interested in the costs accruing in such suit; and if such rule be entered against the plaintiff, and he fail to comply therewith, within the time prescribed by the court or judge thereof, the suit shall be dismissed."

The terms of the quoted order are such as to indicate that it was not intended to require that an order be made that the plaintiff give security for the costs whenever moved for by a defendant, and that an exercise of the power conferred was left to the discretion of the court. The complaint in the cause described the plaintiffs as residents of the Canal Zone. The record does not disclose what, if any, evidence was adduced on the hearing of the motion in question. There was evidence in the trial to the effect that the plaintiffs were residents of the Canal Zone. The quoted order is not to be given the effect of putting it in the power of a defendant to make a resident plaintiff's right to prosecute a suit dependent upon his giving security for the costs. It is not made to appear that there was any abuse of discretion in the disposition made of the motion.

[3] In reference to the complaint as to the action of the court in overruling a motion of the defendant for a second continuance of the cause no more need be said than that it is not made to appear by the record that that ruling was an improper one. It is not disclosed what, if any, evidence was adduced on the hearing of that motion.

[4] The action was for the recovery of damages claimed to have resulted from injuries sustained by Mrs. Curran in consequence of her slipping and falling on the floor of the defendant's commissary or store in the village of Pedro Miguel, Canal Zone, while she was there for the purpose of making purchases. The alleged injuries were attributed to the negligence of the defendant in permitting the floor to be in a dangerously slippery condition. The right of the plaintiffs to maintain the action was brought into question on the ground that the store or commissary at which the injuries complained of occurred was not being operated by the defendant under its charter and by-laws, but, at the time of the injuries alleged and for some years prior thereto, was operated by the defendant as an agency of the government of the

United States in the construction and operation of the Panama Canal. On the cross-examination of R. K. Morris, a witness for the defendant, he stated:

"The commissaries are merely general stores for the benefit of the employés of the Panama Railroad and the Panama Canal. All of the employés have the privilege of going there for the purpose of buying. The goods at the Pedro Miguel commissary are all bought by the Panama Railroad. The commissaries are owned by the Panama Railroad Company, and the proceeds of the sale of these goods go to the railroad, and the railroad uses that money in paying the employés and in buying other goods. All of the employés of the Pedro Miguel commissary are paid by the Panama Railroad, including the employés who oil the floors. The Pedro Miguel has been in operation since 1912 in its present site. We had a commissary there since 1905."

The defendant is a New York corporation. All its capital stock is owned by the United States. Thirteen of the shares stand in the names of the directors of the company. Each of the directors for the time being gives to the Secretary of War an irrevocable power of attorney to transfer the stock standing in his name at any time. This enables that official, when the holder of a share ceases to be a director, to transfer it to the succeeding director. In the manner indicated the government absolutely controls the operations of the company. An intention to preserve the existence of the defendant as a private corporation has been clearly manifested in acts of Congress, some only of which need be mentioned. Act June 25, 1910, c. 384, making appropriation for sundry civil expenses of the government for the fiscal year ending June 30, 1911 (36 Stat. 771), contains an item of \$2,000,000 "for the payment of the cost of relocating the Panama Railroad, including salaries, wages, material, and supplies, and all other expenses incident thereto." That act contained the following provision:

"The foregoing appropriations shall be available to reimburse the Panama Railroad Company for marine losses, and for losses due to destruction of or damage to its plant, equipment, or commissary supplies by fire: Provided, that the Panama Railroad Company shall carry no insurance against loss from causes covered by this appropriation: Provided, further, that hereafter payment by the Panama Railroad Company to the United States, in accordance with the treaty with Panama, of the annual subsidy of two hundred and fifty thousand dollars, as provided by the concession granted by the United States of Columbia, shall not be required."

Section 6 of the Panama Canal Act of August 24, 1912 (37 Stat. 560 [Comp. St. § 10042]), contains the following:

"The President is also authorized to establish, maintain, and operate, through the Panama Railroad Company or otherwise, dry docks, repair shops, yards, docks, wharves, warehouses, storehouses, and other necessary facilities and appurtenances for the purpose of providing coal and other materials, labor, repairs, and supplies for vessels of the Government of the United States and, incidentally, for supplying such at reasonable prices to passing vessels, in accordance with appropriations hereby authorized to be made from time to time by Congress as a part of the maintenance and operation of the said canal. Moneys received from the conduct of said business may be expended and reinvested for such purposes without being covered into the Treasury of the United States; and such moneys are hereby appropriated for such purposes, but all deposits of such funds shall be subject to the provisions of existing law relating to the deposit of other public funds of the United States, and any net profits accruing from such business shall

annually be covered into the treasury of the United States. Monthly reports of such receipts and expenditures shall be made to the President by the persons in charge, and annual reports shall be made to the Congress."

Departmental regulations and rulings indicate that it has been recognized that a purpose of preserving the corporate existence and organization was to make inapplicable to Panama Railroad receipts provisions requiring payment into the treasury of receipts by governmental agents. Whatever the purpose was, such legislation as that which has been mentioned shows that the lawmakers intended the relation between the government and the defendant to be that of a stockholder to the corporation which issued the stock, and not that of principal and agent. This being true, the following statements made in the opinion of Chief Justice Marshall in the case of *Bank of the United States v. Planters' Bank*, 9 Wheat. 904, 6 L. Ed. 244, are applicable to the facts of the instant case:

"The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, not by that of the individual corporators. The state does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the state of Georgia, although the state holds an interest in it. It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus many states of this Union who have an interest in banks are not suable even in their own courts; yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character. so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act."

From the fact that one owns all the stock of a private corporation it does not follow that the acts of the corporation are to be treated, not as its acts, but as the acts of its sole stockholder. *Pullman Palace Car Co. v. Missouri Pacific R. Co.*, 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; *Salas v. United States*, 234 Fed. 842, 148 C. C. A. 440. The defendant was not, on the ground mentioned, exempt from the liability asserted against it.

[5] It is not material to inquire whether the defendant, in conducting the store or commissary in which the plaintiff was hurt, was exercising a power conferred by its charter. A corporation cannot escape liability for negligent conduct of a business in which it engages by showing that it was not authorized to carry on that business.

[6] The defendant was not entitled to have the jury instructed to find in its favor on the ground of the absence of evidence tending to prove the negligent conduct alleged. There was evidence tending to prove that the defendant's employés so oiled the floor of the store as to make it dangerously slippery, and that the plaintiff, Mrs. Curran,

while in the store as a customer, was injured in consequence of such negligence. Under the law in force in the Canal Zone the defendant was liable for such negligence. *Panama R. Co. v. Bosse*, 249 U. S. 41, 39 Sup. Ct. 211, 63 L. Ed. —, Term, 1918.

Other rulings which are complained of are not such as to call for a discussion of them. The record does not show the commission of any reversible error.

The judgment is affirmed.

PANAMA R. CO. v. ROBERT.

(Circuit Court of Appeals, Fifth Circuit. March 24, 1919.)

No. 3322.

In Error to the District Court of the Canal Zone; Wm. H. Jackson, Judge. Action by Evelina Robert against the Panama Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Frank Feuille, of Ancon, C. Z., and Walter F. Van Dame, of Balboa Heights, C. Z., for plaintiff in error.

Stevens Ganson, of Panama, R. P., for defendant in error.

Before PARDEE, WALKER, and BATTIS, Circuit Judges.

PER CURIAM. So far as the questions presented for decision are concerned, there is no material difference between this case and the case of *Panama Railroad Co. v. Curran* (U. S. Circuit Court of Appeals, 5th Circuit, present term) 256 Fed. 768, — C. C. A. —. Following that decision, the judgment in this case is affirmed.

EQUITABLE SURETY CO. v. BOARD OF COM'RS OF MUDDY BOTTOM
SWAMP LAND DIST. NO. 1, TIPPAAH COUNTY, MISS.

(Circuit Court of Appeals, Fifth Circuit. March 31, 1919.)

No. 3337.

1. PRINCIPAL AND SURETY ⇨151—ACTIONS—PARTIES.

Ordinarily obligee on bond is proper party to enforce it.

2. DRAINS ⇨49—CONTRACTOR'S BOND—PARTIES.

Under Code Miss. 1906, § 387, regulating handling of money by swamp land district commissioners, the commissioners may sue contractor's surety in their own name.

3. PRINCIPAL AND SURETY ⇨151—ESTOPPEL—RECEIVING PREMIUM.

Surety, receiving a premium, is estopped to deny obligee's capacity to sue for breach of bond.

4. PRINCIPAL AND SURETY ⇨123(1)—NOTICE TO SURETY—NECESSITY—"DEFAULT."

The contract requirement of exertion by contractor of all reasonable diligence and activity being for the benefit of the obligee on the contractor's bond, the obligee, by failing to treat a less amount of diligence as a default, waived it, and was not required to give the surety notice there-

of; it not being in such case a "default" within the meaning of the contract.

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

5. WITNESSES ⇨244, 255(9)—EXAMINING WITNESSES—LEADING QUESTIONS—REFRESHING RECOLLECTION.
In action on surety's bond, court did not abuse its discretion in allowing surety's former manager when called as witness for plaintiff, to be examined and led as a hostile witness, and his memory refreshed by a deposition previously made by him.
6. PRINCIPAL AND SURETY ⇨162(2)—JURY QUESTION—MISREPRESENTATION.
In action on surety's bond, evidence that surety's manager construed contract as authorizing payment of disputed item to contractor, etc., held to make a jury question whether such payment was authorized by contract.
7. PRINCIPAL AND SURETY ⇨162(2)—JURY QUESTION—MISREPRESENTATION.
In action on surety's bond, evidence that consideration named in drainage contract was subject to discount under another contract, etc., made a jury question whether plaintiff made a material false representation to defendant surety that contractor would receive amount stated in original contract.
8. PRINCIPAL AND SURETY ⇨162(2)—JURY QUESTION—MISREPRESENTATION.
In action on a surety's bond, conflicting evidence held to make jury question whether plaintiff falsely represented to defendant surety that bond was to cover additional work, for which contractor would receive additional pay.
9. PRINCIPAL AND SURETY ⇨145(1)—EVIDENCE—ADMISSIBILITY.
In action on surety's bond, judgment against principal for breach of contract is admissible as prima facie evidence of principal's default, even against surety.
10. DRAINS ⇨49—CONTRACTOR'S BOND—AMOUNT OF RECOVERY.
In action on swamp land district contractor's bond, actual loss suffered from having to relet work may be recovered, including sums not yet due under the new contract.

In Error to the District Court of the United States for the Northern District of Mississippi; Henry C. Niles, Judge.

Action by the Board of Commissioners of the Muddy Bottom Swamp Land District No. 1, Tippah County, Miss., against the Equitable Surety Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 231 Fed. 33, 145 C. C. A. 221; 246 Fed. 633, 158 C. C. A. 589.

C. L. Sivley, of Memphis, Tenn. (Sively, Evans & McCadden, of Memphis, Tenn., on the brief), for plaintiff in error.

Thomas E. Pegram, of Ripley, Miss., Lester G. Fant, of Holly Springs, Miss., and William M. Hall, of Memphis, Tenn., for defendant in error.

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

GRUBB, District Judge. This is a writ of error to a judgment in favor of the defendant in error, plaintiff in the District Court, against the plaintiff in error, which was defendant in that court, upon two

surety bonds, executed by it as surety, payable to the defendant in error, and conditioned to secure the faithful performance of a contract entered into between the defendant in error and the Delta Drainage Company, which was the principal, for the cutting of a drainage canal. The case has been heretofore twice before this court. On the first trial the defendant in error obtained a judgment in the District Court, which was reversed by this court because of the refusal of the District Court to give certain charges requested by the plaintiff in error. *Equitable Surety Co. v. Board of Commissioners*, 231 Fed. 33, 145 C. C. A. 221. On the second trial in the District Court the District Judge directed a verdict for the present plaintiff in error, and the present defendant in error sued out a writ of error from the judgment then rendered, which was reversed by this court for that reason. *Board of Commissioners v. Equitable Surety Co.*, 246 Fed. 633, 158 C. C. A. 589. The law of the case has been pretty well established by the two former opinions of the court. A recital of the facts is unnecessary, in view of the statement of facts contained in the former opinions. The difference between the facts upon the first trial and the trial from the judgment following which the present writ of error was taken consists very largely in the evidence of plaintiff in error's former manager at Memphis, one Morrison, who was a witness on the second and third, but not on the first, trial of the case.

[1-3] The first ground for reversing the judgment advanced by plaintiff in error is that the suit should have been instituted in the name of board of supervisors of Tippah county, and not in the name of defendant in error. The bond sued upon was payable to defendant in error, and not to Tippah county, or to its board of supervisors. The general rule is that the obligee of a bond is the proper party to enforce it. 32 Cyc. 123; 9 *Corpus Juris*, 85; *Cass County v. Johnston*, 95 U. S. 360, 24 L. Ed. 416; *Tyler v. Hand*, 7 How. 573, 12 L. Ed. 824; *Davenport v. County of Dodge*, 105 U. S. 237, 26 L. Ed. 1018. The statute of Mississippi (section 387, Code of Mississippi of 1906) provides that the board of supervisors of the county shall sell the bonds issued for drainage purposes, and turn over the proceeds to the commissioners of the district to be by them expended in the drainage of the land, and in payment of the expenses incident thereto, and the commissioners are required to give bond for more than the amount of the funds received, conditioned to faithfully apply and account to the county for the money received. It seems, in view of this legislation, that they are entitled to sue in their own name for a liability on a bond, the recovery on which would be funds in their hands for which they would be accountable under the statute. Certainly the plaintiff in error, after receiving a premium, as a consideration for executing a bond in which the defendant in error was named as obligee, is estopped to deny the capacity of the obligee to sue for a breach of the bond. *Tyler v. Hand*, 7 How. 572, 583, 12 L. Ed. 824. The same point was made on the former appeals; on the first, it was reserved; on the second, it was not expressly referred to, but was impliedly passed upon adversely to plaintiff in error's contention, since the case was remanded for a third trial in its then form.

The second point presented is the refusal of the District Judge to direct a verdict for plaintiff in error. This contention was determined adversely to the plaintiff in error upon the second appeal. 246 Fed. 633, 158 C. C. A. 589.

[4] The third complaint is that the court failed to charge upon the effect of want of notice to plaintiff in error of the contractors' default, and refused requested instructions on that issue. The defendant in error gave prompt notice to the plaintiff in error, within the 10 days prescribed by the bond, of the default of the contractors in finally abandoning the work. No criticism is made of the sufficiency of this notice. It is claimed, however, that there was a previous default by the contractors, in that they did not exert all reasonable diligence and activity to accomplish the proper completion of the work, as stipulated by the contract, and that no notice was given of this default, as required by the bond.

The requirement of the exertion of all reasonable diligence and activity was for the benefit of the defendant in error, which it had the election to insist upon or waive. If the defendant in error failed to treat a less amount of diligence on the part of the contractors as a default, it thereby waived the default arising therefrom, and was not required to give the plaintiff in error notice of what was not in that event a default, within the meaning of the contract. The record shows that the defendant in error first claimed a default only when the contractors gave notice that they would no longer proceed with the contract, and of this default the required notice is conceded to have been given.

[5] The fourth point relied upon by the plaintiff in error to reverse the judgment is in relation to the treatment of the witness Morrison, who was examined by the defendant in error, though summoned by the plaintiff in error. The plaintiff in error insisted on his oral examination, when defendant in error sought to introduce his deposition. The defendant in error was permitted by the court to ask the witness leading questions, and to attempt to contradict him by his former evidence, taken by deposition. It was within the discretion of the court to treat the witness as hostile to the defendant in error, under the circumstances, and, as such, to permit him to be led, and his recollection to be refreshed by his deposition. We cannot say that the discretion was abused.

[6] The plaintiff in error complains, as a fifth ground of reversal, of the charge of the court, and of the refusal of the court to give certain requested instructions with respect to the effect of certain advances made by the defendant in error to the contractors, before the work done by the contractors justified the making of the advances, under the terms of the contract as claimed by the plaintiff in error. The principal item was an advance of \$4,500 for the purchase of machinery by the contractors for the digging of the canal. Upon the first appeal the court construed the contract between the defendant in error and the contractors as giving the former the right to decline to make payments under the contract until the work done equaled the payment made, and held that if the defendant in error departed from the contract, and paid the con-

tractors money in advance of the time, it could be required or reasonably expected thereunder that the surety company, plaintiff in error, would be released. The evidence on the second and third trials differed from that on the first trial, in that the witness Morrison testified upon the second and third trials, but not upon the first trial. His testimony upon both the second and third trials was to the effect that he understood the provision of the contract as to payments as making it permissible for the defendant in error to advance or pay to the contractors the amounts required to pay the price of and the freight on machinery or implements needed by the contractors to enable them to do the work contracted for. The present record also shows that the machinery was mortgaged to the plaintiff in error as indemnity, and its purchase known to and approved by the representative of the surety company. This court, on the second appeal, with reference to this evidence, said:

"A finding that the defendant's sole representative so understood the proposed contract hardly would be reconcilable with one that the defendant, in consenting to become the contractors' surety, was influenced by the consideration that the contract protected it from liability for losses resulting from payments or advances made by the plaintiff to the contractors for such a purpose. However that may be, evidence above mentioned of payments to the contractors for work contracted for made after that work was done was enough to make it a question for the jury whether the contractors' abandonment of the work before it was completed entailed upon the plaintiff a loss which was chargeable against the defendant, the contractors' surety. In view of that evidence, the second above-mentioned defense cannot be regarded as having been so made out as to justify the giving of the instruction complained of." Board of Commissioners v. Equitable Surety Co., 246 Fed. 633, 636, 158 C. C. A. 592.

The court below rightly refused the direction of a verdict, and properly instructed the jury on the issue in conformity with the opinion of this court. In any event, it seems difficult to see how any unauthorized advances could effect more than a destruction of defendant in error's right to have them included in its damages, and all the requested instructions refused on this question went to the extent of denying all right of recovery to the defendant in error.

[7] The plaintiff in error also complains, as a sixth ground of reversal, of the charge of the District Judge upon the issue as to whether the defendant in error misrepresented to the plaintiff in error the amount of compensation agreed to be paid the contractors for the work to be done by them. On the first appeal this court held that there was an issue of fact in this respect, as to whether there was a representation that the contract price of the work was falsely represented as being \$19,500, instead of \$18,000, and as to whether such a misrepresentation, if made, materially increased the surety company's risk. Upon the second trial a verdict was directed against the present defendant in error, which was held to be error upon the second appeal; this court holding that all the three defenses presented to the cause of action presented issues of fact. There were opposing versions of this question, also, on the third trial. The plaintiff in error contended that a discount paid by the contractors to the taker of the bonds was, in effect, a diminution of the consideration expressed in the contract for

the doing of the work. The defendant in error contended that the agreement of the contractors to pay the discount was a separate one from the working contract, and so did not affect the consideration agreed to be paid the contractors by the terms of the contract. The District Judge, under proper instructions, left the solution of this question, as well as that of the question as to whether there was a representation made by the defendant in error to plaintiff in error as to the amount to be paid the contractors, and of its materiality, if made and untrue, to the jury, in conformity to the previous opinions of this court in the case.

[8] Two bonds are sued upon. The first contained a penalty of \$5,000. After its execution, and after the machinery was purchased by the contractors and the money therefor advanced by the defendant in error, the defendant in error required the contractors to give an additional bond of \$2,500, which it did, with the plaintiff in error as surety. The plaintiff in error contends, in the seventh place, that one of the commissioners, McBride, caused the agent of the contractors to represent to the agent of the surety company that the second bond was for additional work, which, under the original contract, was to be paid for at an increased price, and that this was untrue, and that the risk would have been less, if it had been true. The making of the representation by the defendant in error was disputed by it, and the District Judge submitted this question, as well as the materiality of the representation, if made, to the jury, under a fair charge, for its determination, as was directed to be done by this court. The subject-matter of the plaintiff in error's requested instructions, refused by the District Judge, relating to this question, was fully covered by the court's general charge.

[9] The plaintiff in error complains, in the eighth place, of the admission in evidence of the judgment obtained at a previous term of the District Court by the defendant in error against the contractors for a breach of the contract the bond sued upon was given to secure. The judgment was prima facie evidence of the principal's default, even against his surety, and was properly admitted. *Moses v. United States*, 166 U. S. 571, 600, 17 Sup. Ct. 682, 41 L. Ed. 1119.

[10] The measure of damages fixed by the court represented the actual loss the defendant in error suffered from having to relet the work, and was the proper one. The fact that the second contractor had not as yet claimed the difference not due him under his contract till the end of the litigation is unimportant.

Finding no error in the record, the judgment is affirmed, with costs. Affirmed.

MYRES v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 4, 1919. Rehearing Denied June 25, 1919.)

No. 3189.

1. HOMICIDE ⚡300(1)—INSTRUCTIONS—SELF-DEFENSE—EVIDENCE.

The killing being when deceased was standing inoffensive and unarmed, in peaceful conversation with third person, submission in instruction of issue of self-defense, even under rule of apparent danger, is not required, on evidence merely that deceased, who had a bad reputation for peace and quietness, had recently threatened defendant's life, and had his hand in his pocket, where it remained till he was shot.

2. HOMICIDE ⚡253(1)—MURDER IN FIRST DEGREE—MALICE AFORETHOUGHT—EVIDENCE.

Evidence in homicide case held to warrant finding of capacity to form, and of forming, deliberate and malicious intent to kill, necessary for murder in first degree.

3. HOMICIDE ⚡22(1), 28—RESPONSIBILITY—INTOXICATION—MENTAL CONDITION.

Abnormal mental and nervous condition, during recovery from spree, of one committing homicide, does not serve to excuse or lower the degree of his offense, provided he was capable of knowing right from wrong, and had will power to do right and abstain from wrong, and capacity to form the deliberate and malicious intent necessary for first degree murder.

4. COURTS ⚡337—FEDERAL COURTS—FOLLOWING STATE PRACTICE—CRIMINAL PROCEDURE.

The federal courts in criminal procedure do not follow the practice of the courts of the states in which they sit.

5. COURTS ⚡337—PROCEDURE OF STATE COURTS—DOCUMENTARY EVIDENCE—AUTHENTICATION.

Provision of Rev. St. § 906 (Comp. St. § 1520), authorizing use in federal courts of authenticated documents from state courts and offices, that they shall have such faith and credit given them as they have by law or custom in the courts or offices of the state, is not an adoption of the rules of practice, under the state's law, as to the preliminaries necessary for their introduction, as length of time of filing before trial and notice to adverse party.

6. CRIMINAL LAW ⚡1213—CRUEL AND UNUSUAL PUNISHMENT—GRIEVANCE WITH VERDICT.

Grievance, on which is bottomed complaint that infliction of sentence of life imprisonment for a murder committed while defendant was in an abnormal mental condition is a cruel and unusual punishment, in violation of the Constitution, is not with the sentence, but with the verdict of first degree murder.

7. INDICTMENT AND INFORMATION ⚡110(17)—MURDER—FELONIOUSLY.

Indictment for murder need not use the word "feloniously"; it not being used in Pen. Code, §§ 273, 274 (Comp. St. §§ 10446, 10447), creating the offense, and defining murder, its two degrees, and manslaughter.

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

Frank Myres was convicted of murder in the first degree, and brings error. Affirmed.

John T. Hill, of El Paso, Tex., for plaintiff in error.
R. E. Crawford and W. H. Fryer, Asst. U. S. Attys., both of El Paso, Tex.

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

GRUBB, District Judge. The plaintiff in error was convicted in the District Court of the crime of murder in the first degree, and sentenced to imprisonment for life, the verdict of the jury excluding capital punishment. The judgment of conviction is assailed upon six grounds, which will be passed upon in order.

[1] 1. The plaintiff in error complains that the issue of self-defense was not submitted to the jury in the general charge of the court, and because the court refused to defendant an instruction presenting that issue. The record shows that the issue was not presented in either way to the jury. The question is whether there was evidence to support it. It is conceded that the undisputed facts show that the defendant was in no real danger of life or great bodily harm from deceased when he killed him. The contention is that there was evidence of apparent danger from defendant's viewpoint, which required a submission of the issue of self-defense to the jury; i. e., that the defendant had reasonable grounds for believing that the deceased was about to draw a pistol from his pocket and shoot him.

There is evidence that the deceased had, shortly before he was killed, and on the same day, threatened to kill the defendant before sundown. Both were noncommissioned officers in the same company, stationed at Ft. Bliss, Tex. The defendant had been on a spree during the Christmas holidays, from which he was recovering on the day of the killing. He had had a dispute on the morning of that day with deceased, who refused to permit him to have a saw sharpened, and it was after this that the alleged threats were made by the deceased. The killing occurred about 12:30 p. m. in the company street. About noon the defendant went to the deceased's tent and inquired for him. Not finding him there, he returned to his own tent, loaded his pistol, and went out of his tent, into the company street. The deceased had been to the company commander's house, and was returning along the company street. He passed another sergeant, named Hixon, in the company street, and, after passing him, turned and accosted him, and began a conversation with him, while both were standing in the company street. The defendant, after leaving deceased's tent, discovered deceased in the street, talking with Hixon, and, approaching him, shot him first in the right arm, and then three times in the body; the deceased sinking to the ground after the first or second shot. The defendant, after the fourth shot, threw his pistol on the ground, and then picked it up and pointed it at deceased, but it failed to go off. After the deceased was shot he only said: "You've got me." The defendant said nothing before or immediately after the shooting.

The deceased was unarmed; his pistol being in his tent at the time he was killed. During the conversation with Hixon he stood with his right hand in his pocket, but, according to the undisputed evidence,

made no effort to withdraw it, and did nothing that could be construed as a hostile demonstration of any kind, and was unaware of the presence of the defendant until the first shot was fired by defendant. The defendant did not testify in his own behalf, and there is no dispute about the immediate facts of the occurrence, and they are as stated. The deceased had a bad reputation for peace and quietness. Unless we are prepared to say that a man who has recently threatened another's life can be justifiably killed by that other when he is standing unarmed and inoffensive, engaged in peaceful conversation with a third person, merely because his hand is in his pocket, where it remains till he is shot, we cannot say that there was any evidence to support the issue of self-defense in this case, for this is what the undisputed evidence in the record discloses. The District Judge rightly refused to submit that issue to the jury.

[2, 3] 2, 3. The plaintiff in error contends that a verdict of murder with malice aforethought was improper, in view of defendant's mental condition at the time of the killing, due to previous intoxication, and that the defendant should either have been acquitted by reason of insanity, or convicted of a lower degree of crime. The District Judge charged on the various degrees of murder and upon manslaughter; also upon the effect of insanity and drunkenness upon the degree of crime as affecting the specific intent required to be proven. No complaint is made of the charge in any of these respects. The complaint is with the finding of the jury upon the facts, under the court's unchallenged charge. That there was evidence justifying the jury in determining that the defendant was not excused by insanity for the killing is clear. The defendant was doubtless in an abnormal mental condition, due to the spree he was just recovering from, and, as a result, he magnified trifles, permitted them to prey upon his mind, with the result of resenting them in a way he would not have done, if free from the influence of liquor.

The evidence would have justified the jury, however, in finding that he was not drunk on the day of the killing. It was conceded that he had charge of the company camp on that day, though the evidence tends to show he performed his duties indifferently. There is evidence that he acted abnormally, and also evidence that he was able to act and perform his duties without causing comment. The jury had evidence before them that would have justified them in finding that there was nothing different in his condition from that of any man whose nerves were affected by recent intoxication, and whose predisposition was to nurse grievances and resent trifles. The law neither excuses nor mitigates crime because of such a condition, self-imposed by the defendant. The evidence shows that the defendant, at least half an hour before he killed the deceased, sought deceased in his tent, and, not finding him there, returned to his own tent, loaded his pistol, continued his quest, and immediately upon discovering him, and without accosting him, commenced to shoot at him, and continued till he was mortally wounded. The jury might well have deduced from this the capacity of the defendant to form the deliberate and malicious intent to kill, necessary to constitute murder in the first degree.

After the occurrence the defendant was in a nervous state, due to the excitement and his weakened condition. While his condition, when he committed the offense, and his previous good character, when not intoxicated, might form the basis of an appeal for executive clemency, they do not serve to excuse or lower the degree of his offense in the eye of the law, provided they left him with the capacity to know right from wrong and the will power to do right and abstain from the wrong, and the capacity to form the deliberate and malicious intent necessary to the crime of murder in the first degree. The jury have found against him on these issues upon evidence sufficient to justify them in so doing, and there is no redress available to him in the courts.

[4, 5] 4. The plaintiff in error complains of the admission of certified copies of the deeds of the owners of the lands constituting the government reservation at Ft. Bliss, and the deed of the Governor of Texas, ceding jurisdiction over it to the United States, upon the ground that, under the Texas Civil Code, such certified copies are admissible, in civil or criminal proceedings, only when filed three days before the trial, and when notice of the filing is given the adverse party. The United States courts, in criminal procedure, do not follow the practice of the state courts of the states in which they sit. Section 906, Revised Statutes of the United States (Comp. St. § 1520), authorizes the use in the federal courts of authenticated documents from state courts and offices. It provides that such certified records "shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state, territory, or country, as aforesaid, from which they are taken." The effect of this provision is not an adoption of the rules of practice as to the preliminaries necessary to the introduction of certified records fixed by state statutes, but to give to such certified copies, when introduced, the like faith and credit that they are accorded in the courts of the state.

[6] 5. The plaintiff in error complains that the infliction of a sentence of life imprisonment in the penitentiary for a murder committed while the defendant was in an abnormal mental condition is a cruel and unusual punishment, and contrary to the federal Constitution. It will not be contended that life imprisonment is too severe a punishment for murder in the first degree, or that it is an unusual one for that crime. The defendant was adjudged guilty of that crime, after a jury had found him guilty. The complaint, if there is any, is therefore with the verdict and judgment of conviction, and not with the sentence. An innocent man, legally convicted, would be in the same attitude. Any punishment of an innocent man would be cruel and unusual; but his grievance would be against the verdict, and not against the sentence.

[7] 6. The plaintiff in error lastly criticizes the indictment because it does not charge that the offense was feloniously committed. The crime of murder under the federal law is defined by statute to be "the unlawful killing of a human being with malice aforethought." In defining murder in the first and second degree, and also manslaughter, the Penal Codes does not make use of the word "feloniously." The

offense being created and defined by statute, and the statute not using the word "feloniously" in defining the crime, the indictment need not charge that it was done feloniously. Penal Code (Act March 4, 1909, c. 321) §§ 273, 274, 35 Stat. 1143 (Comp. St. §§ 10446, 10447); *Bannon and Mulkey v. United States*, 156 U. S. 464, 467, 15 Sup. Ct. 467, 39 L. Ed. 494; *United States v. Staats*, 8 How. 41, 12 L. Ed. 979.

We find no error in the record, and the judgment is affirmed.

MELANSON v. UNITED STATES.

ELLSWORTH v. SAME.

(Circuit Court of Appeals, Fifth Circuit. April 4, 1919.)

Nos. 3195, 3200.

1. POISONS ⇨9—VIOLATION OF NARCOTIC ACT—AVERMENT OF CHARACTER OF DRUGS.

An indictment charging violation of the Harrison Narcotic Act (Comp. St. §§ 6287g-6287q), which averred that defendant at the time of the offense knew that cocaine was a derivative of coca leaves, and that morphine and heroin were salts and derivatives of opium, sufficiently averred by implication the fact that cocaine was a derivative of such leaves, and that morphine and heroin are salts or derivatives of opium.

2. CRIMINAL LAW ⇨1186(4)—INDICTMENT—APPEAL—HARMLESS IMPERFECTIONS.

In view of Rev. St. § 1025 (Comp. St. § 1691), imperfections in indictment for violating the Harrison Narcotic Act (Comp. St. §§ 6287g-6287q), in that it did not aver that cocaine is a derivative of coca leaves, and that morphine or heroin are salts or derivatives of opium, *held* harmless imperfections, carrying no consequences.

3. INDICTMENT AND INFORMATION ⇨111(1)—HARRISON NARCOTIC ACT—FAILURE TO AVOID EXCEPTIONS OF ACT.

Under Harrison Narcotic Act, § 8 (Comp. St. § 6287n), indictments charging violation of the act were not defective, because not averring facts showing defendants did not come within any of the exceptions of the act.

4. POISONS ⇨9—HARRISON NARCOTIC ACT—DERIVATIVES OF DRUGS—SUFFICIENCY OF EVIDENCE.

In prosecutions for violating and conspiracy to violate the Harrison Narcotic Act (Comp. St. §§ 6287g-6287q), evidence in one case *held* sufficient to show the drugs, cocaine, morphine, and heroin, are salts and certainly derivatives of coca leaves or opium, and, in the second case, sufficient to authorize submission of the issue to the jury.

5. CRIMINAL LAW ⇨304(1)—JUDICIAL NOTICE—FACTS OF CHEMISTRY.

The courts take judicial notice of the facts of chemistry contained in the United States Pharmacopœia.

6. CRIMINAL LAW ⇨371(1)—OTHER OFFENSES—SALE OF NARCOTICS—EVIDENCE—INTENT.

In prosecution of a physician for violating the Harrison Narcotic Act (Comp. St. §§ 6287g-6287q), order forms used by defendant to procure morphine from a druggist, other than the one with whom he was charged with having conspired and with having made a sale, were admissible on the issue of intent to furnish the drug to an addict, and not to aid or cure a patient in his practice as a physician.

7. CRIMINAL LAW ⚡472—HARRISON NARCOTIC ACT—EXPERT EVIDENCE.

In prosecution of physicians for violating the Harrison Narcotic Act (Comp. St. §§ 6287g-6287q), the testimony of qualified medical experts that the prescribing of the drug under stated quantities and circumstances would not be in the course of a physician's regular practice was admissible, on the issue whether the drug was dispensed in the legitimate course of defendants' practice as physicians.

8. CONSPIRACY ⚡48—HARRISON NARCOTIC ACT—GUILT OF PHYSICIANS—QUESTION FOR JURY.

In prosecutions of physicians for having conspired to violate the Harrison Narcotic Act (Comp. St. §§ 6287g-6287q), and having made sales illegally, question whether or not each defendant had conspired with a druggist, a codefendant, to dispense the drug in the guise of prescriptions to patients, but really to addicts for the gratification of their appetite, and not for their cure, *held* for the jury under the evidence.

9. POISONS ⚡9—HARRISON NARCOTIC ACT—PROSECUTION OF PHYSICIANS—QUESTIONS FOR JURY.

In prosecution of physicians for sale of drugs in violation of Harrison Narcotic Act (Comp. St. §§ 6287g-6287q), whether dispensing of drug in each case was a dispensing of it by a physician to a patient, in which case no order form was required, or whether the form of prescription was used by defendants as an evasion of the law, and not in good faith, in which case the dispensing would be a sale, and an order form necessary to bring it within the law, *held* for the jury.

10. POISONS ⚡9—HARRISON NARCOTIC ACT—CHARACTER OF DRUG USERS—KNOWLEDGE OF PHYSICIANS—QUESTIONS FOR JURY.

In prosecution of physicians for having violated the Harrison Narcotic Act (Comp. St. §§ 6287g-6287q), whether two persons were consumers of the drug and not patients of defendants, and whether defendants and the druggist on whom they issued prescriptions, their codefendant, knew the true character in which such persons sought to procure drugs, *held* for the jury.

11. CRIMINAL LAW ⚡1177—HARMLESS ERROR—ESTABLISHMENT OF ONE OF TWO COUNTS—SENTENCE.

If either count of indictments for having violated and having conspired to violate the Harrison Narcotic Act (Comp. St. §§ 6287g-6287q) was established, defendants have no just complaint; the sentence imposed having been within the maximum prescribed for the offense charged in either count.

12. POISONS ⚡9—HARRISON NARCOTIC ACT—FAITH OF PHYSICIANS—SUBMISSION OF ISSUE.

In prosecution of physicians for having violated and conspired to violate the Harrison Narcotic Act (Comp. St. §§ 6287g-6287q), the trial court in his general charge properly submitted an issue as to the good faith of defendants in issuing their prescriptions to supposed patients, since the defendants could only protect themselves if the prescriptions were issued legitimately in their practice.

In Error to the District Court of the United States for the Western District of Texas; William R. Smith, Judge.

M. C. Melanson and Guillermo Q. Ellsworth were convicted of violations of and conspiracy to violate the Harrison Narcotic Act, and they bring error. Affirmed.

Volney M. Brown, of El Paso, Tex. (R. C. Walshe, C. M. Wilchar, and A. J. Harper, all of El Paso, Tex., on the brief), for plaintiffs in error.

R. E. Crawford and W. H. Fryer, Asst. U. S. Attys., both of El Paso, Tex.

Before WALKER and BATT'S, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. The plaintiffs in error were convicted under two separate, but similar, indictments; each charging violations of section 2 of the Harrison Narcotic Act (Act Dec. 17, 1914, c. 1, 38 Stat. 786 [Comp. St. § 6287h]), and of a conspiracy to violate that section of the act, under section 37 of the Penal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. § 10201]), in separate counts. The trials were separate, but the questions presented by the appeals, with one exception, are the same.

Each defendant was charged with having conspired with one M. A. Dolan, who was a druggist, and who was a joint defendant in each indictment. The plaintiffs in error were each physicians. The gist of the conspiracy charged in the first count of each indictment was that the defendants were to write prescriptions for alleged patients, calling for morphine or cocaine, which were to be filled by their codefendant Dolan; all the defendants knowing that the alleged patients were not being treated by the physicians in the course of their legitimate practice, but were being furnished the drugs to appease their appetites for it. The first count in each indictment charged a conspiracy. The second count charged a joint sale by the physician and druggist without the use of the order form, required by the law to be used and filed in making sales, other than to patients in the regular practice of a physician on prescription, or by personal administration.

The plaintiffs in error first question the sufficiency of the indictments in two respects.

[1, 2] The first count is criticized because it contains no direct averment that cocaine is a derivative of coca leaves, and that morphine and heroin are salts or derivatives of opium. It is averred in the first count of each indictment that the respective defendants, at the time of the commission of the offense, knew that cocaine was a derivative of coca leaves, and that morphine and heroin were salts and derivatives of opium. It is difficult to see how they could know this to be a fact, unless it was a fact, and the averment that it was known by them to be a fact implies the averment that it was a fact. It certainly informs the defendants sufficiently of the charge against them, and, if an imperfect averment, is a harmless imperfection, carrying no consequences, in view of R. S. § 1025 (Comp. St. § 1691).

[3] The indictments are also criticized because they do not aver facts showing that the defendants did not come within any of the exceptions of the act. In the cases of *Thurston v. United States*, 241 Fed. 335, 154 C. C. A. 215, and *Fyke v. United States*, 254 Fed. 225, — C. C. A. —, we held that the provisions of section 8 of the act (Comp. St. § 6287n) made it unnecessary for the government either to aver or prove facts excluding defendants from the excepted classes.

[4, 5] It is objected that there should have been evidence introduced by the government that cocaine was a derivative of coca leaves, and that heroin and morphine were salts of opium. In the *Ellsworth Case*, the plaintiff's witness Will S. Wood testified as follows:

"Morphine is an alkaloid of opium, and heroin is a derivative of opium, and cocaine is an alkaloid of coca leaves. Alkaloid means the principal agent of opium. Cocaine is a principal agent of coca leaves; it comes from coca leaves. Morphine and heroin both come from opium."

No transaction in heroin was relied upon by the plaintiff as a ground for conviction. The first count of the indictment alleged that—

"morphine was a salt and derivative of opium, and that heroin was a salt and derivative of opium, and that cocaine was a salt and derivative of coca leaves."

The second count contained this averment:

"Said morphine (referring to that charged to have been unlawfully sold) being a salt and derivative of opium."

We think the proof in the Ellsworth case was sufficient to show that the drugs were salts, and certainly derivatives, respectively, of coca leaves or opium. The proof as to this fact is not as specific in the Melanson case, but was sufficient to authorize submission of the issue to the jury, if, indeed, proof of such a scientific fact was required. The courts take judicial knowledge of the facts of chemistry contained in the United States Pharmacopœia.

[6] In the case of *Melanson v. United States*, objection is made to the action of the District Court in permitting the plaintiff to introduce in evidence certain order forms, used by the defendant Melanson for the procuring of morphine from a druggist other than the one with whom Melanson is charged with having conspired in the first count, and with having made a sale jointly, in the second count. A physician, under the terms of the law, may legally dispense the drug, either by prescription or by personal administration, in the legitimate course of his practice. The issue was presented under both counts as to whether the drug was dispensed in the legitimate course of Melanson's practice. The issue involved the question of the good faith of defendant as a physician in dispensing the drug. If dispensed in the legitimate course of his practice, the law was not violated. If the prescription was a cloak to cover a dispensing, not to aid a cure, but to furnish the drug to an addict to satisfy his appetite, the law was violated. The question depended upon the good or bad faith of the physician, and this involved his intent. Upon the question of intent, the quantities in which the defendant Melanson procured the drug reflected upon the question of his intent or good faith in dispensing it. The defendant Dolan entered a plea of guilty, and was not tried with Melanson. The issue of Melanson's intent being involved, the plaintiff was entitled to show on that issue, if it could, that the amounts of the drugs Melanson had procured, at or about the time of the alleged commission of the offense, from all sources, exceeded what would be required for his legitimate practice.

[7] The plaintiffs in error further complain that the court permitted the witnesses Dr. Jamison and Dr. Rogers, in the Melanson case, and Dr. Rogers, in the Ellsworth case, to testify that the prescribing of the drug under stated quantities and circumstances would not be in the course of a physician's regular practice. The witnesses qualified as medical experts, and were entitled, as such, to give opinion evidence.

The issue being whether or not the drug was dispensed in the legitimate course of defendants' practice as physicians, the evidence was germane to that issue; and, being competent expert testimony, the District Court properly permitted it to be introduced.

[8] Both plaintiffs in error contend that the evidence of the government was insufficient to show (1) a conspiracy under the first count; or (2) an illegal sale, because not made in response to an order on an order form, as charged in the second count. In the Ellsworth case the evidence showed that the defendant Ellsworth had issued in the period three months before the prosecution was instituted 700 prescriptions for the drugs, all of which had been filled by his codefendant Dolan, or his employes, and in quantities varying from 15 grains to 60 grains. The evidence also showed that prescriptions of the kind and quantity shown to have been issued by Ellsworth, and in the aggregate amount for the period, could not have been issued in the course of his professional practice legitimately. In the Melanson case, the evidence showed that the defendant Melanson had an office in the rear of his codefendant's drug store; that during a like period he had issued 900 prescriptions for the prohibited drugs, which had been filled by Dolan or his employes; and that no prescription for any other kind of drugs had been issued by Melanson to be filled by Dolan or his employes during that time. The evidence also showed that the prescriptions were of a character, and for an amount, that would not be issued by a physician in the course of his professional practice. This was sufficient evidence in each case for submission to the jury, upon the issue as to whether or not each of the defendants had conspired with Dolan to dispense the drug, in the guise of prescriptions to patients, but in fact to them as addicts, for the gratification of their appetite, and not for their cure.

[9-11] The plaintiffs in error also contend that the evidence was insufficient to show an illegal sale under the second counts of the two indictments. The contention is that, when the drug is prescribed by a physician, it is not required to be in pursuance of an order from the patient on an order form. Conceding this to be the law, it was for the jury to determine, in each case, whether the dispensing of the drug, in the one case to Clifford Frank, and in the other case to W. Banning, was a dispensing of it by a physician to a patient, in which case no order form was required, or whether the form of a prescription was used by the defendants as an evasion of the law, and not in good faith, in which case the dispensing would be a sale, and an order form would be necessary to bring it within the law. The amount of the drug prescribed in the Ellsworth case to Clifford Frank, and the frequency, amount, and circumstances attending the issuance of the prescription to Banning and others, and Banning's own testimony as to its intended use, and Melanson's probable knowledge thereof, made it a question for the jury to determine whether Frank and Banning were consumers of the drug, and not patients of defendant, and whether Melanson and Ellsworth and Dolan knew the true character in which they sought to procure it from defendants. In the latter event, the transaction would be a mere sale, and could be validated only if made upon receipt

of an order form from the respective purchasers. If either count of the indictment was established, the defendants have no just complaint, since the sentence imposed was within the maximum prescribed for the offense charged in either count.

[12] The plaintiffs in error also complain because the District Judge, in his general charge to the jury, submitted the issue as to the good faith of the defendants in issuing the prescriptions to the supposed patients. We think this issue was a pertinent one. The defendants could only protect themselves, under the act, if the prescriptions were issued in the legitimate course of their professional practice. The law does not mean by this to immunize those who use the form of the relation of physician and patient as a mere method to avoid the law's penalties, when in fact they are dispensing the drug, not to cure a patient, but to satisfy the craving of an addict, who bears no such relation to them. If the act were given that construction, it would be valueless to remedy the evil aimed at, since physicians could register, and with impunity furnish the drug, through pretended prescriptions, in collusion with registered druggists.

We find no error in the records, and the judgment in each case is affirmed.

MORRIS LAND & CATTLE CO. v. KILPATRICK et al.
(Circuit Court of Appeals, Fifth Circuit. April 4, 1919.)

No. 3268.

1. APPEARANCE \Leftrightarrow 20—**GENERAL APPEARANCE—WAIVER OF ISSUANCE OF PROCESS.**

On information for forfeiture of cattle imported from Mexico without entry and inspection, where, when defendant filed exception or motion that the part of the intervener's answer which prayed judgment against defendant be stricken out, defendant was represented in the cause by attorneys whose appearance was general, by appearing and pleading to the claim asserted against it by the intervener's answer, defendant waived the issuance of process, and by invoking decision as to the merits of the claim asserted abandoned any rights it might have had to refrain from joining issue until notified or required.

2. APPEAL AND ERROR \Leftrightarrow 1026—**REVERSAL—HARMLESS OMISSION.**

A judgment is not to be reversed because of an omission which did not have the effect of depriving the party complaining of any substantial right.

3. ANIMALS \Leftrightarrow 35—**CUSTOMS DUTIES** \Leftrightarrow 130—**UNLAWFUL IMPORTATION OF CATTLE—FORFEITURE—JUDGMENT FOR INTERVENING CLAIMANTS.**

On information by the United States against a cattle company for forfeiture of cattle for unlawful importation, wherein individuals intervened and claimed the cattle or their value, judgment that the interveners recover from the cattle company possession of the cattle, and, if they were not delivered, recover a sum per head, the value as assessed for each head not delivered, *held* proper.

Appeal from the District Court of the United States for the El Paso Division of the Western District of Texas; William R. Smith, Judge.
Information against the Morris Land & Cattle Company for for-

feiture of cattle, wherein J. J. Kilpatrick, Jr., and others, appeared and filed answer to the information, claiming the cattle, or, in lieu thereof, recovery of an appraised value from the company. From a judgment for the interveners, the Cattle Company appeals. Affirmed.

Ed. M. Whitaker and Peyton J. Edwards, both of El Paso, Tex., for appellant.

Volney M. Brown and R. E. Crawford and W. H. Fryer, Asst. U. S. Attys., all of El Paso, Tex., for appellees.

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

WALKER, Circuit Judge. On January 15, 1916, the district attorney, in behalf of the United States, filed an information praying the forfeiture of 27 head of cattle, which were described and were alleged to have been seized while in a pasture known as the "Kilpatrick pasture," within the collection district of Eagle Pass, on the grounds that said cattle were knowingly and fraudulently imported into the United States from Mexico, without being entered, unladen, and inspected as required by the customs laws of the United States, and without being inspected by the Bureau of Animal Industry of the Department of Agriculture of the United States, as required by law.

On January 15, 1916, there was filed in the court an affidavit of the manager of the Morris Land & Cattle Company (which will be referred to as the appellant), stating that that company was the owner of said cattle and that they were imported into the United States without its knowledge, authority, or consent. On January 22d the appellant filed a petition praying that the marshal be ordered to deliver said cattle to the petitioner upon its executing bond with sureties as provided by statute. In that petition it was averred that no other person or corporation is the owner of said cattle. On January 31st there was filed in the court a stipulation, signed by the attorney for the appellant and by an assistant district attorney, that the valuation of said 27 head of cattle was \$407.50.

On February 3d an order was made that the cattle be delivered to the appellant upon its executing a bond to the United States in the sum of \$407.50, with two good and sufficient sureties. The bond was given and the cattle were delivered pursuant to the order, and the appellant duly answered the information. Thereafter, and after notice of the information and the seizure had been given by publication in a newspaper, pursuant to an order of the District Judge, the appellees, J. J. Kilpatrick, Jr., and others, appeared and filed an answer to the information. That answer put in issue the averments of the information as to the cattle being imported from Mexico, alleged that they had never been in Mexico, that they were American cattle belonging to the appellees, and were in their pasture when they were seized, denied that the appellant had any interest in them, and prayed that said cattle be awarded to the appellees, or that, in lieu thereof, they have and recover the appraised value of the cattle from the appellant. Thereafter the appellant, by its attorneys, filed in the cause an instrument of which,

omitting the caption and the signatures of the attorneys, the following is a copy:

"Now comes the Morris Land & Cattle Company, and excepts to that part of the answer and plea of intervention of J. J. Kilpatrick and D. D. Kilpatrick and J. J. Kilpatrick, Jr., wherein they ask judgment of the Morris Land & Cattle Company, and asks that same be stricken out and not considered by the court for the following reasons, to wit:

"(1) Because said pleading was filed after the property in controversy in this action had been delivered to Morris Land & Cattle Company under bond filed in this court, and no new libel has ever been filed herein, and no process has ever been served on said Morris Land & Cattle Company, and said Morris Land & Cattle Company has never made any appearance in this cause as to said cross-action or intervention on the part of the said Kilpatricks, and the court has no jurisdiction to render judgment against said Morris Land & Cattle Company on said cross-action, in that said property is no longer in the hands of the officers of this court.

"(2) And now comes Morris Land & Cattle Company, and, not waiving any of its exceptions to the jurisdiction of the court over it as to the cross-action or intervention on the part of J. J., D. D., and J. J. Kilpatrick, Jr., but relying on same, demurs to the allegations of said cross-action, and says that same are insufficient in law to require further answer of it, and of this it prays the judgment of the court.

"For answer herein, if answer be required, but not waiving any of the matters hereinbefore set out, defendant Morris Land & Cattle Company denies all and singular the allegations set out in cross-action of said defendants, and demands strict proof of same."

The above-mentioned exceptions were overruled, and, a jury being waived, the court, after hearing the evidence, found that the animals described in the information were not subject to seizure and forfeiture, and were the property of the appellees, and it was adjudged that the appellees have and recover from the appellant possession of the said cattle and the costs; the judgment providing, if the said 27 head of cattle, or any of them, are not delivered by the appellant pursuant to a writ of possession ordered to be issued, appellees have and recover of the appellant the sum of \$15.10 per head, the value thereof as assessed by the court for each head of cattle not delivered. The record does not set out the evidence adduced in the trial court.

[1] What is complained of is the overruling of the exception or motion that that part of the appellees' answer which prayed judgment against the appellant be stricken out. When the above-mentioned exceptions of the appellant were filed, it was represented in the cause by attorneys, whose appearance was general, not special or limited. It took notice of the answer of the appellees by filing the above-mentioned exceptions thereto. It may be assumed that, prior to service of notice or process so requiring, it was not incumbent upon the appellant to take notice of the claim asserted against it by the answer of the appellees. By appearing and pleading to the claim so asserted, it waived the issuance of process thereon. By invoking the court's decision as to the merits of the claim asserted, it abandoned any rights it may have had to refrain from joining issue thereon until notified or required to do so. *Pease v. Rathbun-Jones Eng. Co.*, 243 U. S. 273, 37 Sup. Ct. 283, 61 L. Ed. 715, Ann. Cas. 1918C, 1147, 228 Fed. 273, 142 C. C. A. 565; *St. Louis & San Francisco Railway Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659.

[2] The appellant now is complaining of the absence of process on a pleading upon which it made issues, which have been decided against it. There no longer is any occasion or necessity of issuing process when the party to be served has appeared and joined in the issue tendered. To issue and serve now the process which the appellant contends was improperly omitted would amount only to giving formal notice of a claim of which it already has taken notice by unsuccessfully contesting it on the merits. A judgment is not to be reversed because of an omission which did not have the effect of depriving the party complaining of any substantial right.

[3] By representing to the court that it was the owner of the cattle seized, and that no other person or corporation owned them, the appellant acquired possession upon giving bond in an amount which it admitted to be the value of the cattle. It remained a party to the cause, represented by attorneys appearing generally therein for it, when it was disclosed to the court that the ownership of the cattle was claimed by others, who were entitled to appear in the proceeding and resist the forfeiture prayed for. The appellant still being a party to the cause and subject to proper orders made therein, upon the court finding that the cattle were not subject to forfeiture and that they belonged to the appellees, there was no legal obstacle to prevent the court ordering the appellant to deliver to the appellees either the cattle or the sum of money which the appellant had agreed was the value of them. The effect of the order was to require a party to the cause, who wrongfully had obtained possession of the property in the court's custody, to restore the property itself or to pay the admitted value of it to another party found to be entitled to it. The fact that the appellant was enabled to get possession of the cattle by giving a bond, with sureties, for its value, did not have the effect of exempting it from such an order. There was no judgment against the sureties on the bond. Nothing in the record indicates that the court was in error in adjudging that the cattle were not subject to forfeiture and that the appellees were entitled to them. This being so, the appellant has no valid ground of complaint against the judgment appealed from, which can be satisfied by paying the sum which it admitted was the value of the cattle in question, and the costs.

This judgment is affirmed.

ECONOMY LIGHT & POWER CO. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1919.)

No. 2525.

1. NAVIGABLE WATERS ⇨22(1)—DAMS—CONTROL BY STATE.

Under Act Sept. 19, 1890, providing that dams or other structures in navigable waters of the United States shall not be built without authority of the Secretary of War, and Act March 3, 1899, § 9 (Comp. St. § 9971), relating to navigable waters wholly within the state, dams or other structures may be built only by joint assent of the national and state governments.

2. NAVIGABLE WATERS ⇨22(1)—DAMS—WATERS LYING WHOLLY WITHIN A STATE—STATUTES—APPLICATION.

Act March 3, 1899, under which dams or other structures may be built in or over navigable streams wholly within a state only by joint assent of the national and state governments, should be construed to refer to navigable capacity and not rigidly restricted to streams floating interstate or foreign commerce at the time of its passage.

3. NAVIGABLE WATERS ⇨3—ORDINANCES AS TO GOVERNMENT OF NORTHWEST TERRITORY.

The purposes of the Ordinance of July 13, 1787, for the government of the Northwest Territory, was to retain forever, the free and unrestricted use to the people of the country of any or all waterways then known to be navigable, or waterways that might thereafter be used by the people in the more remote parts of the country for the purposes of commerce.

4. NAVIGABLE WATERS ⇨1(1)—NECESSITY FOR USING.

The fact that shipping methods have dispensed with the necessity for using the carrying places in the Desplaines river does not lessen in any degree the value of the navigable portions of the stream, nor render them not navigable.

5. NAVIGABLE WATERS ⇨1(1)—"NAVIGABILITY."

Navigability does not depend on the amount of tonnage, depth of water, width of stream, character of craft, or relative ease or difficulty of navigation, nor the use at some time for commerce; navigability being determined by natural conditions.

6. NAVIGABLE WATERS ⇨1(6)—DESPLAINES RIVER.

The Desplaines river in Illinois is a navigable stream, and a dam cannot be constructed therein without the consent of the United States government, under Act March 3, 1899, § 9 (Comp. St. § 9971).

7. COURTS ⇨372(1)—DECISIONS OF STATE COURTS—NAVIGABLE WATERS.

A federal court need not follow a decision of the Supreme Court of Illinois as to the navigability of the Desplaines river.

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

Bill by the United States against the Economy Light & Power Company. From a decree in favor of the plaintiff, defendant appeals. Affirmed.

December 14, 1909, the United States filed its bill of complaint against the Economy Light & Power Company, alleging that said company had, without the consent of Congress and without authority of the Legislature of Illinois, commenced the construction of a dam in the Desplaines river at a point in Grundy county, Ill., and that the portion of the Desplaines river in which the construction of the dam had been commenced was navigable water of the United States, and praying the court to order, adjudge, and

decree said Desplaines river to be a navigable river and one of the navigable waters of the United States; that the portion of the dam constructed be held to be in violation of the provisions of section 9 of the act of March 3, 1869 (30 Stat. 1151, c. 425 [Comp. St. § 9971]), and ordering its removal, and that the defendants and its officers and agents and all persons acting under them be enjoined perpetually from placing any further obstruction in said river, and from doing any other act or performing any other work in connection with the construction of said dam.

On February 28, 1910, the defendant filed its answer, admitting the commencement of the construction of a dam as alleged, but denying the navigability of the portion of the Desplaines river in which said dam was being constructed. A very large amount of evidence was taken, the abstract containing 3,186 printed pages. From a decree entered May 25, 1917, perpetually enjoining the defendant, its officers, agents, etc., as prayed, defendant appeals.

Frank H. Scott, of Chicago, Ill., for appellant.

Charles F. Clyne and Clarence N. Goodwin, both of Chicago, Ill., for appellee.

Before BAKER and EVANS, Circuit Judges, and SANBORN, District Judge.

SANBORN, District Judge (after stating the facts as above). *The Desplaines up to 1894.*—The Chicago-Desplaines-Illinois water route, used from 1673 to 1825 by explorers and in the fur trade, was made up of portions of the Chicago and Desplaines rivers, now some eight miles apart. It includes the Chicago river from its mouth on Lake Michigan to Robey street, Chicago, on the West fork of the South branch, thence westerly, by water or portage, to Mud Lake, about two miles, thence to the Desplaines near Riverside, two miles, down the river to the Illinois, made by the confluence of the Desplaines and Kankakee. The part of this route between the Chicago and Desplaines is called the Chicago divide. The Desplaines river rises near the county line between Racine and Kenosha counties, Wis., and runs in a southerly direction, parallel substantially to the west shore of Lake Michigan, through Lake and Cook counties, Ill., until it reaches Riverside, some 11 miles from the mouth of the Chicago river; thence it takes a southerly direction through Cook and Will counties to its confluence with the Kankakee river near the east line of Grundy county. The original area of the Desplaines river basin was 1,428 square miles, and with the changes which have been made the present area is taken at 1,392 square miles. The Desplaines river basin is usually divided into the upper Desplaines and the lower Desplaines; the term upper Desplaines applying to that portion above Riverside. The upper Desplaines basin has an area of 633 square miles, a general length of about 60 miles, and a general width of about 10 miles, and is a true basin—has practically no true tributary basins, except Salt creek, which has about 110 miles, entering at Riverside. It is a rolling country, originally covered with one-half to one-third in timber. Its general declivity by its flood plane is about $1\frac{1}{2}$ feet per mile. The river bed is cut as a groove in a prairie, rather than the ordinary river bed, with an overflow or flood plane on either side. Originally it had a considerable quantity of swamp, marsh, and bog at headwaters, and in Lake county and in portions of Cook county and also upon Salt creek in Du Page county,

and a lake development in Lake county, from which that county derives its name.

The characteristics of the Lower Desplaines basin, that portion below Lyons or Riverside, are that it covers by the general course of the valley about 42 miles to the confluence with the Kankakee, and has a total descent of about 102 or 103 feet. It has a true subbasin in the Du Page river, which covers 366 square miles. The total area is 795 square miles below Riverside, but outside of the Du Page river this area is only 429 miles. The valley in itself is not a characteristic valley, like the Upper Desplaines, but has the appearance of being an old water course or outlet from the Great Lakes, in which the modern stream follows through remnants of an ancient stream of much greater magnitude, a succession of pools and wide expanses, with intermediate channels, which have not yet developed to their proper proportions, connecting these pools and water stretches. The river valley or river has two considerable tributaries aside from the Du Page, in Hickory creek and Jackson creek, but otherwise the drainage is essentially marginal or shore drainage.

Beginning within a mile of the township line between Riverside and Lyons is a long level expanse, known as the 12-mile level, consisting of a succession of water expanses and connecting straits or channels, from 150 feet up to a quarter or an eighth of a mile in width, in places, and with varying depths up to 10 or 15 feet in localities; these water expanses having a mud bottom which seem to be more vegetable deposits than alluvial, and which indicate originally much greater depth, and margined in by a vegetable growth. These expanses were for a long time used as ice fields by the ice interests which had their market in Chicago. Below the 12-mile level is a succession of ponds and shallow connections in the rock, like Goose Lake and Round Lake, and others between Romeo and the 12-mile level. This whole stretch is well described in the original land survey as a succession of swamps, ponds, lakes, and marshes connected by currents.

Below Romeo, which is 6 miles below Lyons, there is a declivity at the rate of 7 feet per mile from the Romeo highway down to the head of Lake Joliet, a distance of 11 miles, pretty uniformly distributed. Thence for a distance of about 13 miles, between that and the mouth of the river, there are some 10 miles occupied by pools, or Lake Joliet, which has a length of nearly 6 miles and has a width of 500 to 900 feet, and a depth originally up to 15 or 20 feet, and then a pool of over a mile in length immediately below Treat's Island rapids; then Lake Du Page, some 13 miles in length, with a width of about 350 feet on the average, and with a depth of 10 feet and upwards, these pools being connected by intermediate rapids like the one at Treat's Island and the one near the mouth of the Kankakee, and the reach of swifter and shallower water between the pool below Treat's Island and the head of Lake Du Page. These distances are given only approximately, and to show some of the characteristics of the stream. This description applies to the Desplaines river as it was known up to about 1894, when the Sanitary District works changed the conditions very radically through the valley above the city of Joliet, between there and Lyons

or Riverside. The proportion of the Desplaines river itself from the end of the portage road to its mouth, or confluence with the Kankakee, that would consist of pools, would be about 60 per cent. The total distance from the portage road to the confluence with the Kankakee is about 44.5 miles. In that distance there would be the so-called 12 mile level, which is 13.7 miles, Lake Joliet, the pool below Treat's Island, and Lake Du Page, aggregating 10 miles, and Goose Lake and Round Lake, and some other stretches unnamed, amounting in all to about 27 or 28 miles, out of a total of 44.5. The distance from dam No. 1 to the mouth of the river is 15.72 miles, of which about 10 miles consists of pools. This stretch is now more particularly in question. The condition of these pools, if the Desplaines river were to run dry, that is, no water pass from pool to pool, would be that Lake Joliet would be practically available for boats as before; the depth in it being from 20 to 25 feet at the maximum, and a large proportion of it having more than 10 feet.

The distance from Lake Michigan to the mouth of the Desplaines river is 58.32 miles, made up as follows:

From Lake Michigan to Ashland avenue, which is substantially at the forks of the South Branch of the Chicago river.....	5.5	miles
Ashland avenue to Ogden dam, which is across the old portage slough, on the range line, range 12, 13, north of Summit.....	8.3	
The so-called 12-mile level, actual length.....	13.7	
From 12-mile level to Isle la Cache.....	6.7	
Isle la Cache to dam No. 1.....	8.4	
Dam No. 1 to head of Lake Joliet.....	3.	
Head of Lake Joliet to mouth of Desplaines river.....	12.72	
	<hr/>	
	58.32	

A gauge record kept at Riverside for a period of 20 years, from the year 1886 to 1904, both inclusive, showed the water stood at above 18 feet on the Riverside gauge an average of 4.3 days per year; at or above 13.8 feet an average of 47.6 days per year; at or above 13 feet an average of 73.2 days per year; at an elevation of 12.4 feet an average of 116.2 days per year; at or above 11.85 feet an average of 190.65 days per year.

When the water stood at 10.5 at the head of the 12-mile level at Summit, corresponding to 13 feet on the Riverside gauge, and a volume of 600 second feet, the water in the portage swamp and channels connecting with the Desplaines river would be flowing over to the Chicago river to the extent of the capacity of the trench that existed below this level. During the 20-year period referred to water would have flowed over the Chicago divide on an average of 73.2 days per year.

At all elevations when the water at Summit stood at 11.73 or above, corresponding to an elevation of 13.8 on the Riverside gauge, and to a volume of 1,052 second feet, a boat drawing 15 inches of water could pass from the Desplaines river across the Mud Lake region and over the continental divide and into the Chicago river without making any portage between them. Such condition would have prevailed during the 20-year period an average of 47.6 days per year.

At an elevation between 13.8 feet and 13 feet, the water would

gradually diminish in depth on the Chicago divide, and when a portage became first necessary it would be about 1 mile in length, and when it reached the level of 10.5 it would be 2 miles in length between the West fork at Western avenue, Chicago, and the beginning of deep water in Mud Lake.

At an elevation between 13 feet and 12.4 feet on the Riverside gauge, boats could no longer pass between Mud Lake and the Desplaines river, except light, and be entirely stopped, and a portage of 1 or 2 miles would be required between Mud Lake and the Desplaines river, in addition to the portage of 2 miles between the West fork and Mud Lake. In this condition there would be a substantial navigable depth of 15 inches between Isle la Cache and Mount Juliet, a distance of 11 miles. Isle la Cache is located in the Desplaines river on the township line between the towns of Du Page and Lockport.

At an elevation between 12.4 feet and 11.85 feet on the Riverside gauge, the Chicago divide would require the two portages mentioned, or the alternative of a 7-mile portage between the waters of the Chicago river and the Desplaines. The Desplaines would have a navigable depth of 12 to 15 inches, with possibly some deficiency in one or two localities; from Romeo down to the head of Lake Joliet there would be sufficient water for a boat at the higher stages to go down partially loaded, and at the lower stages to go down light, but at the lower stages the cargo itself would require a transfer over the 11 miles from Isle la Cache to Mount Juliet. All the river below Lake Joliet would be navigated by discharging the cargo in part or wholly at Treat's Island, and near the mouth of the river.

There has been no time when the Desplaines river ran absolutely dry, and there was not any water passing from pool to pool, except as it was artificially produced by the abstraction of water from the Desplaines either for canal purposes during the time in which the Desplaines was used in that connection as a feeder, or through the cutting down of the Chicago divide and the draining of the water towards Chicago at medium and low stages.

Changes in Desplaines River.—Various changes have been made in the Desplaines river from its condition as it existed in a state of nature. The portage swamp region lying east of the range line at Summit has been drained and made tributary to the Chicago river, except so much as is tributary to the canal; this area amounting to 48 square miles. There has been added from the Sag region an area of about 12 square miles, making the change below Lemont 36 square miles to be deducted from the former areas. The deficiency of rainfall, averaging 2.9 inches per year during the period of 20 years from 1887 to 1910, computed from the Riverside gauge, would produce a deficiency in run-off of probably 15 or 20 per cent., and the effect of that would be to diminish both the volume and duration for the stages of water exhibited in the table referred to. There is also a deficiency in the run-off, due to the substantial clearing away of the forest-covered area of 5 per cent. There are changes which have affected the distribution of the run-off. The clearing away of the forests has destroyed an element of control, which has diminished the control and the duration of the stages of water; and in addition the restriction of ponds and lakes

and the drainage of wet lands, bogs, and marshes, and particularly the destruction of a special control existing in the portage swamp region and 12-mile level, all of which under natural conditions prolong the stages of water.

There have been radical changes in reference to the depletion of the water in the Desplaines river from a state of nature. The first change of significance was due to the construction of the Illinois and Michigan Canal in 1848. The effect of the construction of that canal upon the water in the lower Desplaines was a reduction of the drainage of the river below the dams at Joliet to less than 250 square miles out of a total of 1,428 square miles. Further interference arose from the fact that the location of the canal along the south and east side of the valley caused the hill drainage to be turned in part toward Chicago, and on the tangent between Summit and Bridgeport (in the southwestern part of Chicago) it ran across the south arm of Mud Lake, cutting off the drainage and reservoir control of that portion of the portage swamp region lying to the south of the canal. From 1866 to 1871 the Illinois and Michigan Canal was deepened, causing interference with the flow of the river. Further interference was caused by the construction of ditches in the Mud Lake region, and by the erection of pumping works at Bridgeport in 1883. Interference also occurred by reason of the construction of the river diversion by the Sanitary District in 1893-94, by which the Desplaines river was shifted to the west and north side of the valley, so as to leave a site between the river as thus changed and the Illinois and Michigan Canal for the construction of the drainage canal itself. Interference has also been caused by inhabitation which has cut away forests, thus curtailing the run-off, and there has been drainage of swamps and wet lands, and the destruction of ponds and lakes. The Sanitary and Ship Canal, which was completed in 1892, joins the Desplaines at dam No. 1, 31.6 miles from Riverside, from which point its waters flow into and increase the current of the Desplaines.

These various changes have materially interfered with the flow of the river, and the conditions in the basin itself have been changed by the actual distribution of the flow. The Desplaines river has an impermeable soil bottom, and the control that was exercised was surface control largely. The destruction of this surface control has affected the flow of the water much more radically than would have been the case had the ground been permeable.

Use of Desplaines River.—From the latter part of the seventeenth century through the first third of the nineteenth century men engaged in the fur trade passed up and down the Chicago and Desplaines rivers in canoes and flatboats very regularly. Fourteen specific instances of the use of the Desplaines down to the year 1830 are shown in the evidence, as follows: Trips to Chicago: Joliet and Marquette, 1673; Perreault, 1783; Joutel, 1688; Hubbard, 1819; Ebenezer Child, 1821; Tonty, 1680; La Salle, 1681; Fonda, 1825. Trips from Chicago: Father Membre, 1682; St. Cosme, 1698; Hubbard, 1818; Marquette, 1674; Howard, 1790; Furman, 1830. Very many other trips made during the same period, not so well authenticated, are disclosed in the

evidence, and numerous historical references to the Chicago-Illinois route. No doubt other instances of its use may properly be inferred. It was employed by the American Fur Company down to 1825, and then abandoned for other routes. The trial judge found, as the record shows, that there is no evidence of actual navigation within the memory of living men, and therefore there would be no present interference with navigation by the building of the proposed dam. But it was held that the evidence shows the Desplaines a navigable water of the United States, preserved as such by the legislation of Congress.

In the early days the fur trade was a leading branch of commerce in the Western world, and this trade was one of the characteristics of the Desplaines river. Large quantities of supplies of various kinds needed by the settlers in a new country were also transported over the Desplaines during the same period in boats of the size and character then commonly used in river commerce; this transportation being carried on between Chicago, St. Louis, and other points. Canoes of several tons burden were used; some were 35 feet long by 6 feet wide, some 33 feet long by 4½ feet wide, worked by paddles and occasionally a sail, and had a crew of eight men, carrying as much as 6,000 pounds of freight as well as 1,000 pounds of provisions. The pirogues were manned by six or seven oars; the bateaux were larger than the pirogues; the Durham boats were heavy freight craft, 60 feet long, 8 feet wide, 2 feet deep, with a capacity of 15 tons, drawing 20 inches of water.

Commerce of this character existed until about the year 1825. After that year the fur trade, having receded to interior portions of Illinois, was reached more generally by horses. After the year 1848, when the Illinois and Michigan Canal was constructed, commerce that had formerly been carried on the Desplaines river was carried on the canal. Radical changes had taken place in the condition of the river as heretofore shown, which resulted in a diminution of the flow in the river, and this was one of the causes for the nonuse of the river.

Up to 1889 several dams had been built across the Desplaines river, to wit: Daggett's Mill, one half mile below Lockport; dam No. 1, 10 feet high, belonging to the state, Joliet; dam No. 2, 8 feet high, one-half mile below dam No. 1, also belonging to the state; Adams dam, 6 feet high, and less than a half mile below dam No. 2. Formerly a dam existed at the foot of Lake Joliet, at Treat's Island, and also one at the foot of Lake Du Page. These have long been abandoned. There are at the present time no dams in the Desplaines between dam No. 1 and the mouth of the river. Some of these dams were constructed as early as the year 1835, and their existence in the river was a source of obstruction to the commerce that had formerly been carried on. There are also a considerable number of bridges of various kinds across the river.

Is the river navigable within the Act of 1899? The main question in the case is whether the evidence shows the Desplaines a navigable stream of the United States, or one capable of bearing interstate commerce via the Illinois and Mississippi, at the time of the passage of the acts of 1890 and 1899. If the river be decided navigable in fact,

though not used for navigation, the further question is whether the words "navigable river, or other navigable water of the United States," includes a stream of navigable capacity, but not actually used in transportation for the past 75 years. In other words, does the act of 1899 refer only to streams then actually used for interstate commerce, or as well to rivers formerly navigated, like the Wisconsin, Rock, and hundreds of other streams of perfect navigable capacity, but whose use long ago ceased as an instrument of commerce (except for water powers)?

[1] The act of 1890 (Act Sept. 19, 1890, c. 907, § 7, 26 Stat. 454) provides that dams or other structures in navigable waters of the United States shall not be built without authority of the Secretary of War, and the act of 1899 that when such navigable waters are wholly within a state, such structures may be built under authority of the state Legislature if the plans are submitted to and approved by the Chief of Engineers and the Secretary of War. Under this legislation it has been established that dams or other structures may be built only by joint assent of the national and state governments. The effect of the act of 1899, "reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a state, depend upon the concurrent or joint assent of both the national government and the state government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such authority, obtain also the assent of the state acting by its constituted agencies." *Cummings v. Chicago*, 188 U. S. 410, 23 Sup. Ct. 472, 47 L. Ed. 525, approved in *Gring v. Ives*, 222 U. S. 370, 32 Sup. Ct. 167, 56 L. Ed. 235; *Simpson v. Shepard*, 230 U. S. 352, 408, 33 Sup. Ct. 729, 57 L. Ed. 1511, 1543, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; *Montgomery v. Portland*, 190 U. S. 89, 23 Sup. Ct. 735, 47 L. Ed. 965. See, also, *Cobb v. Lincoln Park*, 202 Ill. 427, 67 N. E. 5, 63 L. R. A. 264, 95 Am. St. Rep. 258.

It is argued that the act of 1899 was passed under the constitutional power to regulate interstate commerce, and as no such commerce on the Desplains then existed the statute can have no application, and that if the statute be construed to reach beyond this it was to that extent beyond the legislative power. Even so it might be sustained under the war power. We have lately had a significant reminder of the inadequacy of railroad transportation in a time of stress.

[2] But, however this may be, we think streams of actual navigable capacity, but not now used for interstate commerce, are within congressional power to preserve for purposes of future transportation, and that the act of 1899 applies to such streams. If this is not the proper construction, very few interstate streams are within its terms. The Wisconsin river, that great water route of early times between the St. Lawrence and the Mississippi, could be destroyed if the state permitted. The Rock river in Wisconsin and Illinois, a stream in its natural state completely navigable from Lake Koshkonong to the Mississippi,

would be under no government protection, however important for future need. It might be covered with business blocks in cities lying upon it, as was permitted by the Wisconsin Supreme Court in *State v. Carpenter*, 68 Wis. 165, 31 N. W. 730, 60 Am. Rep. 848. Hundreds of like streams, immensely important to the future welfare of the country, on this theory could never come within the reach of congressional power, except possibly through restoration by the states. We are unwilling to assent to this narrow view of the purpose of the act of 1899, and think it should be construed to refer to navigable capacity (which is the test of navigable water), and not rigidly restricted to streams floating interstate or foreign commerce at the time of its passage. The question has never been decided by the Supreme Court or other federal tribunal.

The disposition of this case upon these facts may therefore well be narrowed down to the question: Was the Desplaines river navigable in its natural condition?

[3] The purpose of the provision referred to in the Ordinance of 1787 was not to declare or make the Desplaines river, or other waterways within the ceded territory, navigable waters of the United States, but only to define rights which depend on its existence. *Illinois v. Economy Light & Power Co.*, 234 U. S. 497, 523, 34 Sup. Ct. 933, 58 L. Ed. 1429. A further purpose was to retain forever the free and unrestricted use to the people of the country of any and all waterways then known to be navigable, or waterways that might thereafter be used by the people in the more remote parts of the country, for the purposes of commerce. In respect to waterways no additional power was granted by the ordinance to the newly created territory, either at the time of the cession or in 1818, when Illinois was admitted to the Union, over the power held by the original 13 states, and the United States relinquished or lost none of its original power and control over the specific things included within its jurisdiction, one of the most important of which was the waterways.

The purpose of the Ordinance of 1787 is clearly stated by the court in *The Montello*, 20 Wall. 430, 444 (22 L. Ed. 391):

"To preserve the natural character of all the rivers leading into the Mississippi and St. Lawrence, and to prevent a monopoly of their waters, was the purpose of the Ordinance of 1787 declaring them to be free to the public."

It is immaterial to inquire whether the ordinance is still in force, or was superseded by the Illinois Enabling Act, or the act of admission, because the same principle is preserved in those statutes, and in the Illinois Constitution. It is very evident that from the earliest days the intention of Congress has been to retain in the public for all time the right to the use of streams of navigable capacity. Act Cong. May 18, 1796, c. 29, 1 Stat. 464, entitled "An act providing for the sale of lar is of the United States in the territory northwest of the river Ohio, and above the mouth of the Kentucky river," provides in section 9:

"And be it further enacted that all navigable rivers within the territory to be disposed of by virtue of this act, shall be deemed to be and remain public highways." (Comp. St. § 4918.)

Act Cong. March 26, 1804, c. 35, 2 Stat. 279, entitled "An act making provision for the disposal of public lands in the Indiana Territory, and for other purposes," provides in section 6:

"That all navigable rivers, creeks and waters, within the Indiana Territory, shall be deemed to be and remain public highways."

[4] The contention of counsel for appellant that the carrying places between the streams cannot be held to be within the intent of Congress in preserving the right to the use of navigable streams, is not material in this case, for the reason that in the progress and improvement in the means and methods of transporting commerce those carrying places have become unnecessary. The fur trader of the early days had but one way to make his trip from Chicago to St. Louis; the waterways and the carrying places between. But the fact that changing methods have dispensed with the necessity for using the carrying places does not lessen in any degree the value of the navigable portions of the streams. It is also to be noted that the statutes of 1796 and 1804 referred to do not mention carrying places, but only refer to the waterways. If the carrying places were deemed of equal importance with the waterways they would undoubtedly have been mentioned in these acts.

In the leading case of *The Montello*, 87 U. S. (20 Wall.) 430, at page 441, 22 L. Ed. 391, the court said:

"And, independently of the Ordinance of 1787, declaring the 'navigable waters' leading into the Mississippi and St. Lawrence to be 'common highways,' the true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation. If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market.

"It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice Shaw said ([*Rowe v. Granite Bridge Corp.* (Mass.) 21 Pick. 344), 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.' * * * But the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand bars."

In *Miller v. Mayor of New York*, 109 U. S. 385, at page 395, 3 Sup. Ct. 228, at page 234, 27 L. Ed. 971, the court said:

"The power vested in Congress to regulate commerce with foreign nations and among the several states includes the control of the navigable wa-

ters of the United States so far as may be necessary to insure their free navigation, and by 'navigable waters' are meant such as are navigable in fact, and which by themselves or their connection with other waters form a continuous channel for commerce with foreign countries or among the states"—citing *The Daniel Ball*, 10 Wall. 557, 19 L. Ed. 999.

In *The Daniel Ball*, 10 Wall. 557, at page 563, 19 L. Ed. 999, the court said:

"Those rivers must be regarded as * * * navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States, * * * when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water."

In *St. Anthony Falls Water Power Co. v. Board of Commissioners*, 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497, the Mississippi river at and above St. Anthony Falls, Minneapolis, was held navigable. The court say:

"In order to be navigable, it is not necessary that it should be deep enough to admit the passage of boats at all portions of the stream."

[5, 6] Navigability does not depend on the amount of tonnage, depth of water, width of the stream, nor the use at some time for commerce. Navigability is determined by natural conditions. *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. 60, 5 L. R. A. 392, 25 Am. St. Rep. 848. Neither character of craft nor relative ease or difficulty of navigation are tests of navigability. *State v. Pacific Guano Co.*, 22 S. C. 50. "The test of navigability is navigable capacity without regard to the character of the craft, the business done, the ease of navigation, the surroundings of the stream." *Heyward v. Farmers Mining Co.*, 42 S. C. 139, 19 S. E. 963, 20 S. E. 64, 28 L. R. A. 42, 46 Am. St. Rep. 702. In *Stratton v. Currier*, 81 Mo. 497, the court held as correct an instruction that, the stream being of sufficient capacity to float logs, the public had a right to its use for that purpose. So in this case, the Desplaines river having the capacity to carry interstate and foreign commerce, the public has the right to its use. In *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209, the court holds that navigability consists in the capacity for valuable floatage. This case also holds that the Ordinance of 1787 supersedes the common-law doctrine of the necessity of usage or custom to establish a public right. In *Burroughs v. Whitwam*, 59 Mich. 279, 26 N. W. 491, the court held that the Ordinance of 1787 was intended to apply to such streams as were then common highways for canoes or bateaux in the commerce between the northwestern wilderness and the settled portions of the United States and foreign countries, and to such rivers not then in use as would by law be embraced in the definition of navigable waters. In *Ten Eyck v. Town of Warwick*, 75 Hun, 562, at page 566, 27 N. Y. Supp. 536, at page 539, the court follows the reasoning in many of the cases cited, and says:

"That is, streams must be capable, in their natural condition, of floating commodities to market"—citing and quoting *Morgan v. King*, 35 N. Y. 461, 91 Am. Dec. 58.

In the latter case the court said:

"The true rule is that the public have a right of way in every stream which is capable, in its natural state and its ordinary volume of water, of transporting, in a condition fit for market, the products of the forests or mines, or of the tillage of the soil upon its banks. * * * Nor is it essential to the easement that the capacity of the stream, as above defined, should be continuous, or, in other words, that its ordinary state, at all seasons of the year, should be such as to make it navigable. If it is ordinarily subject to periodical fluctuations in the volume and height of its water, attributable to natural causes, and recurring as regularly as the seasons, and if its periods of high water or navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement."

In *Wadsworth, Adm'r, v. Smith*, 11 Me. 278, 26 Am. Dec. 525, it is held:

"Those [streams] which are sufficiently large to bear boats or barges, or to be of public use in the transportation of property, are highways by water, over which the public have a common right."

In *Brown v. Chadbourne*, 31 Me. 11, at page 22, 50 Am. Dec. 641, the court said:

"A distinguishing criterion consists in the fitness to answer the wants of those, whose business require its use. Its perfect adaptation to such use may not exist at all times, although the right to it may continue, and be exercised whenever an opportunity occurs. In many rivers, where the tide ebbs and flows, the public are deprived of their use for navigation during the reflux of their waters. A way, over which one has a right to pass, may be periodically covered with water. In high northern latitudes, most fresh water rivers are frozen over during several months of the year."

The statement, "A way, over which one has a right to pass, may be periodically covered with water," gives rise to the suggestion that a river in the latitude of the Desplaines is ordinarily frozen over during some of the winter months, and in a new country, where the roads, if any, are very poor and inadequate, such a river would afford an excellent highway, at least in many places, for teams drawing sleighs. In *Lewis v. Coffey County*, 77 Ala. 190, at page 193 (54 Am. Rep. 55), the court said:

"We do not understand that, to constitute a navigable stream, it is requisite there shall be sufficient water for the common uses of trade and commerce during all seasons of the year. It must, however, as the results of natural causes, be capable of valuable floatage periodically during the year, and so continue long enough at each period to make it susceptible of beneficial use to the public."

The same doctrine is announced in *Morrison Bros. & Co. v. Coleman*, 87 Ala. 655, 6 South. 374, 5 L. R. A. 384. In *Little Rock, etc., R. R. v. Brooks*, 43 Am. Rep. 277 (39 Ark. 403), the court, after discussing the question of what constitutes navigable capacity, says:

"The true criterion is the dictate of sound business common sense, and depends on the usefulness of the stream to the population of its banks, as a means of carrying off the products of their fields and forests, or bringing to them articles of merchandise. If in its natural state, without artificial im-

provements, it may be prudently relied upon and used for that purpose at some seasons of the year, recurring with tolerable regularity, then, in the American sense, it is navigable, although the annual time may not be very long. Products may be ready and boats prepared, and it may thus become a very great convenience and materially promote the comfort, and advance the prosperity of the community."

See *Carter v. Thurston*, 58 N. H. 104, 42 Am. Rep. 584.

In *East Hoquiam Boom & Logging Co. v. Neeson et al.*, 20 Wash. 142, 54 Pac. 1001, the court holds it to be well settled that a stream which can only be made navigable or floatable by artificial means is not a public highway, citing a number of cases. In *Kamm v. Normand*, 50 Or. 9, 91 Pac. 448, 11 L. R. A. (N. S.) 290, 126 Am. St. Rep. 698, the court, after an extensive review of the authorities, holds that a stream to be navigable or floatable for sawlogs must be capable in its natural condition at ordinary recurring freshets of being successfully and profitably used for that purpose.

Under these authorities it seems clear that the Desplaines river, having been used as an interstate highway of commerce from 1673 to 1825 in the only kind of commerce then existing, is to be deemed of navigable capacity and a navigable stream within the Ordinance of 1787 and the acts of Congress of May 18, 1796 and March 26, 1804, by which Congress specifically took jurisdiction over navigable streams and declared that they should forever remain public highways. The river is a continuous stretch of water from Riverside to its mouth, and although there is a rapid, and in places shallow water, with boulders and obstructions, yet these things do not affect its navigable capacity. The same may be said of the upper part of the Illinois river above the head of steamboat navigation. We have no hesitation in deciding that both streams are navigable and are within the act of 1899.

[7] The only hesitation we have had in this case is on account of the decision of the Supreme Court of Illinois in *People v. Economy Light & Power Co.*, 241 Ill. 290, 89 N. E. 760. The difference in the records in the two cases would not, perhaps, warrant a different conclusion, although the evidence here is somewhat stronger in favor of navigability than in that case. Taking, as we do, a different view as to the force and effect of the historical accounts of the early use of the river, and being clear that it is in fact a navigable stream, we feel that we should follow our own views.

Decree affirmed.

COLDWELL v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. March 27, 1919.)

No. 1360.

1. CRIMINAL LAW ⇨1144(16)—REVIEW—PRESUMPTION—ABSENCE OF EVIDENCE.

Where the evidence on which the jury returned verdict of guilty has not been reported, the Circuit Court of Appeals must accept the verdict as fully sustained by the evidence, if the allegations in the indictment were sufficient in law to sustain it.

2. WAR ⇨4—ESPIONAGE ACT—INDICTMENT.

Facts set out in indictment charging defendant with willfully attempting to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, etc., *held* to constitute a violation of Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c).

3. WAR ⇨4—ESPIONAGE ACT—ATTEMPT TO CAUSE INSUBORDINATION—CIRCUMSTANCES.

The time and place when and where statements charged to have been violative of Espionage Act (Comp. St. 1918, § 10212a et seq.), were made by defendant, and all the surrounding circumstances, should be considered by the jury in reaching a conclusion as to whether their utterance constituted the attempt charged to cause insubordination in the military service of the United States, as well as defendant's intent in making them.

4. ARMY AND NAVY ⇨40—ESPIONAGE ACT—OBSTRUCTION OF RECRUITING.

Indictment charging defendant with willfully obstructing the recruiting and enlistment service of the United States, by making certain statements in addressing a public meeting, in violation of Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), *held* sufficient.

5. WAR ⇨4—ESPIONAGE ACT—INCITEMENT OF INSUBORDINATION.

The language of Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), making it an offense willfully to attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, or willfully to obstruct the recruiting or enlistment service, is broad enough to include statements calculated to produce such results when made in presence of persons not in the military or naval forces, providing they are willfully made and with the intent specified.

6. WAR ⇨4—ESPIONAGE ACT—INCITEMENT OF INSUBORDINATION IN MILITARY SERVICE—OBSTRUCTION OF RECRUITING—QUESTIONS FOR JURY.

Whether defendant's statements in addressing a public meeting, not consisting of soldiers and sailors, under the circumstances constituted an attempt to cause insubordination, etc., in the military and naval forces of the United States, or obstruction of the recruiting or enlistment service of the country, in violation of Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), were questions for the jury.

7. WAR ⇨4—ESPIONAGE ACT—INCITEMENT OF INSUBORDINATION, ETC.—INDICTMENT.

An indictment charging defendant with violation of Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), in that his speech to a public meeting was made with intent to cause insubordination, disloyalty, etc., in the military and naval forces of the United States, etc., *held* not insufficient, as not alleging that defendant's utterances caused any injury to the military or naval service and to the United States.

8. WAR ⚡—ESPIONAGE ACT—INCITEMENT OF INSUBORDINATION, ETC.—INSTRUCTION.

In a prosecution for violation of Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), instructions submitting the questions of the likelihood of defendant's utterances to produce insubordination or refusal of duty in the military service, or obstruction of the recruiting and enlistment service, and the intent with which they were made, *held* proper.

9. CRIMINAL LAW ⚡371(1)—ESPIONAGE ACT—INCITEMENT OF INSUBORDINATION, ETC.—EVIDENCE.

In prosecution for violation of Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), by inciting insubordination in the military service and obstructing recruiting, circulars distributed by defendant before passage of act, urging that persons to whose hands they might come should fail to register under the Draft Act, etc., also prior statements in regard to conscription made by defendant, *held* admissible to show intent with which defendant made statements on which his prosecution was based, though he had been indicted for the offense of distributing the circulars.

In Error to the District Court of the United States for the District Court of Rhode Island; Arthur L. Brown, Judge.

Joseph M. Coldwell was convicted of violating the Espionage Act, and he brings error. Affirmed.

Anthony V. Pettine, of Providence, R. I. (Luigi de Pasquale, of Providence, R. I., on the brief), for plaintiff in error.

Harvey A. Baker, U. S. Atty., of Providence, R. I.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

JOHNSON, Circuit Judge. Joseph M. Coldwell, the defendant below, was indicted and convicted in the District Court of Rhode Island, under title 1, § 3, of the act of Congress approved June 15, 1917, c. 30, 40 Stat. 219, known as the Espionage Act (Comp. St. 1918, § 10212c), which is as follows:

"Sec. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully 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 indictment contained eight counts and he was tried on the first four. He was charged in two counts with willfully attempting to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States, and in two other counts with willfully obstructing the recruiting and enlistment service of the United States, by making the following statements in addressing a public meeting held in the People's Forum at Providence, R. I., on the 13th day of January, 1918, the United States being then at war with the Imperial German Government, in the presence and hearing of 500 persons to the grand jurors unknown:

"Dunn, Yanyar, and Hiller, who are to serve 20 years in the Atlanta penitentiary, are victims of a damnable system of government, for which those who support it are directly responsible."

"Law is of no avail now. It sleeps in America during the war. Dunn, Yanyar, and Hiller are guilty of no crimes. They merely refused to become uniformed murderers."

In a long parenthesis, in the way of innuendo, it was set out in each count that John T. Dunn, Theodore Hiller, and Adolph Fred Yanyar, residents of Rhode Island, were on the 5th day of June, 1917, between the ages of 21 and 30, both inclusive, and required by law to register under the provisions of Act May 18, 1917, c. 15, 40 Stat. 76 (Comp. St. 1918, §§ 2019a, 2019b, 2044a-2044k), the proclamation of the President, and regulations issued by the President thereunder, and became members of the United States army by virtue of the provisions of the act of May 18, 1917, and the regulations issued thereunder by the President; that they refused to serve as soldiers in the United States army, and were tried for desertion from the service of the United States, before a general court-martial of the United States army, and convicted and sentenced to be dishonorably discharged from the service and to forfeit all pay and allowances due and to become due, and to be confined at hard labor at such place as the reviewing authority might direct, for 20 years; and that the sentence of said court-martial was duly approved, and the United States penitentiary at Atlanta, Ga., designated as the place of confinement. The necessary intent was alleged in each count.

To each of the counts in the indictment the defendant filed a demurrer, assigning in each the following grounds:

First. That the facts therein set forth are not in violation of section 3 of the Espionage Act, so called.

Second. That it does not appear in said count that the divers persons whom the said defendant is alleged to have addressed were persons in the military or naval forces of the United States.

Third. That it does not appear in said count that the alleged utterances of the said defendant caused any injury to the military or naval service and to the United States.

Fourth. That said count of said indictment does not set out facts which constitute any offense against the laws of the United States.

Fifth. That said count of said indictment charges no offense known to the law.

The demurrers were overruled, and at the trial a motion to quash the indictment for the causes assigned in the demurrers was filed, which was denied. At the close of the testimony the defendant moved the direction of a verdict of acquittal for the following reasons:

That the government had failed to show any facts in violation of section 3 of the Espionage Act, so called, or that any person addressed by the said defendant was in the military or naval service of the United States, or that the alleged utterances of the said defendant caused any injury to the military or naval service or to the United States, or that the alleged utterances were made with the intent charged in the indictment; that there was a variance between the proof and the allegations in the indictment, in that the indictment alleged that the

utterances were made "in addressing a public meeting in said Providence, at which said meeting a large number of persons, to wit, five hundred, were present whose names are to the grand jurors unknown," whereas, in truth and as a matter of fact, the government proved that the persons were actually known to the grand jurors.

This motion was denied, and the defendant, having been found guilty by the jury on the first four counts in the indictment, was sentenced to serve a term of imprisonment of three years at hard labor in the United States penitentiary at Atlanta, Ga., on each count, said terms to run concurrently.

[1] The defendant seasonably excepted to the overruling of his demurrers, the denial of his motions, and the admission of evidence relating to the circulation by him of certain circulars prior to the passage of the Espionage Act, and these rulings are assigned as error. No error is assigned because of any instructions given in the charge of the presiding judge to the jury, and at its close counsel for the plaintiff in error said he was perfectly satisfied with it. The evidence upon which the jury returned their verdict of guilty has not been reported. The court submitted to them the determination of whether the words were spoken substantially as alleged, and, if so, whether they were adapted to create the offenses charged, and also the intent with which they were uttered; and we must accept the verdict of the jury in favor of the government on these issues as fully sustained by the evidence, provided the allegations in the indictment were sufficient in law to sustain it.

[2] The first ground of demurrer is that the facts set forth do not constitute a violation of section 3 of the Espionage Act. This act was amended on May 16, 1918, by adding thereto the following:

"Whoever, when the United States is at war, shall wilfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the army or navy of the United States, or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the army or navy of the United States into contempt, scorn, contumely or disrepute." Chapter 75, § 1 (Comp. St. 1918, § 10212c).

It is contended in argument that, as the defendant was charged with uttering the words set out in the indictment, before the passage of this amendment, this is proof that, without it, the alleged utterances would not be penal. The amendment, however, does not relate to the offenses with which the defendant was charged, but to other and distinct offenses, which may be committed by utterances in regard to the form of government of the United States, the military or naval forces or the flag of the United States, or the uniform of the army or navy of the United States, or by language intended to bring the form of government of the United States, the military and naval forces, the flag, or the uniform, into contempt, scorn, contumely, or disrepute.

The system of government to which the alleged statements of the defendant related was plainly the system of raising an army, which

had been provided by the Conscription Act, passed by Congress, and the regulations promulgated by the President by authority of that act. The characterization of that act and these regulations as "a dainnable system of government," and of those who had been sentenced because of violation of these regulations as "victims" of such a system, for which those would be responsible who supported it, could be found by the jury, under the circumstances and the intent set out in the indictment, an attempt "to cause insubordination, disloyalty, mutiny or refusal of duty," not only on the part of those who had become, by registration and the regulations which had been prescribed under the Selective Draft Act, members of the military and naval forces of the United States, but also of those who under the act and regulations were required to perform any duty.

It is urged by counsel that, when the defendant said that the three parties named had been guilty of no crime, he had in mind that they had never been inducted into the military service and that they therefore could not possibly be guilty of desertion, or, in other words, that one cannot desert that which he never joined. But in the innuendo it is alleged that they had become members of the United States army by virtue of the provisions of the act of May 18, 1917, and had refused to serve as soldiers in the United States army, and were tried for desertion from that service before a general court-martial, and convicted, and afterwards sentenced, which sentence was duly approved by the proper military officers. The justification of their conduct, as stated by the plaintiff in error, was, not that they had been convicted of an offense which they had not committed, but that "they merely refused to become uniformed murderers." Certainly the use of such language could be interpreted as an attempt to encourage others to imitate their conduct, and an attempt to breed a spirit of rebellion and disobedience to military law, and also to the requirements of the Selective Draft Act, in the mind of one who had already been inducted into the military or naval forces, or of one who had not yet been inducted into the military or naval service, but was liable to be inducted into that service, by causing him to feel that the service into which he had been or might be called was not an honorable one, in defense of high ideals and the protection of the popular institutions to which he owed allegiance, but that when clothed in the uniform of his country he would be driven to commit acts of murder.

[3] The time and place when and where the alleged statements were made by the defendant, and all the surrounding circumstances, could be considered by the jury, and were properly for their consideration, in arriving at a conclusion in regard to whether their utterance constituted the attempt charged as well as the intent of the defendant in making them. The language attributed to the defendant does not call for any legal or expert knowledge in its interpretation, and the jury was as well able to judge of its adaptability to produce the results alleged as the court.

[4] Was the offense of obstructing the recruiting and enlistment service of the United States with willful intent sufficiently charged in these counts? The government had devised an elaborate scheme with

the regulations which had been promulgated for calling into the military service those between the ages of 21 and 30, inclusive.

We have only to consider the effect that might have been produced if any considerable number of men within the draft age had been induced to believe that the system which had been inaugurated was a "damnable" one, and that service in the naval or military forces might make them murderers, to reach the conclusion that the attempt to implant such a feeling in their minds would obstruct the recruiting and enlistment service of the United States. In order to obstruct it is not necessary that enlistment be actually prevented, or that any one be persuaded from complying with any of the provisions of the Conscription Act. The statute forbids the willful creation of any obstruction that makes the enforcement of the recruiting or enlistment laws more difficult, provided the intent to obstruct is present; and it is a sufficient allegation of the offense if language is alleged to have been willfully used by the defendant which was calculated to make enlistment or recruiting more difficult, provided the intent to effect this result is also alleged.

[5, 6] The second ground upon which the several counts in the indictment are alleged to be insufficient is that it does not appear in them that the persons whom the defendant is alleged to have addressed were in the military or naval forces of the United States. The act makes it an offense to willfully "attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States," or to "willfully obstruct the recruiting or enlistment service of the United States," and its language is broad enough to include statements calculated to produce these results, when made in the presence of persons who are not in the military or naval forces of the United States, provided they are willfully made and with the intent set out in the act. Whether the statements alleged to have been made constituted, under the circumstances, an attempt "to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States," or an obstruction of "the recruiting or enlistment service of the United States to the injury of the service or of the United States," were questions for the jury.

[7] It is also urged that the counts were insufficient, because it is not alleged that the utterances with which the defendant was charged "caused any injury to the military or naval service and to the United States."

In *United States v. Krafft*, 249 Fed. 919, 162 C. C. A. 117, L. R. A. 1918F, 402, in which a writ of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit was denied by the United States Supreme Court, without opinion (247 U. S. 520, 38 Sup. Ct. 582, 62 L. Ed. 1246), it was held that violation of this statute is not dependent upon any one actually being influenced by the language used, and "that all that need be shown is use of language which would be likely to cause mutiny, disloyalty, or insubordination, with intent so to do, and that both the speaking of the words and the intent of the speaker are for the jury."

We think that the allegations in the indictment were sufficient, and that they fully apprised the defendant of the nature of the offense with

which he was charged, and with sufficient definiteness so that, in case of conviction or acquittal he could thereafterwards plead the judgment in any other prosecution for the same offense.

[8] The court properly submitted the question of the likelihood of such utterances to produce insubordination, refusal of duty and causing an obstruction to the recruiting and enlistment service, and the intent with which they were made, to the jury with the following instructions:

"You must be satisfied, gentlemen, that the words are adapted to produce the effect alleged and were used with the intent to produce it. * * *

"It is not necessary that the United States shall prove an attempt to influence any particular person. It is enough for them to satisfy you that an attempt was made to cause persons who should thereafter, during the period of the war, become, by enlistment or by draft, members, as the statute says, in the military and naval forces, to refuse the duty imposed upon them, or to become insubordinate, disloyal, or mutinous."

With these instructions we fully agree, and they are in accord with the interpretation of the statute by other courts.

[9] During the trial the court admitted in evidence certain circulars containing advice not to register, and against conscription. These circulars were alleged to have been distributed by the plaintiff in error during the month of May, 1917. This was the contents of one handed by him to Thomas H. Gardiner:

"Friend of American Freedom:

"You are opposed to the conscription law. You do not want to see a military system forced upon the people of this country against their will. You do not want to be compelled to be a cog in a huge military machine. You do not want to see every young man in this country trained to the point where he has no will power of his own, but simply a tool to obey the orders of his so-called superior officers. The youth of America must not be used for cannon fodder.

"These are just a few of the conditions that will be imposed upon the people of this country. Can you imagine a democracy with conscription? This conscription law is just one more attempt of Wall Street to tighten its grip on the people. A strong military power now means despotism in the near future.

"You can do your share to stop this law from being put into effect if you will act now. This note to you is one of many thousands that are being sent out all over the country. You are one link in an endless chain, and we want you to work with us by following these suggestions.

"1st. Do not register; no matter what your age or physical condition. Registration is the first step toward conscription. You will not be alone in this; thousands are going to refuse. You will make one more in this huge protest against Prussianizing America.

"2d. Have copies of this circular written or printed and send them to every person you can think of.

"3d. Tell every person whom you can trust not to register.

"4th. Do it now as time is short; use the inclosed circulars where they will do the most good.

"Caution.—Do not sign your name to any communication you may send out on this matter, and remember that eternal vigilance is the price of liberty. Get busy."

The other circulars, inclosed in envelopes and sent to other parties through the mail, were of the same general tenor, and urged the persons to whom they were sent to "kill conscription by refusing to register." As these circulars were distributed before the enactment of the

Espionage Act of June 5, 1917, it is claimed that they were inadmissible. The court, however, correctly instructed the jury that they were received in evidence only for the purpose of showing the intent with which the defendant made the statements with which he was charged in the indictment under which he was being tried, and that, whether the defendant could be punished for distributing these circulars urging a violation of a law which had not yet been enacted was not a question before the jury and about which they "need not bother their heads." They were also told to consider that men change their minds, and that, "if there were previous to this period an intent, that there were many circumstances in this case referred to by counsel for the defendant which would have made it unlikely that he should then and there have spoken words with that intent." With this caution he submitted this evidence with the following instructions:

"It is for you to say, gentlemen, whether or not, in your opinion, they are sufficiently close in time and in connection with the meeting of January 13th to indicate any intent of that kind, or whether they aid you in any way in making up your mind as to the existence of the intent on that occasion."

It is also urged by counsel that these circulars were inadmissible for the further reason that the plaintiff in error had been indicted by a federal grand jury for the district of Rhode Island because of their distribution, and that said indictments were then pending against the plaintiff in error; but the circulars were competent to show the intent with which the utterances alleged in this indictment on which he was tried were uttered. They were admitted for this purpose only, and the rights of the defendant were carefully guarded by the instructions which were given in regard to them, and there was no error in their admission nor in that of prior statements in regard to conscription made by the defendant.

As the evidence has not been reported, we are unable to determine whether there was any variance between it and the allegations in the indictment or not; but, if there was such a variance, as stated by the defendant in his motion for an acquittal, it was immaterial.

Since the submission of this case the Supreme Court has, in *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. —, decided on March 3, 1919, *Debs v. United States*, 249 U. S. 211, 39 Sup. Ct. 252, 63 L. Ed. —; and *Frohwerk v. United States*, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. —, decided on March 10, 1919, given a like construction to the Espionage Act.

We regard those decisions as conclusive on the main questions in this case.

The judgment of the District Court is affirmed.

GOLDSTEIN v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1919. Rehearing Denied March 4, 1919.)

No. 2619.

1. CRIMINAL LAW ⇔304(6)—VENUE—EVIDENCE—JUDICIAL NOTICE.

Where there was evidence that an offense was committed in Rockford, Ill., the court could take judicial notice that it was within the Northern district, Western division, of Illinois, so that the venue was established.

2. INTOXICATING LIQUORS ⇔236(15)—SALE TO SOLDIER—EVIDENCE—UNIFORM.

In prosecution for unlawful sale of liquor to soldiers in uniform, testimony by the purchasers that they were in uniform, and reference to the purchasers as soldiers by other witnesses, who did not know them, is sufficient to warrant the jury in finding that they were in uniform when the purchases were made.

3. CRIMINAL LAW ⇔37—PROSECUTION—ESTOPPEL—PROCURING SALES.

The fact that soldiers who purchased liquor were military police, who made the purchases to procure evidence, does not estop the government from prosecuting the seller, where no deception was practiced upon him, though the soldiers claimed to want the liquor for sickness.

4. CRIMINAL LAW ⇔37—PROSECUTION—ESTOPPEL—DECOYS OR DETECTIVES.

The mere use by the government of decoys or detectives does not raise the issue of estoppel to prosecute, but there must be deception of such character as to make it unconscionable for the government to press its case.

In Error to the District Court of the United States for the Western Division of the Northern District of Illinois.

Abraham Goldstein was convicted of unlawfully selling intoxicating liquor to soldiers in uniform, and he brings error. Affirmed.

Writ of error to review sentence pronounced upon the defendant, who was found guilty upon three counts of an indictment charging him with unlawfully selling intoxicating liquor to soldiers in uniform.

H. J. Rosenberg, of Chicago, Ill., for plaintiff in error.

Charles F. Clyne and James R. Glass, both of Chicago, Ill., for the United States.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. [1] It is claimed by defendant that the government failed to prove venue. We reject this contention, because it was shown that the offense was committed in Rockford, and inferentially that the Rockford referred to was in the state of Illinois. The court properly took judicial notice of the fact that Rockford, Ill., is in the Northern district, western division, state of Illinois. Hoyt v. Russell, 117 U. S. 401, 6 Sup. Ct. 881, 29 L. Ed. 914.

[2] Defendant also complains because the testimony fails to show that the soldiers were, at the times when whisky was sold them, in the uniform of the military forces of the United States. The soldier W. stated that on February 5th, being one of the dates fixed in the

indictment when liquor was sold to him, he was in full military uniform. On February 8th, another date similarly fixed, he named two men and himself, and was then asked, "All soldiers?" and replied, "All soldiers, and in uniform."

There is other testimony showing that witnesses other than defendant observed "the soldier" about defendant's restaurant. These witnesses were not acquainted with W., but significantly referred to him as "that soldier." Defendant also referred to the soldier K., to whom whisky was delivered, as "the sergeant." Having no acquaintance with K., it would have been unusual for the defendant to call him sergeant, unless his uniform indicated his position. There was testimony in the record to the effect that these men were in the restaurant only when on duty, from all of which we conclude that the jury was justified in finding the soldiers were in uniform when they received the whisky.

[3] Defendant relies chiefly, however, upon the claim that the government is estopped from prosecuting this case, because its officers induced defendant to commit the crime, citing *Voves v. United States*, 249 Fed. 191, 161 C. C. A. 227. Passing for the moment the government's assertion that no claim of estoppel was ever made in the District Court, to a consideration of the evidence, we are persuaded that no jury question was presented upon this issue.

Three witnesses, soldiers at Camp Grant, testified for the government. They were members of the military police. Their duty was to secure evidence against persons selling whisky to soldiers. From their statement it appears the defendant sold whisky on the 3d, 5th, 8th and 18th of February to one or more of them; that they received this whisky in bottles that bore a grape juice label; that on the last occasion they asked for a larger bottle, adding that they "were putting on a little party." On this occasion the defendant left the restaurant, went to a nearby hotel, where he filled the larger bottle with whisky and brought it back, receiving \$1.50 therefor.

But if we are to determine whether any jury question in reference to this issue was presented by the evidence, we may, as we are doubtless required to do, ignore entirely this testimony and confine our attention to the defendant's story.

Defendant testified that one of the soldiers, W., came into the restaurant almost daily, spent considerable time visiting with defendant, and became friendly with him and his family, including the children. During one of these visits he asked for a drink of whisky and was refused. This request was repeated on various occasions, and was always refused. Finally, after defendant had just returned from a trip to Chicago, W. complained of being despondent. To quote defendant's exact language the soldier said:

"If you don't give me some, I don't know what I am going to do with myself."

"You won't find me alive."

"You have got to give me a little to quiet me down."

Whereupon defendant gave him whisky, and W. left a half dollar.

On one of the other occasions defendant stated that one of the soldiers complained of having a headache, while on the last occasion,

the day before the larger bottle was obtained, two of the soldiers brought a note from W., which told of W.'s confinement to his bed and his need of whisky. The next day, the 18th, three of the soldiers were present, and defendant admits that he was told that they desired a larger amount in order to "put on a party." For this larger bottle he received \$1.50.

This story discloses no deception on the part of the government officers. Defendant knew he was violating the statute—knew the parties to whom the liquor was sold were soldiers. No excuse whatever is offered for the third and fourth violations; for, if a soldier may absolve the vendor from liability by saying he has a headache, the statute is entirely useless.

[4] Quite different was the *Voves Case*. There the government not only used a decoy, but selected one whose appearance and dress was such as to deceive the defendant into believing the Indian was one of a Mexican crew working in the neighborhood. More, when the defendant made the announcement that the decoy was a Mexican, the government agents sat by and did not dispute him. In that case the defendant was lured into committing a crime by the government's deception. Upon such circumstances the prosecution was unwarranted.

But something more than the mere use of decoys or detectives by the government is necessary to raise an issue of estoppel. *Grimm v. United States*, 156 U. S. 604, 610, 15 Sup. Ct. 470, 39 L. Ed. 550; *Goode v. United States*, 159 U. S. 663, 669, 16 Sup. Ct. 136, 40 L. Ed. 297. There must be deception of such a character as to make it unconscionable for the government to press its case.

In the present action, defendant was suspected of selling liquor to soldiers. The suspicions appeared well founded. Members of the military police were asked to put the defendant to the test. He was tempted, not once by a single soldier, but on several occasions by one soldier, by two soldiers, and by three soldiers. The men dressed as soldiers, known to the defendant as such, asked for whisky, and it was sold them.

We find nothing that required the court to submit to the jury any issue of estoppel.

The judgment is affirmed.

HUSTIS v. HERBERT.

(Circuit Court of Appeals, First Circuit. April 5, 1919.)

No. 1364.

1. MASTER AND SERVANT ⇨278(18)—RAILROADS—PREMATURE STARTING OF TRAIN—NEGLIGENCE.

In action for death of employé at a station, evidence held insufficient to sustain finding that railroad was negligent in starting the train, although there was a bag on a truck to be loaded on the express car.

2. MASTER AND SERVANT ⇨240(1)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

A station employé of a railroad, who lost his footing and fell under the cars, was guilty of negligence in attempting to throw a bag of poultry in the open door of a baggage car traveling at the rate of 7 or 8 miles an hour.

In Error to the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Action by H. W. Herbert, as administrator of the goods and estate of John R. Little, against James H. Hustis, as receiver of the Boston & Maine Railroad. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Austin M. Pinkham, of Boston, Mass., 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. This is a writ of error from a judgment of the District Court of the United States for the District of New Hampshire, in favor of H. W. Herbert, as administrator of the goods and estate of John R. Little, against James H. Hustis, as receiver of the Boston & Maine Railroad.

Little, the deceased, was so severely injured on July 28, 1917, at the station of the railroad company at the village of Pike in the state of New Hampshire, that he died in consequence of his injuries. There was no question about the nature of his employment, although there was some doubt whether he was employed by the railroad company or by the American Express Company. He was employed to do regular station work, including handling baggage, freight, and express, and was paid both by the railroad and by the express company.

The station agent of the railroad company at this station was E. Bertram Pike, who was also employed as agent of the express company. The work at the station was done by a Mr. Aldrich and the deceased, who were paid by Mr. Pike from the revenue of his office. In addition to his duties in handling express, baggage, and freight, the deceased also acted as a telegraph operator for the railroad at the station.

In the view that we have taken of the case it is immaterial whether Little was employed by the railroad company or by the express company.

There was very little work to be done at the station except during the summer months, and on the day when he received his injuries, which was Sunday, he and Aldrich were present at the station awaiting the arrival of the paper train, which arrived about 9:10 a. m. There was a trunk and a bag of poultry upon a truck on the platform in front of the station. The trunk was to be placed in the baggage car and the poultry in the express car. The paper train was made up of an engine, mail car, express car, baggage car, smoker, and one coach, in the order named. Upon the arrival of the train Aldrich pushed the truck up to the rear door of the baggage car, while Little went to the forward door of the express car to receive the express which was to be unloaded at the station. Aldrich got upon the truck and put the trunk into the baggage car, and after he had done this he jumped from the truck and started to draw it up toward the express car. The forward express car door was about 60 or 70 feet from the rear door of the baggage car, into which Aldrich had put the trunk. As Aldrich started forward with the truck on which was the bag of poultry, weighing about 70 pounds, he shouted to Little that he had a bag of poultry to go, and the latter came toward the truck and seized the bag. Aldrich was not certain whether the train had started before Little seized the bag or not; but about that time the train did start, and Aldrich took hold of the bag with Little, and both started toward the open door of the express car, but, finding they could not reach it, the express man told them to put the bag into the rear door of the express car. This they were unable to do, as that door was closed. They then waited for the baggage car to come along. The train was moving upon a down grade and rapidly gained headway, so that its speed was at the rate of 7 or 8 miles an hour when the rear door of the baggage car was opposite them. They then attempted to throw the bag of poultry into this door, but in some way Little lost his footing and fell under the cars and was run over, receiving injuries resulting in his death. Aldrich was unable to testify just how the accident happened; whether Little was thrown up against the car as they attempted to throw the bag into the baggage car, or whether he slipped and fell. No testimony was offered by the railroad company, and at the close of all the testimony the defendant moved that the court direct the jury to return a verdict in its favor, which was denied, and this is assigned as error.

We have carefully examined the testimony, fully realizing that, if there was any evidence or inference which might reasonably be drawn from it to sustain the verdict of the jury, it must be allowed to stand.

The plaintiff in his writ alleged that the defendant—

“carelessly and negligently started its train and baggage and express cars without notice or warning to said plaintiff's intestate before he had finished transferring express from said truck to said express car, thus making it necessary for said plaintiff's intestate to finish loading said car while said train was moving.”

There was no testimony to sustain this allegation; but, on the contrary, it was undisputed that the deceased, Little, had taken from the forward door of the express car all the express that was to be delivered at that station; that he had no truck with him at the express door and no express upon the platform to put aboard the express car; that he had finished his work at the express door, and Aldrich had taken the trunk from the truck at the rear door of the baggage car and placed it in that car, and then had started with the truck, with the bag of poultry upon it, toward the express car, and notified the deceased that the bag was to go by express. At about this time the train started. There was no evidence that a signal was given by anybody for its starting, nor any evidence that those in charge of the train had been notified that the bag of poultry was to go by express.

[1] The fact that the bag was upon the truck in front of the station when the train pulled in would not necessarily impart any information or authorize any inference that it was to be put aboard the express car; as it was on the truck with the trunk, which was rolled forward to the baggage car, it might well have been assumed that both the trunk and the bag were baggage; and we do not think that any reasonable inference could be drawn by the jury from the situation that those in charge of the operation of the train knew or had any reasonable ground to believe that the bag was to be loaded into the express car. We think, therefore, there was no evidence to sustain the allegation that the defendant was guilty of negligence in starting the train when it did.

The plaintiff relies upon *Ayers v. Boston & Maine R. R.*, 68 N. H. 208, 39 Atl. 1021; but in that case the plaintiff, assisted by others and the brakeman on the train, was loading cans of milk, and, when all but five cans had been loaded, the train was started without any signal from the brakeman and without any notice or warning to the plaintiff. The plaintiff then hurriedly took up three of the cans, walked along the platform opposite the car, and, in attempting to put them into it, was injured. The process of loading was interrupted by the sudden starting of the train, without any warning to the plaintiff, and an emergency was created which justified hurried action by the plaintiff, and there was evidence of negligence in starting the train while the loading of the cans of milk was in process.

In order to recover in the case under consideration, it was necessary to show in the first instance that there was negligence on the part of the railroad. As we do not think this was shown, there was error in denying the motion for a directed verdict.

[2] We think, also, if there had been any evidence which would justify a finding of negligence in the starting of the train, that, under the circumstances disclosed by the evidence, the negligence of the defendant had no causal connection with the injuries received by the deceased, but that they were sustained by him because of his own negligence. He was a man of mature years, and had been employed for three summers, at least, about that station, doing the work of loading and unloading baggage and express.

After it was discovered that the rear door of the express car was

closed, he and Mr. Aldrich waited upon the platform until the rear door of the baggage car was opposite them. Deceased then had a full view of the situation, and the danger must have been obvious to him. He undertook to do a dangerous thing, with a full realization of the whole situation, when he had time for reflection, and the injuries he received were solely the result of his own negligence.

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

In re LILIENTHAL,
Appeal and Petition of BOAS.

(Circuit Court of Appeals, Ninth Circuit. April 7, 1919.)

No. 3225.

1. BANKRUPTCY ⚡397—ATTACHMENT LIENS—EFFECT OF CONFIRMATION OF COMPOSITION.

In view of Bankruptcy Act July 1, 1898, §§ 67c, 67f, 70f (Comp. St. §§ 9651, 9654), confirmation of an offer of composition by bankrupt debtor prior to any adjudication in bankruptcy dissolved liens of attachment placed within four months of the commencement of bankruptcy proceedings, under section 14c (section 9598).

2. BANKRUPTCY ⚡391(3)—RESTRAINING PROCEEDINGS IN STATE COURTS.

The District Court in bankruptcy has jurisdiction to issue an order staying, until adjudication or until dismissal of the petition for adjudication of bankruptcy, proceedings in actions in state courts in which attachment had been placed upon the bankrupt's property within four months prior to commencement of bankruptcy proceedings.

Appeal from, and Petition for Revision of Proceedings in, District Court of the United States for the Southern Division of the Northern District of California; Maurice T. Dooling, Judge.

In the matter of E. R. Lilienthal, bankrupt. From an order of the District Court, denying a motion of Nat Boas to vacate an order staying further proceedings in certain suits in attachment which had been instituted by him in the state court in California, he appeals and petitions to revise. Affirmed.

Appellant petitioner asks reversal of an order of the District Court denying a motion to vacate an order staying further proceedings in certain suits in attachment which had been instituted by him in the state court in California. Appellant is a creditor of the bankrupt, E. R. Lilienthal, and sets forth:

That on September 27, 1917, a petition for adjudication in involuntary bankruptcy was filed against Lilienthal; that on October 13, 1917, petitioner filed his answer to the petition and denied the commission of any act of bankruptcy as alleged; that the issue raised by such petition and answer has never been brought to hearing or decision, and that no adjudication in bankruptcy has been had; that on December 26, 1917, the bankrupt filed a petition for composition with his creditors, and that after proceedings were regularly had thereon, and about June, 1918, the court made its order of confirmation of the offer presented, and that said order of confirmation has never been vacated; that petitioner has not accepted the offer, and has filed no proof of

claim; that petitioner holds certain security for his claim, in that on August 31, 1917, as plaintiff, he commenced two suits against Lillienthal, now bankrupt, and others, in the state courts, to recover judgments for the amounts due to him, and in each suit caused writs of attachment to issue and levies to be made upon all of the money and effects belonging to Lillienthal and levied upon certain realty; that neither of said actions has been tried; and that on October 24, 1917, the District Court ordered a stay of further proceedings in the actions in the state court "until an adjudication of Lillienthal as a bankrupt, or until the dismissal of the petition for adjudication of bankruptcy herein."

Milton Newmark, of San Francisco, Cal., for appellant and petitioner.

Lillienthal, McKinstry & Raymond, of San Francisco, Cal. (Thomas, Beedy & Lanagan and Charles W. Slack, all of San Francisco, Cal., of counsel), for appellee and respondent.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). Appellant contends that, having placed the attachments within four months of the commencement of bankruptcy proceedings, and no trial upon the issue of bankruptcy having been had, and no adjudication in bankruptcy having been made, the liens of attachment remain valid, and that therefore he is entitled to proceed in the state court to the enforcement thereof; while appellee takes the position that, under the Bankruptcy Act and the amendment, the court having confirmed an offer of composition by the bankrupt debtor, the liens of attachment were discharged.

A composition being one of the methods of procedure open to a bankrupt, he may tender certain sums to his creditors. The sums tendered are regarded as the equivalent of the assets which would be obtained by regularly proceeding according to the more usual bankruptcy methods. Creditors may accept or reject the offer. If they accept, the matter is submitted to the court, and after inquiry into the regularity of the proceedings and whether they are for the best interests of creditors, the effect of the proposed offer upon creditors who have not assented to the offer, and into the good faith of the offer and acceptance, the court may confirm the composition. If it so orders, the status becomes fixed by section 14c of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 550 (Comp. St. § 9598), which provides:

"The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge."

Prior to the amendment of 1910 (Act June 25, 1910, c. 412, 36 Stat. 838) it was held that a bankrupt before adjudication could not effect a composition with his creditors. But by the act of 1910 he—

"may offer, either before or after adjudication, terms of composition to his creditors. * * * In compositions before adjudication, the bankrupt shall file the required schedules, and thereupon the court shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of estates, at which meeting the judge or referee shall

preside, and action upon the petition for adjudication shall be delayed until it shall be determined whether such composition shall be confirmed." Remington on Bankruptcy, §§ 2354¼, 2354½.

Inasmuch as a confirmation before as well as after adjudication discharges the bankrupt from his debts, other than those not affected by a discharge, it is but reasonable to hold that all liens incident to the debts from which the bankrupt is discharged are also discharged. This view is strengthened by considering section 70f of the Bankruptcy Act (Comp. St. § 9654), which provides that—

"Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revert in him."

It would not be consistent with the right to be reinvested with property that the amount of attachment liens should be considered and provided for in the orders of the court with respect to the composition. It is of common experience that often bankruptcy proceedings are brought because a creditor has sued and levied attachment in the state court. Under such conditions, where voluntary bankruptcy proceedings are begun, if it were the duty of the United States court sitting in bankruptcy, when it hears evidence upon an offer of composition, to deduct the amount of the liens in attachment from the gross value of the assets of the bankrupt, the order of confirmation would not operate to discharge the bankrupt from all debts other than those agreed to be paid by the terms of the composition and those not affected by the discharge. But that the effect of a composition is to restore the estate to the bankrupt free from all his debts provable and dischargeable in bankruptcy, and to distribute among his creditors the amount the bankrupt is required to pay, is well established by the decisions of the courts. *Sturges v. Crowninshield*, 4 Wheat. 122, 194, 4 L. Ed. 529; *Harrison v. Sterry*, 5 Cranch, 289, 301, 3 L. Ed. 104; *Cumberland Glass Co. v. De Witt*, 237 U. S. 447, 35 Sup. Ct. 636, 59 L. Ed. 1042; 7 *Corpus Juris*, p. 346. See, also, *Brandenburg on Bankruptcy*, § 1233; *Black on Bankruptcy*, § 660. In *Miller v. MacKenzie et al.*, 13 Nat. B. R. 496, 43 Md. 404, 20 Am. Rep. 111, the Court of Appeals of Maryland held that the operation of an assignment in bankruptcy in reference to an attachment was to arrest all proceedings under it—to dissolve it. In *Smith Stebbins & Co. v. B. Engle et al.*, 4 N. B. R. 481, 44 Iowa, 265, a case very close to the one under consideration, the Supreme Court of Iowa held that the debt of the attaching creditors was extinguished by the composition under the Bankruptcy Act, and that the attachment "of course falls to the ground." *Corner v. Mallory*, 31 Md. 468.

[1, 2] It being indisputable that under section 67, subdivisions (c) and (f), of the act (Comp. St. § 9651), where there has been adjudication in bankruptcy, a lien of attachment falls, we cannot see that a different result should follow where there may not have been such an adjudication. The statute which gives the right to offer composition has no words which abridge the effect of an order upon statutory attachment liens against the property of the debtor, although he may not have been adjudged a bankrupt, and it is our opinion that, the indebtedness having been discharged by the composition, the attachment liens were dissolved, and that the District Court in bankruptcy has jurisdic-

tion to issue the order made. *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; *Virginia Iron Co. v. Olcott*, 197 Fed. 730, 117 C. C. A. 124.

Affirmed.

LOUISIANA AGRICULTURAL CORPORATION v. PELICAN OIL
REFINING CO., Inc.*

(Circuit Court of Appeals, Fifth Circuit. April 5, 1919.)

No. 3270.

1. EQUITY ⇨66—MAXIMS—SEEKING AND DOING EQUITY.

One is not entitled to the aid of a court of equity for the enforcement of any right he may have, unless he is ready and willing to do equity.

2. INJUNCTION ⇨108—CONDITION PRECEDENT—PAYMENT OF DEBT TO DEFENDANT.

The owner of a capsized vessel, which has gone aground, is not entitled to an injunction to restrain a creditor having a lien on it from saving it, where he has not, by pleading or otherwise, offered to pay the debt owing to the creditor, or to do equity, even though the creditor has no legal right to save the vessel.

3. APPEAL AND ERROR ⇨843(2)—MATTERS REVIEWABLE—MOOT QUESTIONS.

On appeal from an order granting an injunction, the question of the propriety of the issuance of an injunction will not be reviewed, where the injunction is no longer effective.

4. TRIAL ⇨11(3)—TRANSFER OF CAUSE.

In a suit for injunction, where plaintiff was denied relief on the ground that he refused to do equity, court should not have dismissed the bill, under equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv), but should have transferred the cause to the law side of the court, where a state of facts was alleged which, if proved and not rebutted, would entitle the plaintiff to some relief in an action at law.

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

Suit by the Louisiana Agricultural Corporation against the Pelican Oil Refining Company, Incorporated. From a decree for defendant, plaintiff appeals. Affirmed in part, and reversed and remanded in part, with directions.

Claude L. Johnson and T. M. Miller, both of New Orleans, La., for appellant.

M. M. Boatner and Geo. H. Terriberry, both of New Orleans, La., for appellee.

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

WALKER, Circuit Judge. This is an appeal from a decree which was adverse to the appellant, Louisiana Agricultural Corporation, the plaintiff in a bill in equity against the appellee, Pelican Oil Refining Company, praying that the latter be enjoined from trespassing upon or questioning or slandering appellant's alleged title and possession of the steam yacht *Radha*, and for general relief. The averments of the bill showed that the claim of the appellant to the vessel mentioned was

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*Certiorari denied 249 U. S. —, 39 Sup. Ct. 494, 63 L. Ed. —.

based upon an alleged sale to it by Charles Collins Buck, on or about June 21, 1913, of all his rights, title, and interest therein. The bill contained averments to the effect that prior to the just-mentioned sale said vessel was bought by one Stern at a judicial sale under a decree made in a suit to which said Buck was a party, and that Stern executed a conveyance, in blank, of the vessel, which was delivered to Buck's attorney, and that thereupon Buck re-entered into possession and ownership of the vessel. The averments as to Buck acquiring ownership and possession of the vessel were duly put in issue. The evidence adduced showed the following state of facts:

Stern, the purchaser of the vessel at judicial sale, agreed to release or sell it, not to Buck alone, but to Buck and two creditors of his, who held mortgage liens on the vessel, for considerations which included the payment of \$400 to Stern. Buck being unable to pay that amount, and the mortgage creditors being unwilling to pay it, with their consent and approval, an arrangement was made with the Metropolitan Bank to pay Stern the \$400 upon the delivery to it of a conveyance of the vessel by Stern; there being a blank left in that instrument for the insertion of the name of a grantee. That arrangement was carried out. After that occurred, the vessel capsized in the Mississippi river near its bank in the upper part of the city of New Orleans. From that time until the time of the bringing of this suit it remained there, aground and partly under water. Buck refused to pay the amount owing to the Metropolitan Bank, though often requested to do so. He would not, individually, or as the managing officer of the appellant, agree to a sale of the vessel, though, as stated by a witness for the appellant, it was "going to wreck and ruin." In this situation the Metropolitan Bank, in July, 1917, entered into an agreement with the appellee, by which the latter agreed to attempt to save the vessel at its own expense, and, if successful, was to have an option for 30 days after the vessel was floated to buy it for \$3,000. Under this arrangement, the appellant took charge of the vessel; no one else then being in possession of it. Up to that time it had no notice that the appellant had or asserted any claim to it.

[1, 2] An injunction was prayed for by the appellant as a means of preventing the carrying out by the appellee of its undertaking to save the vessel. The appellant's prayer for an injunction was denied, and its bill was dismissed without prejudice to any rights it may have in and to the said yacht Radha. It is plain that the transaction with the Metropolitan Bank was intended to secure it for the amount advanced by it. There was evidence indicating that debts other than that one were intended to be secured. By that transaction the bank was enabled to vest title to the vessel in itself, or another, by inserting the name of the grantee in the blank left for that purpose in the conveyance made by Stern. Buck being a party to that transaction, if he reacquired possession, it may be inferred he did so for the bank, or that he held possession subject to its rights. By the appellant's purchase from Buck, it acquired only such rights as he had. It is not entitled to the aid of a court of equity for the enforcement of any right it may have, unless it is ready and willing to do equity. It has not, by pleading or

otherwise, offered to pay the debt owing to the bank. Whether the bank did or did not have the right to salve the vessel itself, or to get another to do so, a court of equity is not called on to help the appellant to prevent this being done, so long as the appellant does not evince a willingness to do equity in the premises. Whether the action of the court in denying the injunction prayed for by the appellant is or is not sustainable on other grounds, it is sustainable on the ground that the appellant was seeking the aid of a court of equity and did not show its readiness or willingness to do equity. The appellant cannot refrain from either rescuing the vessel or paying what is due on it, and, at the same time, be entitled to the aid of a court of equity to prevent the carrying out of an attempt to save the vessel to which a creditor having a claim upon it is a party.

[3] On a cross-bill filed by the appellee, the court ordered the issuance of an injunction restraining the appellant from interfering with the appellee, its agents or servants, its contractors or subcontractors, in the work of raising and salving the said yacht. On the hearing in this court, it was stated, and not denied, that since the decree appealed from was rendered the appellee had raised, salved, and repaired or reconstructed the vessel, and that it is now in use in commerce. This being true, the injunction issued on the cross-bill no longer is effective, and the question of the propriety of its issue and maintenance has become a moot one. So far as that action of the court is concerned, there remains nothing on which the decision of this court can operate, and it need not decide a question that has become purely moot. *Wingert v. First National Bank*, 223 U. S. 670, 32 Sup. Ct. 391, 56 L. Ed. 605.

[4] The record shows that the appellant alleged a state of facts which, if proved, and not rebutted, entitled it to some relief in an action at law complaining of what the appellee did with the vessel under its contract with the Metropolitan Bank. The situation was such a one as to make equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv) applicable. Instead of dismissing appellant's bill, though this was done without prejudice, the court should have ordered that the cause be transferred to the law side, to be there proceeded with, as provided in the rule mentioned.

It follows from the above-stated conclusions that the decree appealed from should be affirmed, except the part of it which ordered the dismissal of the appellant's bill without prejudice, and that that part of the decree should be reversed, and that the cause should be remanded, with direction to transfer it to the law side of the court; and it is so ordered, each of the parties to be taxed with half of the costs.

KIRKWOOD v. UNITED STATES.

DENISON v. SAME.

(Circuit Court of Appeals, Eighth Circuit. March 26, 1919. Rehearing Denied June 2, 1919.)

Nos. 5137, 5138.

BRIBERY \Leftrightarrow 11—CONSPIRACY \Leftrightarrow 47—BRIBERY OF UNITED STATES OFFICER—SUFFICIENCY OF EVIDENCE.

Evidence held insufficient to sustain a conviction of one of two defendants jointly indicted for bribery of a post office clerk and of conspiracy to commit such offense, but sufficient to sustain the conviction of his codefendant of the former offense.

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

Criminal prosecution by the United States against Fred Kirkwood and Ernest B. Denison. Judgment of conviction, and defendants separately bring error. Reversed as to defendant Denison, and affirmed as to defendant Kirkwood.

Thad B. Landon, of Kansas City, Mo. (Sherman & Landon, of Kansas City, Mo., and George Link, Jr., of New York City, on the brief), for plaintiff in error Kirkwood.

Thomas Hackney, of Kansas City, Mo., and Rome G. Brown, of Minneapolis, Minn. (Edward J. White, of St. Louis, Mo., and Martin Lyons, of Kansas City, Mo., on the brief), for plaintiff in error Denison.

Elmer B. Silvers, Asst. U. S. Atty., of Kansas City, Mo. (Francis M. Wilson, U. S. Atty., and William G. Lynch, Asst. U. S. Atty., both of Kansas City, Mo., on the brief), for the United States.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

HOOK, Circuit Judge. Fred Kirkwood and Ernest B. Denison were jointly indicted and convicted of promising money to a clerk in a post office to induce him unlawfully to open certain letters passing through the office, and also of conspiring to commit that offense, contrary to sections 37 and 39 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. §§ 10201, 10203]). At the conclusion of the evidence each of them asked a directed verdict of not guilty, which the trial court denied. They prosecuted separate writs of error from this court.

Briefly stated, the facts were these: Oslin M. Jackson and others were indicted in New York for swindling operations. Jackson fled and became a fugitive from justice. The defendant Denison was one of the prosecuting witnesses, and having lost heavily through Jackson's acts interested himself in having him found and brought to justice. The postal authorities in New York and also the state prosecuting officers were or had been making investigations. Denison employed a detective agency in New York to locate Jackson. The

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defendant Kirkwood was in the service of that agency. It was believed that relatives of Jackson were corresponding with him under the cover of a brother-in-law who lived at Harrisonville, Missouri, and Kirkwood was furnished with descriptive information and specimens of Jackson's handwriting, and sent there by the agency to investigate. Kirkwood made acquaintance with a post office clerk at Harrisonville and paid him to make tracings of addresses on certain letters passing through the office, so that they could be compared with known writings of Jackson. It was claimed by the government that, this method proving fruitless, Kirkwood, at the instance or with the co-operation of Denison, induced the clerk by a promise of money to open letters in search of the desired information. This was the foundation of the indictment. Either by opening letters or by information obtained in New York and elsewhere, it does not matter which, Jackson was located in Oregon and afterwards arrested.

We think that in the conviction of Denison there was a clear miscarriage of justice; that, considering the character and source of the evidence against him and its value in relation to all that was received at the trial, it should reasonably be said that there was no substantial proof of his guilt. Denison employed and paid the agency for which Kirkwood worked, but there was no evidence whatever, except as presently mentioned, that he otherwise employed Kirkwood, or paid him for his services or expenses, nor evidence that he directed him in his dealings with the post office clerk at Harrisonville, or authorized or knew of any unlawful tampering with the mails. All of the direct evidence upon these matters was that he did not, in any way, have anything to do with the opening of the letters. Denison, who lived in New York, was not at Harrisonville. He dealt with the detective agency in the former city to aid the public authorities in finding Jackson, as under the circumstances he had a lawful right to do. The sole adverse proof was the testimony of a detective of Chicago and his stenographer that in a subsequent conversation in that city Denison admitted connection with the opening of the letters. The stenographer fully discredited herself, and we put her testimony aside without further mention. The credibility of the Chicago detective was impeached by evidence of former officials in Oregon that he gave false testimony under oath and made false statements there, and also by witnesses from Chicago of apparently respectable stations in life and callings that his reputation for truth and veracity where he lived was bad. A thorough examination of the proceedings at the trial has convinced us that the conviction of Denison was due in no small measure to the latitude allowed counsel for the government in the examination of witnesses and the emphasis put upon relatively unimportant matters. Upon the assumption that it was proper to show Denison's animus against Jackson, counsel were allowed to go so far afield, that the specific charges in the indictment seemed at times to be out of view. There was a disproportion of collateral matters, the significance of which was unduly magnified.

With the failure of the case against Denison the charge against Kirkwood that he conspired with him also fails. There is left, however, the charge that Kirkwood induced the post office clerk to open

letters by a promise of a money reward. The sentence of Kirkwood was not more than could have been imposed for that single offense. The proof upon this branch of the case is within narrow compass. It consists almost entirely of the testimony of the clerk and Kirkwood, and while the former was uncertain and indefinite in some of his statements we cannot say there was not substantial evidence supporting the verdict. Kirkwood may have suffered somewhat from the effort to convict Denison, but that cannot be entirely avoided in cases of joint indictment, especially when conspiracy is charged. We do not find that in this part of the case error was committed in the admission of evidence or in the instructions as set forth in the assignments of error.

The sentence of Kirkwood is affirmed. The sentence of Denison is reversed.

PARKERSON v. BORST.

(Circuit Court of Appeals, Fifth Circuit. April 5, 1919.)

No. 3371.

1. COSTS ⇔70—DETERMINATION AS TO ITEMS.

Until final judgment, incidence of costs is not determinable, and any attempt to adjudicate correctness of items at the instance of one party might be futile, and hence the court need not adjudicate the correctness of items prior to final judgment.

2. COSTS ⇔2—TAXABLE COSTS.

Taxable costs are made so either by statute, rule of court, or order of court in a specific case, or by established usage, equivalent of a rule.

3. COSTS ⇔251—PREMIUMS PAID FOR APPEAL BOND.

There being no statute, rule of court, order of court, or established usage requiring it, a District Judge did not err in disallowing a premium paid for an appeal bond to be taxed as costs.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by Louise Stone Borst against Mrs. Camilla Putnam Parkerson, testamentary executrix of the estate of W. S. Parkerson, deceased. From an order disallowing certain items in taxation of costs, the defendant brings error. Affirmed.

Edwin T. Merrick, of New Orleans, La. (Merrick, Gensler & Schwarz, of New Orleans, La., on the brief), for plaintiff in error.

E. J. Bowers, of Gulfport, Miss., and D. B. H. Chaffe, of New Orleans, La., for defendant in error.

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

GRUBB, District Judge. Upon a former appeal this case was reversed and remanded to the District Court, to be there transferred from the equity to the law side of the docket for a retrial by a jury. Parkerson v. Borst, 251 Fed. 242, — C. C. A. —. The plaintiff in error was the appellant and the defendant in error the appellee on the

former appeal. Since the remand of the case to the District Court there has been no retrial of the case, and no final judgment has been rendered.

[1] The case comes again to this court for the correction of supposed errors in the taxation of the costs of appeal, which were ordered by this court, on the former appeal, to be paid by the appellee. Two items of costs are in question: First, an item of \$100, paid by appellant for a premium on the appeal bond upon the former appeal; second, an item of \$104.25, paid for the services of a stenographer upon the hearing in the District Court on the motion to dismiss and upon the merits. The assignments of error may present other items, but the two mentioned were the only ones insisted upon either in the brief or in oral argument of the plaintiff in error. The very sufficient reason for not considering any of the items, other than the first-mentioned, is that the record shows that no final judgment has been rendered in the cause, and any assessment of costs of the District Court, save those of the former appeal, is premature. Until final judgment, the incidence of the costs is not determinable, and any attempt to adjudicate the correctness of the items, at the instance of one party, might be futile, since the moving party might not be adjudged, by the final judgment, to pay the costs, and hence would not be interested in their amount or legality. This is the view the District Judge took, and declined to render a judgment final in form for this reason. It will be time enough to hear plaintiff in error's complaint as to this item when, if at all, there is a final judgment in the main cause against her which adjudges her liable for the costs. This applies to all items except the premium paid for the appeal bond, which was disallowed by the District Judge.

[2, 3] Plaintiff in error contends that the amount paid for the premium for the appeal bond on the former appeal should be taxed as a part of the costs of appeal, which were adjudged against appellee on the former appeal. There is no statute or rule of court touching the question. There was no order of the District Court directing the making of a surety bond, or, indeed, any bond. The District Court merely fixed the amount of the appeal bond, which was to operate as a supersedeas, leaving it to the determination of the appellant as to whether any and as to what character of bond she would give. Decisions in admiralty cases are therefore not in point. Taxable costs are made so either by statute, rule of court, or order of court in a specific case, or by established usage, the equivalent of a rule. No one of these methods is relied upon as authority for the taxation of the item contended for in this case. The plaintiff in error contends that the modern method is to give surety bonds, and that the expense of procuring them is a legitimate disbursement of the appellant. The propriety of a rule of court requiring that such items be taxed as part of the costs may be conceded, without affecting this case, in which there was no such rule.

There have been numerous decisions of the District Courts and Courts of Appeals upon this question, and they are not all in harmony. The Supreme Court has not decided the question. The Court of Ap-

peals of the Sixth Circuit, in the case of Lee Injector Mfg. Co. v. Penberthy Injector Co., 109 Fed. 964, 48 C. C. A. 760, held that there was no authority to tax a premium on an appeal bond as part of the taxable costs. In the case of The Gov. Ames, 187 Fed. 41, 48, 109 C. C. A. 94, the Court of Appeals of the First Circuit held that, in the absence of any statute, rule, or order of court, or usage, the amount paid a surety company for executing a stipulation for the discharge of a vessel from a libel was not part of taxable costs. The court in this case distinguished between cases where the security was required to be given by order of court and those where its giving was optional. It distinguished, for that reason, the case of Jacobsen v. Lewis Klondike Expedition Co., 112 Fed. 73, 50 C. C. A. 121 (Court of Appeals of the Ninth Circuit), and The Volund, 181 Fed. 643, 667, 104 C. C. A. 373 (Court of Appeals of the Second Circuit). In the case of The Texas, 226 Fed. 897, 905, 141 C. C. A. 501, 509, the Court of Appeals of the First Circuit said:

"The next question is whether the District Court was correct in refusing to tax as part of the costs the premiums that were paid for the entry of corporate security. The precise point is not whether, in our opinion, modern conditions have made it desirable that such premiums should be taxed as costs, but whether any statute, or any rule or equivalent custom, in the district of Delaware, required or justified the taxation. The clerk rejected the items on the following ground: 'I do not know of any statute that makes such items taxable as disbursements or otherwise, and there is no rule of court or established practice in this district permitting a recovery of such items. I am aware of no decision of the Circuit Court of Appeals for the Third Circuit or of the District Court for this district on this subject.' And the District Court affirmed the clerk's decision. In our opinion the clerk was right in saying that no statute makes such an item taxable. The subject has been sufficiently discussed in the following cases [citing cases]. And we shall only add our approval of the argument that a rule of court, or a practice equivalent thereto, is needed to justify the taxation. But we may also say that we think such a rule or practice has become so desirable that we feel confident the court below will take an early opportunity to conform its procedure in this respect to the custom prevailing in other districts."

The case of Edison v. American Mutoscope Co., 117 Fed. 192, a Circuit Court case, apparently supports the contrary rule. The Circuit Judge, however, bases his opinion upon the fact that the disbursement was one rendered necessary by a rule of practice, and the rule of practice is not set out in the opinion. In this case, the disbursement was not made as a result of any rule of practice, and there is no statute, rule or order or usage, by which it is made a part of the taxable costs of the case. The District Judge properly disallowed the item. The judgment is affirmed and the plaintiff in error taxed with the costs of appeal.

FIRST TRUST CO. v. ILLINOIS CENT. R. CO. SAME v. CHICAGO & N. W. RY. CO. SAME v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. March 3, 1919.)

Nos. 5062-5064.

1. CORPORATIONS Ⓒ—376—POWERS—PURCHASE OF OWN STOCK.

In the absence of statutory or charter restriction, a corporation has inherent power to purchase its own stock.

2. CORPORATIONS Ⓒ—542(1)—PURCHASE OF OWN STOCK—VALIDITY.

Where a purchase of its own stock by a corporation is made when it is insolvent, or if such transaction renders it insolvent, such purchase is voidable as to existing creditors, and as to subsequent creditors who became such without notice and in reliance on its former solvency, and if notes or bonds are given in exchange for the stock, they will be subordinate to the claims of such creditors, but not to claims of subsequent creditors with notice.

Appeal from the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

Suit in equity by the First Trust Company, as trustee, against the Crooked Creek Railroad & Coal Company, in which the Illinois Central Railroad Company, the Chicago & Northwestern Railway Company, and the Northern Pacific Railway Company separately intervened. From the decree for interveners, complainant appealed. Reversed in part (252 Fed. 965, — C. C. A. —), and interveners petition for rehearing. Denied.

F. H. Helsell and Charles A. Helsell, both of Ft. Dodge, Iowa, for petitioner Illinois Cent. R. Co.

James C. Davis, of Chicago, Ill., for other petitioners.

PER CURIAM. The three grounds upon which the appellees in their petition for rehearing insist that their claims are entitled to be paid in priority to the mortgage bonds are:

(1) That the bonds were issued in payment for stock of the corporation at a time when it was insolvent, or at least that the transaction rendered it insolvent, and that for this reason the bonds are to be subordinated to the claims of all creditors, both existing and subsequent.

(2) That the bondholders were in control of the corporation when the claims of the interveners originated, and for that reason the claims should be paid before the bonds.

(3) That there was a diversion of the corporate income, which should have been devoted to the payment of interveners' claims.

We do not think it necessary, as to the second and third grounds, to say anything in addition to what was said in the opinion filed. As to the first ground, in view of a seeming change on the part of counsel for appellees from their former position, that the mortgage in question was ultra vires and absolutely void, to their present position, that the mortgage and bonds, though valid, are subordinate to the claims of creditors, both existing and subsequent, we may add to what was said in the opinion the following:

[1] It is well settled by the decisions of this court that, in the absence of statutory or charter restriction, a corporation has inherent power to purchase its own stock. *Burnes v. Burnes*, 137 Fed. 781, 70 C. C. A. 357; *Sanford v. Bank*, 238 Fed. 298, 151 C. C. A. 314. It is not claimed that there is any prohibition in the charter of the Crooked Creek Railroad & Coal Company, and under the decisions of the state of Iowa it would seem clear that there is nothing in the statutes of that state which prohibits such a purchase. *Rollins v. Shaver*; 80 Iowa, 380, 45 N. W. 1037, 20 Am. St. Rep. 427; *Tierney v. Butler*, 144 Iowa, 553, 123 N. W. 213.

[2] It is equally well settled that, where the purchase of its own stock by the corporation is made when the company is insolvent, or if such transaction renders it insolvent, such sale is voidable as to existing creditors, and if notes or bonds are given by the corporation in exchange for the purchase of its stock, such notes or bonds will be subordinate to the claims of existing creditors in the distribution of the assets of the corporation.

The foregoing proposition is also true as to subsequent creditors of the corporation, who become such without notice of the purchase of its own stock by the corporation, but relying upon the supposed previous solvency and unimpaired stock. *Coleman v. Tepel*, 230 Fed. 63, 71, 144 C. C. A. 361; *Atlanta & Walworth Ass'n v. Smith*, 141 Wis. 377, 123 N. W. 106, 32 L. R. A. (N. S.) 137, 135 Am. St. Rep. 42; *M. V. Moore & Co. v. Gilmore*, 216 Fed. 99, 132 C. C. A. 343; *In re S. P. Smith Lbr. Co.* (D. C.) 132 Fed. 618; *In re Fehcheimer Fishel Co.*, 212 Fed. 357, 129 C. C. A. 33; *Hamor v. Taylor-Rice Co.* (C. C.) 84 Fed. 392; *Maryland Trust Co. v. Bank*, 102 Md. 608, 63 Atl. 70.

But the appellees in the present case do not fall within either of the classes mentioned. At the time when the corporation purchased its stock and issued bonds therefor, all of the debts of the corporation were paid (except, of course, to the bondholders). The interveners are therefore subsequent creditors. But this is not all. The mortgage itself recited:

"Whereas, it now appears necessary and proper for the purpose of purchasing 1,125 shares of its capital stock from its present shareholders, * * * the railroad company has now resolved to issue * * * bonds."

This mortgage was recorded on the 4th day of January, 1911, and before any of the interveners became creditors. This was notice to all the world of the purchase of its own stock by the corporation. There is no fraud established, and no claim that the corporation made any representations contrary to the recital just quoted from the mortgage.

The distinction between subsequent creditors with notice and subsequent creditors without notice, who have become such relying upon appearances which were in fact false and deceitful, is well recognized in various classes of cases; for example, in suits by creditors to recover against stockholders for balance on stock which had been issued as fully paid, when in fact not fully paid, or on stock which had been issued for property taken at excessive value, or where dividends had

been paid out of capital by a corporation, solvent at the time, but which afterward became bankrupt. *N. W. Mut. Life Ins. Co. v. Cotton Exch. Co.* (C. C.) 46 Fed. 22, 24; *Rickerson Mill Co. v. Farrell Co.*, 75 Fed. 554, 560, 23 C. C. A. 302; *Cunningham v. Holley Co.*, 121 Fed. 720, 58 C. C. A. 140; *State Trust Co. v. Turner*, 111 Iowa, 664, 82 N. W. 1029, 53 L. R. A. 136; *Bank v. Gustin Minerva Mining Co.*, 42 Minn. 327, 334, 44 N. W. 198, 6 L. R. A. 676, 18 Am. St. Rep. 510; *Hospes v. N. W. Mfg. Co.*, 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637; *Downer v. Union Land Co.*, 113 Minn. 410, 418, 129 N. W. 777; *Mackall v. Pocock*, 136 Minn. 8, 161 N. W. 228, L. R. A. 1917C, 390.

In the case at bar the interveners were subsequent creditors with notice of the impairment of the capital stock, and for that reason cannot claim priority over the bondholders.

The petition for rehearing is denied.

NAPORE v. ROWE et al.

(Circuit Court of Appeals, Ninth Circuit. April 7, 1919.)

No. 3245.

1. ARMY AND NAVY ⇨20—SELECTIVE SERVICE ACT—EXEMPTION OF NONDECLARANT ALIEN.

A nondeclarant alien resident of the United States is not ineligible to military duty under Selective Service Act May 18, 1917 (Comp. St. 1918, §§ 2044a-2044k), but the facts which bring him within the exempted class must be affirmatively proved by him before his local draft board, to which is given power to hear and determine, subject to review by appeal to a district board, all questions of exemption under the act; a decision of the district board being made final.

2. HABEAS CORPUS ⇨16—SELECTIVE SERVICE ACT—REMEDY OF NONDECLARANT ALIEN.

Ignorance of the law and the facts on the part of a nondeclarant alien, who did not prove affirmatively before his local draft board the facts bringing him within the class exempted from Selective Service Act May 18, 1917 (Comp. St. 1918, §§ 2044a-2044k), so that he has been arrested as a military deserter, is no ground for habeas corpus; the alien's failure to avail himself of the remedies of the act and the rules precluding such relief, for only on showing of denial of fair hearing or abuse of discretion in the local or district draft board may resort be had to the courts.

Appeal from the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Petition for writ of habeas corpus by John Napore against James H. Rowe and others, members of the Local Draft Board of Butte, Mont., John K. O'Rourke, Sheriff of Silver Bow County, Mont., and the United States, a party affected by the decision. From an order that petitioner be discharged from custody, respondents appeal. Judgment reversed, and cause remanded, with instructions to dismiss the writ and remand petitioner to custody.

The appellee filed in the court below a petition for a writ of habeas corpus, alleging that he was not a citizen of the United States and had never

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

declared his intention to become such; that on June 5, 1917, he duly registered at Minot, N. D., pursuant to Act Cong. May 18, 1917, c. 15, 40 Stat. 76 (Comp. St. 1918, §§ 2044a-2044k); that thereafter he duly appeared before the local board at Minot, and signed an affidavit before the said board, setting forth that he was born in Russia, and had not declared his intention to become a citizen of the United States, together with other proofs required under the rules and regulations; that he received no notice that anything else would be required of him, or that he should keep in touch with said local board; that he remained in Minot for several months thereafter, and then came to Butte, Mont., where he has since resided; that in September, 1918, while at Butte, he was advised that aliens were required to submit questionnaires to their local boards, the same as other registrants; that this was the first information he ever received on the subject; that immediately after receiving it he appeared before the local board of the city of Butte for the purpose of having his questionnaire filled out and sent to the local board for Minot, N. D.; that he was then arrested and certified as a military deserter.

The appellants, in their return to the order to show cause, alleged that the appellee duly registered on June 5, 1917; that on or about December 15, 1917, the local board for Ward county, N. D., mailed to the appellee a questionnaire, which he was required to fill out and submit not later than December 28, 1917; that he failed to return said questionnaire; that he was thereupon certified to the adjutant general for North Dakota for such delinquency; that on May 3, 1918, said adjutant general notified the appellee of his delinquency and ordered him to report; that the appellee failed to report as so ordered, and on May 17, 1918, he was inducted into the military service of the United States; and that he was detained as a deserter from the United States army. Upon the pleadings and the evidence the court ordered that the appellee be discharged from custody.

Edward C. Day, U. S. Atty., of Helena, Mont., James H. Baldwin, Asst. U. S. Atty., of Butte, Mont., Lieut. Col. Grant T. Trent, Judge Advocate, of Washington, D. C., D. M. Kelly, J. Bruce Kremer, Alf. C. Kremer, L. P. Sanders, J. A. Poore, and William Meyer, all of Butte, Mont., for appellants.

L. F. Lorenz and Barta & Barta, all of Butte, Mont., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The petition for the writ is based upon the propositions that an alien, who has not declared his intention to become a citizen of the United States, is not subject to military duty; that the affidavit which the appellee presented to the local board, wherein he set forth that he was a non-declarant alien, was in itself sufficient to place him in the exempted class; and that therefore the local board in North Dakota had no authority to induct him into military service and certify him as a deserter. The court below was of that opinion, and held that the drafting of a nondeclarant alien was forbidden by law. To that construction of the law we are unable to assent. The Selective Service Act (Act May 18, 1917, c. 15, 40 Stat. 80 [Comp. St. 1918, § 2044e]) provides that all male persons within the prescribed ages shall be subject to registration, "and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this act provided." In brief, the act makes persons of the prescribed age subject to draft, unless exempted or excused by the designated authority. It does not follow that a nondeclarant alien is

ineligible to military duty under the act, or that he is automatically exempted from service. The facts which bring him within the exempted class must be affirmatively proved by him before his local board, the tribunal created by the act, to which is given power to hear and determine, subject to review by appeal to a district board, "all questions of exemption under this act," and the decision of the district board is made final. The uniform ruling of the courts has been that, in order to obtain exemption, the intention of the nondeclarant alien must be expressed in the manner prescribed by law. *United States v. Finley* (D. C.) 245 Fed. 871; *United States v. Bell* (D. C.) 248 Fed. 995; *Summertime v. Local Board, Division No. 10* (D. C.) 248 Fed. 832; *Ex parte Blazekovic* (D. C.) 248 Fed. 327; *Ex parte Tinkoff* (D. C.) 254 Fed. 222.

[2] The appellee has not presented to his local board a claim of exemption in accordance with the regulations, nor has he availed himself of the privilege accorded by the regulations of applying to the local board to reopen the case. All that he alleges by way of excuse for disregarding the regulations is in effect that he was ignorant of the law and the facts. Such ignorance is no ground for habeas corpus. *The Japanese Immigration Case*, 189 U. S. 86, 101; ¹ *Ex parte Kusweski*, 251 Fed. 977; *Ex parte Tinkoff*, 254 Fed. 222. The appellee's failure to avail himself of the remedies afforded by the act and the rules precludes relief by habeas corpus, for it is only upon a showing of denial of a fair hearing or gross abuse of discretion in the local or district board that resort may be had to the courts. *Angelus v. Sullivan*, 246 Fed. 54, 158 C. C. A. 280; *United States v. Bell* (D. C.) 248 Fed. 995; *United States v. Heyburn* (D. C.) 245 Fed. 360; *Ex parte Beales* (D. C.) 252 Fed. 177.

The judgment is reversed, and the cause is remanded, with instructions to dismiss the writ and remand the appellee to custody.

REINA v. BRACHO et al.

(Circuit Court of Appeals, Fifth Circuit. March 25, 1919.)

No. 3298.

1. PARTITION ⇌19—POSSESSION TO SUSTAIN ACTION.

Bill for partition or sale for division, even if it can be made the means of trying a disputed title, cannot be maintained, possession not being in any of the parties, but in the government under a claim of right.

2. ACTION ⇌62—DECLARATION OF RIGHTS—PREMATURE ACTION.

Bill for adjudication of asserted right to a fund is premature, the fund not yet having come into existence, and it not being known whether, if it shall come into existence, claimant will need any relief in addition to that of the tribunal by action of which it will come into existence, and with which claimant has filed a claim for his asserted interest in the fund.

Appeal from the District Court of the United States for the Canal Zone; William H. Jackson, Judge.

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

¹ 23 Sup. Ct. 611, 47 L. Ed. 721.

Suit by Tomas Reina against Beatriz Bracho and others. Bill dismissed, and complainant appeals. Affirmed.

Stevens Ganson, of Panama, R. P., and Chauncey P. Fairman, of Cristobal, C. Z., for appellant.

William C. MacIntyre and W. H. Carrington, both of Cristobal, C. Z., Joseph W. Montgomery, U. S. Atty., of New Orleans, La., Frank Feuille, of Ancon, C. Z., and Walter F. Van Dame, of Balboa Heights, C. Z., for appellees.

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

WALKER, Circuit Judge. This is an appeal from a decree dismissing a bill in equity filed by the appellant against the appellees, 11 individuals and the Panama Railroad Company, a corporation. The bill prayed the division or partition of described lands, in which the appellant claimed a one-eighteenth interest; that, in case the division or partition of said lands cannot be made without manifest prejudice to the parties interested, said lands be sold and the proceeds thereof be distributed between the parties according to their respective interests; for an accounting of rents and profits; and for general relief.

It was admitted that prior to the filing of the bill the lands mentioned in it had been taken possession of by the United States pursuant to an executive order issued by the President under the authority conferred on him by section 3 of the Panama Canal Act of August 24, 1912, c. 390, 37 Stat. 561 (Comp. St. § 10039), which is as follows:

"The President is authorized to declare by executive order that all land and land under water within the limits of the Canal Zone is necessary for the construction, maintenance, operation, sanitation, or protection of the Panama Canal, and to extinguish, by agreement when advisable, all claims and titles of adverse claimants and occupants. Upon failure to secure by agreement title to any such parcel of land or land under water the adverse claim or occupancy shall be disposed of and title thereto secured in the United States and compensation therefor fixed and paid in the manner provided in the aforesaid treaty with the Republic of Panama, or such modification of such treaty as may hereafter be made."

The bill averred that the lands have been or are about to be expropriated for a public use, and that the plaintiff had joined with others in filing a claim, based upon the asserted interest, with the Joint Commission created pursuant to article 6 of the Panama Canal treaty for the appraisal and settlement of—

"all damages caused to the owners of private lands * * * by reason of the grants contained in this treaty or by reason of the operations of the United States, its agents or employes, or by reason of the construction, maintenance, operation, sanitation and protection of the said canal or of the works of sanitation and protection herein provided for."

[1] The special relief sought is either a partition, or a sale for division of the proceeds, of lands not in the possession of any party to the suit, but in the possession of the United States under a claim of right. So far as such relief as that mentioned is concerned the subject-matter of the suit is not brought within the grasp of the court.

so as to be subject to its orders, the sole possessor of it under a claim of right not being a party to the suit. It affirmatively appears that the appellant is not a cotenant of the party in possession. Even if a bill for partition, or for a sale for division, could be made the means of trying a disputed title (*Clark v. Roller*, 199 U. S. 541, 26 Sup. Ct. 141, 50 L. Ed. 300), a court could not, in a suit between private parties, render an enforceable decree for the partition or sale of property in the possession of the Government under a claim of right. The granting of such relief requires that the lands to be partitioned or sold be in the possession of a party or parties brought before the court. The absence from the suit of a party whose presence is indispensable to the granting of such relief therein is a sufficient justification of a denial of such relief. *Barney v. Baltimore City*, 6 Wall. 280, 18 L. Ed. 825; *Greeley v. Lowe*, 155 U. S. 58, 15 Sup. Ct. 24, 39 L. Ed. 69.

[2] The bill does not aver the existence of a state of facts constituting a basis for an adjudication as to an asserted right of the appellant to share in a fund awarded as damages for the taking of the lands by the government or as compensation for their expropriation. It is not shown that any such fund is in existence. On the contrary, it is disclosed that the claim of the appellant based upon the existence of his asserted interest in the lands is pending and undetermined before another tribunal having exclusive jurisdiction to pass upon it. A judicial controversy is premature when it is started before the subject-matter of it has come into existence and before it is known whether, if it shall come into existence, the claimant will need any relief in addition to that given by the tribunal the action of which brings it into existence. It is not yet known whether there will be any fund that could be dealt with by the orders of the court at the instance of the appellant, or that, if there shall be such a fund, there will be any occasion for granting relief to the appellant with reference to it.

The averments of the bill do not show that the appellant is entitled to the relief sought or any part of it.

The decree is affirmed.

PANAMA R. CO. v. PIGOTT.

(Circuit Court of Appeals, Fifth Circuit. March 27, 1919.)

No. 3291.

1. APPEAL AND ERROR ⚡966(1)—CONTINUANCE ⚡7—DISCRETION OF COURT—REVIEW.

Both under Panama law and general principles, motion for continuance is addressed to discretion of trial court, and action thereon is not reviewable, unless abuse of discretion is shown.

2. APPEAL AND ERROR ⚡977(1)—NEW TRIAL ⚡6—DISCRETION OF COURT—REVIEW.

Both under Panama law and general principles, motion for new trial is addressed to discretion of trial court, and action thereon is not reviewable, unless abuse of discretion is shown.

3. NEGLIGENCE ⚡136(10)—QUESTIONS FOR JURY.

Refusing directed verdict in personal injury case is proper, where evidence as to negligence and contributory negligence is conflicting.

4. RAILROADS ⚡281(1)—PERSONAL INJURIES—PANAMA LAW.

Under the Panama laws, a railroad is liable for personal injuries caused by negligence of its employes.

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

Action by Noel Pigott, a minor, by his guardian ad litem, George Morrell, against the Panama Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Frank Feuille, of Ancon, C. Z., and Walter F. Van Dame, of Balboa Heights, C. Z., for plaintiff in error.

Stevens Ganson, of Panama, R. P., and Valentine E. Bruno, of Ancon, C. Z., for defendant in error.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

PARDEE, Circuit Judge. The statement of the case by plaintiff in error is as follows:

"The minor, Noel Pigott, resides with his father, Thomas Pigott, in the city of Colon, republic of Panama. They are British subjects. George Morrell, guardian ad litem of the minor, Noel Pigott, is an American citizen, but resides in the city of Colon, republic of Panama.

"The complaint in this case was filed for the minor, Noel Pigott, by George Morrell, his guardian ad litem, who acted under the order of the District Court of the Canal Zone. The complaint involves a demand for damages against the plaintiff in error in the sum of \$50,000, alleged to have accrued to the said minor on account of an injury received by him in being knocked down and run over by one of the freight cars of the plaintiff in error, in the latter's switchyard situated between E street and Broadway in the city of Colon in the republic of Panama, at the Seventh street crossing. The minor lost his left leg as a result of the accident, which occurred on December 4, 1916. The complaint charged the plaintiff in error with negligence in the operation of its train, and the latter filed a general denial, and by way of special answer it alleged that it was not liable under the laws and jurisprudence of the republic of Panama, and further that the injury to the minor, Noel Pigott, was the result of his own negligence.

"The case was tried before a jury on the 15th of February, 1917, in the Cristobal division of the District Court of the Canal Zone, and resulted in a

verdict and judgment in favor of the defendant in error in the sum of \$7,500. The plaintiff in error now brings this case to this court on writ of error, and is asking that the judgment of the trial court be set aside for the reasons stated in the plaintiff in error's assignments of error."

Then follow some 13 assignments of error, complaining of the trial court's refusal to grant a continuance, to grant a new trial, and to direct a verdict for the plaintiff in error; also refusing special instructions requested, and complaining of instructions given to the jury on the merits of the case. We have carefully considered all the assignments of error in the light of the elaborate briefs presented in the case, and conclude that none of the assignments of error present any reversible error.

[1, 2] Motions for continuance and for a new trial, under the Panama law and the general jurisprudence of this court, are questions within the discretion of the trial court, and not reviewable upon appeal, unless abuse of the discretion is shown, and none appears in this case.

[3] The motion for a directed verdict was properly refused, because the evidence in the case as to the negligence of the plaintiff in error and contributory negligence on the part of the minor, Noel Pigott, was conflicting, and not only warranted, but required, a submission of the case to the jury.

[4] The vital questions involved in this case as to the claimed construction of the laws of Panama have been settled in this and the Supreme Court adversely to the contention of the plaintiff in error. See *Panama Railroad Co. v. Bosse*, 239 Fed. 303, 152 C. C. A. 291; recently affirmed in the Supreme Court at the present term (249 U. S. 41, 39 Sup. Ct. 211, 63 L. Ed. —); *Panama Railroad Co. v. Toppin*, 250 Fed. 989, — C. C. A. —; *Railroad Co. v. Gladmon*, 15 Wall. 401, 21 L. Ed. 114; *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485.

As we find none of the assignments of error well taken, the judgment of the District Court is affirmed.

MAYO, Immigration Com'r, et al. v. UNITED STATES ex rel. JOBIN.

(Circuit Court of Appeals, Fifth Circuit. April 5, 1919.)

No. 3358.

1. HABEAS CORPUS ⚡113(9)—APPEAL—RECORD.

On an appeal from an order on a habeas corpus hearing directing that an alien be released from custody by the Commissioner of Immigration, it cannot properly be said that the overruling of an objection to the admission of testimony by the alien "on the ground that the court had no jurisdiction to receive evidence and inquire into the merits of said cause, without ascertaining whether the alien J. was given a fair trial by the immigration authorities," was error; it not being made to appear that the stated ground of objection existed in fact, the record not disclosing what the evidence was.

2. ALIENS ⚡54—DEPORTATION—CONCLUSIVENESS OF FINDING.

Where an alien was held under an order of deportation, made by a board of special inquiry and affirmed by the Secretary of Labor, order being based upon finding that alien was a person coming to this country for an immoral purpose, findings on habeas corpus proceeding that alien was denied a fair hearing by immigration authorities, and that "she is not of an immoral character and is entitled to admission to the United States," entitled the alien to be released from custody.

3. HABEAS CORPUS ⚡113(12)—MATTERS REVIEWABLE—RECORD.

On appeal from a habeas corpus proceeding, it must be presumed that the findings of the lower court were proper, where the record does not show the contrary.

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

Habeas corpus proceeding by the United States, on the relation of Mademoiselle Laure Jobin, against John P. Mayo, Commissioner of Immigration, and the United States of America. From an order directing that the relator, an alien, be released from custody by the Commissioner of Immigration, defendants appeal. Affirmed.

Nicholas Callan, Asst. U. S. Atty., of New Orleans, La., for appellants.

Jose A. Morales, of New Orleans, La., for appellee.

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

WALKER, Circuit Judge. This is an appeal from an order, made on a habeas corpus hearing, directing that the appellee, an alien, be released from custody by the appellant, the Commissioner of Immigration at the port of New Orleans. The writ was issued pursuant to the prayer of a petition, which alleged that the petitioner, the appellee, was deprived of a fair hearing by the board which ordered her deportation after she was detained upon her arrival at New Orleans on a vessel from a Mexican port. The return to the writ set up that the petitioner was held under an order of deportation made by a board of special inquiry and affirmed by the Secretary of Labor; that order being based upon a finding that the appellee was "a person

coming to this country for an immoral purpose." The record discloses that evidence was adduced on the hearing which resulted in the order appealed from. It does not disclose what that evidence was. Some evidence is set out, without being authenticated in any way by the presiding judge. The record does not purport to contain all the evidence adduced on the hearing.

[1-3] The following is all that is shown by the bill of exceptions: The appellant objected to the admission of testimony by the appellee "on the ground that the court had no jurisdiction to receive evidence and inquire into the merits of said cause without ascertaining whether the alien, Laure Sebastine Jobin, was given a fair trial by the immigration authorities; and his honor, the judge, then and there overruled said objection and admitted said testimony. Whereupon counsel for respondent reserved the bill of exceptions to the said ruling of the court." It is not made to appear that the stated ground of objection existed in fact. It follows that it cannot properly be said that the ruling excepted to was erroneous. The opinion rendered by the District Judge shows that he found that the appellee was denied a fair hearing by the immigration authorities, and that she "is not of immoral character and is entitled to admission to the United States." Proper findings to that effect entitled the appellee to be released from custody under the order of deportation. *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369; *Zadonaite v. Wolf*, 226 U. S. 272, 33 Sup. Ct. 31, 57 L. Ed. 218. It is to be presumed that the findings were proper ones, the record not showing the contrary.

Affirmed.

In re GEORGE C. BRUNS CO.

BRUNS v. GEORGE BAKER & SONS, Inc., et al.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1919.)

No. 2597.

BANKRUPTCY ⌘345—**PRIORITY—AGREEMENTS.**

Where a president of a bankrupt corporation advanced money to the corporation to enable it to carry through a composition agreement, president stating in a circular letter to the creditors, "To effect the settlement, \$2,500 in cash, which is no part of the assets of the corporation, has been put up to guarantee the first payment," the agreement being intended to give to the settlement creditors priority in any liquidation of the assets, the agreed subordination of the rights of such lender to those of other creditors will be enforced.

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

In the matter of the George C. Bruns Company, bankrupt. From an order denying the priority of a claim of George C. Bruns over that of George Baker & Sons, Incorporated, Julius Grossman, Incorporated, and Maetrick, Eyre & Co., Incorporated, Bruns appeals. Affirmed.

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

James Rosenthal, of Chicago, Ill., for appellant.
Julius Moses, of Chicago, Ill., for appellees.

Before BAKER and MACK, Circuit Judges, and SANBORN, District Judge.

MACK, Circuit Judge. The facts in this case are stated in *McKey v. Bruns*, 243 Fed. 370, 156 C. C. A. 150, affirming the allowance of Bruns' claim for \$2,500 advanced by him on October 30, 1915, to the bankrupt corporation to enable it to carry through a composition agreement of 10 per cent. cash and 40 per cent. in notes, made in a former bankruptcy proceeding. The question of the composition creditors' priority over this claim was not then passed upon; that question is now presented on appeal from an order granting such priority.

Under the settlement agreement, the business was to be conducted under the supervision of a creditors' committee until the notes should be paid, and, in case of default in payment continuing for 15 days, the committee was empowered to take possession of the assets, to dispose of them as it deemed advisable, and, after payment of expenses, to apply the proceeds to the payment of the settlement notes. Only the surplus, if any, was to be paid to the bankrupt.

While this agreement was made with the largest creditors on October 28, 1915, it was not to be effective, either until all creditors had accepted it or until the composition was confirmed by the court. On November 9th all the creditors were requested to execute the agreement; in the circular letter to them, Bruns, as the bankrupt's president, stated that—

"To effect the settlement, \$2,500 in cash, which is no part of the assets of the corporation, has been put up to guarantee the first payment."

On December 20th the composition was confirmed.

In our judgment, this agreement was intended to give to the settlement creditors priority in any liquidation of the assets. This priority was not dependent upon a liquidation out of court; the right of the creditors' committee so to proceed, in case of default, was granted merely as an additional means of effectuating the priority. While, as against subsequent bona fide creditors of the company, no lien on the assets was thereby acquired by the settlement creditors, as between them and Bruns, his loan to the company was clearly intended to be a subordinated indebtedness. It was made before the composition agreement became effective, and at a time when the entire assets were applicable to the composition creditors' claims. In effect, it was a not uncommon advance to a corporation for the very purpose of bettering its financial condition, by increasing its assets without correspondingly, as against the composition creditors, increasing its liability.

In *Dozier v. Sangamon Loan & Trust Co.*, 224 Fed. 372, 140 C. C. A. 58, under analogous, though not identical, circumstances, we held that—

"There would seem to be no reason, irrespective of any question of estoppel, for refusing to enforce the agreed subordination of the rights of such a lender to those of other creditors."

Order affirmed.

ISENHOUER et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1919.)

No. 5170.

CRIMINAL LAW § 423(4)—EVIDENCE—ACTS OF COCONSPIRATOR.

Where a conspiracy has been shown, the act of one conspirator in furtherance of the common purpose is admissible in evidence against all; and this is so, though the conspirator committing the act was not a defendant in the case being tried.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Criminal prosecution by the United States against Clure Isenhouer and others. Judgment of conviction, and defendants bring error. Affirmed.

Roscoe C. Arrington, of Shawnee, Okl. (John L. Arrington, of Shawnee, Okl., on the brief), for plaintiffs in error.

Redmond S. Cole, Asst. U. S. Atty., of Pawnee, Okl. (John A. Fain, U. S. Atty., of Lawton, Okl., on the brief), for the United States.

Before HOOK, Circuit Judge, and TRIEBER, District Judge.

HOOK, Circuit Judge. The plaintiffs in error were convicted of violating section 6 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1089 [Comp. St. § 10170]), by conspiring among themselves and with others to prevent, hinder, and delay by force the execution of the Selective Draft Act of May 18, 1917 (40 Stat. 76, c. 15 [Comp. St. 1918, §§ 2044a-2044k]). They do not contend here that the evidence at the trial was insufficient to sustain the verdict against them. The only ground for reversal of the sentences is the admission in evidence of certain threatening notes sent to two deputy sheriffs and an assault upon one of them with intent to kill.

There was overwhelming proof of the existence in Oklahoma, including the Western judicial district, where this case arose, of an extensive organization, which the members called the "Working Class Union," an avowed purpose of which was to destroy the established order of society by force of arms, the killing of officials, and the destruction of property by various acts of sabotage. They claimed to have the support of and to be working in concert with the Industrial Workers of the World, commonly called the "I. W. W." Upon the commencement of the war between the United States and the Imperial German government, and the passage of the Selective Draft Act of May 18, 1917, the activities of the organization were revived and directed against the efforts of this government to execute the above statute and to raise its military forces. Numerous overt acts, including revolt and incipient rebellion, occurred. There was substantial proof that the accused were members of a subdivision or local of the larger organization and had knowledge of its criminal purposes.

While the conspiracy was afoot, certain threatening notes were sent

to two deputy sheriffs, ordering them to leave the country or incur bodily harm. Four were signed "I. W. W.," and the fifth "The Bunch." During the period covered by the sending of the notes, an effort was made in the nighttime to assassinate one of the officers. It is urged that the evidence of the above was inadmissible, because it tended to prove offenses that were separate and distinct from that charged in the indictment. Counsel misconceive the ground upon which it was received. While it was not shown that the accused personally sent the threatening notes or participated in the assault, there was substantial evidence tending to show that the acts were committed by members of the organization to which the accused belonged, and were in aid of and to carry out its unlawful objects. One of the methods of the organization was to impose the will of its members upon the community by threats and physical violence. There was also proof that the acts in question had relation to the common purpose of defeating the observance and enforcement of the provisions of the Draft Act, including the proclamations and regulations in aid thereof. It is an old rule that, when a conspiracy has been shown, the act of one conspirator in furtherance of the common purpose is evidence against all; and this is so, though the conspirator committing the act was not a defendant in the case being tried. *Clune v. United States*, 159 U. S. 590, 16 Sup. Ct. 125, 40 L. Ed. 269.

The sentences are affirmed.

THE RANCAGUA.

(Circuit Court of Appeals, Fifth Circuit. March 24, 1919.)

No. 3274.

MARITIME LIENS \Leftrightarrow 25—EXECUTORY CONTRACT—SERVICES.

Act June 23, 1910, § 1 (Comp. St. § 7783), giving maritime liens to persons furnishing certain services to vessels, does not authorize a libel in rem against a vessel for breaching an entirely executory contract to remove her cargo.

Appeal from the District Court of the United States for the Canal Zone; Wm. H. Jackson, Judge.

Libel by the Cristobal-Colon Stevedoring Company against the steamship Rancagua and others. From a decree dismissing the libel, the libellant appeals. Affirmed.

Chauncey P. Fairman, of Cristobal, C. Z., and Henry P. Dart, Jr., of New Orleans, La., for appellants.

Stevens Ganson and Theodore C. Hinckley, both of Panama, R. P., for appellees.

Before PARDEE, WALKER, and BATTIS, Circuit Judges.

WALKER, Circuit Judge. This is an appeal from a decree dismissing a libel in admiralty against the steamship Rancagua and its cargo. The libel alleged that the master of the vessel, in his own be-

half and as the agent for the charterers, entered into a contract with the libelant, by the terms of which contract the master agreed to pay to the libelant a stated amount per ton for discharging the vessel's cargo of about 8,000 tons of nitrates; that the libelant was ready and willing to perform the contract, but, without fault on its part, was prevented from doing so; and that the master of the vessel, without just cause or complaint, informed the libelant that he had made other arrangements for the discharge of the cargo, and that the libelant's services were no longer needed. What was sought to be recovered was the amount of loss and damage alleged to have been sustained by the libelant in consequence of the alleged breach of the contract mentioned. On the order of the court the vessel was released on the deposit with the clerk of the court of the sum of \$1,500 as a bond. The master of the vessel made the deposit with money in his possession belonging to the owner of the vessel, the republic of Chile. The libel was excepted to by the master on the ground that the vessel belonged to the republic of Chile and was not subject to the jurisdiction of the court on the claim asserted.

The libel was not maintainable, whether it was or was not subject to the exception mentioned. The averments of it do not show that the alleged contract was executed in whole or in part. The libel was one in rem, brought against the vessel and its cargo, without any process or prayer for relief against any person as defendant. So long as a contract remains wholly executory, the vessel and cargo are subjected to no lien which can be enforced by a libel in rem. *The Keokuk*, 9 Wall. 517, 19 L. Ed. 744; *Vandewater v. Mills, Claimant, etc.*, 19 How. 82, 15 L. Ed. 554; *Schooner Freeman v. Buckingham*, 18 How. 182, 15 L. Ed. 341; *The City of Baton Rouge (C. C.)* 19 Fed. 461; *The Strathnairn (D. C.)* 190 Fed. 673; 1 *Corpus Juris*, 1268. Though the contract was for the libelant's services as a stevedore and was maritime in its nature, performance under it was required to confer a lien enforceable by proceedings in rem against the vessel and cargo, if their ownership was such that they so could be subjected to a lien. Contracting to render such necessary services was not the furnishing of them which, under the statute of June 23, 1910 (36 Stat. 604, c. 373, § 1 [Comp. St. § 7783]), gives the furnisher a maritime lien on the vessel.

The decree dismissing the libel was proper, whether the ground relied on to support that action was or was not a tenable one.
Affirmed.

FINLEY v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. January 9, 1919.)

No. 1662.

CRIMINAL LAW \Leftrightarrow 1048—ASSIGNMENTS OF ERROR—NECESSITY OF EXCEPTIONS.
In the Circuit Court of Appeals, an assignment of error will not be considered, unless based on an exception.

In Error to the District Court of the United States for the Western District of South Carolina, at Greenville; Joseph T. Johnson, Judge. Criminal prosecution by the United States against Louise Finley. Judgment of conviction, and defendant brings error. Affirmed.

T. P. Cothran, of Greenville, S. C. (H. P. Burbage, of Greenville, S. C., on the brief), for plaintiff in error.

Frank C. Miller, Sp. Asst. U. S. Atty., of Norfolk, Va. (J. William Thurmond, U. S. Atty., of Edgefield, S. C., and C. G. Wyche, Asst. U. S. Atty., of Greenville, S. C., on the brief), for the United States.

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

PRITCHARD, Circuit Judge. This was a criminal action, tried in the United States District Court for the Western District of South Carolina. The defendant was charged with violating section 13 of the act of Congress of the 18th day of May, 1917 (40 Stat. 83, c. 15 [Comp. St. 1918, appendix, § 2019b]).

While the plaintiff in error (the defendant in the court below) relies on three assignments of error, it appears from the record that no exception was taken either to the charge of the court, or to the introduction of certain evidence by the government. This court has repeatedly held that it would not consider an assignment of error unless the same was based upon an exception. *Beaver v. Taylor*, 93 U. S. 46, 55, 23 L. Ed. 797; *Prioleau v. United States* (4th Circuit) 74 C. C. A. 458, 143 Fed. 320; *Hull Co. v. Marquette Cement Mfg. Co.*, 125 C. C. A. 460, 208 Fed. 260; *Copper River & N. W. Ry. v. Reed*, 128 C. C. A. 39, 211 Fed. 111; *Alwart Bros. Coal Co. v. Royal Colliery Co.*, 127 C. C. A. 599, 211 Fed. 313. Also, in the case of *Robinson & Co. v. Belt*, 187 U. S. 41, 50, 23 Sup. Ct. 16, 19, 47 L. Ed. 65, the court said:

“While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record. It is not the province of this court to retry these cases *de novo*.”

However, in passing, we deem it proper to say that, on examining the record as to the points sought to be raised therein, we find nothing that would warrant us in disturbing the judgment of the court

below, had the assignments been based upon exceptions taken in accordance with the rules of this court.


For the reasons stated, the judgment of the lower court is affirmed.

THE POWHATAN.

THE TELENA.

(Circuit Court of Appeals, Fourth Circuit. January 7, 1919.)

No. 1657.

COLLISION —STEAM VESSELS MEETING—CROSSING SIGNALS.

Decree, holding one of two meeting steamships solely in fault for a collision for crossing and failing to comply with the proper signal of the other for passing port to port, affirmed.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

In Admiralty. Suit by the Merchants' & Miners' Transportation Company against E. D. Goff, with cross-libel, for collision between steamships Powhatan and Telena. Decree against the Powhatan (248 Fed. 786), and her claimant appeals. Affirmed.

H. H. Little, of Norfolk, Va., Daniel H. Hayne, of Baltimore, Md., and John F. Lewis, of Philadelphia, Pa. (Hughes, Little & Seawell and John W. Oast, Jr., all of Norfolk, Va., and Lewis, Adler & Laws, of Philadelphia, Pa., on the brief), for appellant.

Floyd Hughes, of Norfolk, Va., and J. Parker Kirlin, of New York City (Hughes & Vandeventer, of Norfolk, Va., and Kirlin, Woolsey & Hickox, of New York City, on the brief), for appellee.

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

PER CURIAM. We have carefully examined the record and deem it unnecessary to add anything to the full and fair discussion of the case in the opinion of the court below, reported under the title of "The Powhatan—The Telena," 248 Fed. 786. The controversy turns wholly on a question of fact, and ample testimony supports the findings and conclusion of the learned district judge.

We are satisfied that the case was correctly decided, and the decree will, accordingly, be affirmed.

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

FOLTZ SMOKELESS FURNACE CO. et al. v. EUREKA SMOKE-
LESS FURNACE CO.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1919. Rehear-
ing Denied March 4, 1919.)

No. 2637.

1. PATENTS ⇨202(2)—ASSIGNMENT OF APPLICATION—ESTOPPEL.

The assignor of an application for a patent is estopped, as against the assignee, from questioning the validity of a patent, application for which subsequently eventuates in a patent, as to claims within the scope of the original disclosure, though not made in the application as filed.

2. PATENTS ⇨202(1)—ASSIGNMENT.

Where one, who was no novice in the patent business, assigned an application for a patent, no fine line will be drawn in his favor, as against the assignee, between claims as allowed and those originally made upon the description and drawings.

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

Bill by the Eureka Smokeless Furnace Company against the Foltz Smokeless Furnace Company and Ira W. Foltz. From a decree for plaintiff, defendants appeal. Affirmed.

William R. Rummler, of Chicago, Ill., for appellants.

Max W. Zabel, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge. Appellant Foltz made application in March, 1915, for a patent on certain new and useful improvements in furnaces of which he claimed to be the inventor. February 16, 1916, he sold and assigned in writing to appellee corporation (of which he was then a stockholder) his "entire interest for the United States in and to improvements described in my applications for United States patents as follows," enumerating this application, among others. Some time prior to the assignment the Patent Office rejected, on the prior art, all of the claims made. After the assignment, but without further affidavit by Foltz or knowledge on his part, the assignee caused new claims to be filed, which eventuated in the issue July 31, 1917, of patent No. 1,235,516, with 10 claims as therein set forth. The drawings of the original application remained unchanged, and the description as first made was unaltered, save in minor details which are here unimportant.

September, 1917, Foltz organized appellant corporation, of which he was president, treasurer, general manager, and controlling stockholder, and they began the manufacture of furnaces which infringed claims 7, 8, 9, and 10 of the patent. Appellee filed its bill against appellants for injunction and accounting. On the hearing appellants offered testimony to show that Foltz was not the inventor of the thing described in claims 7, 8, 9, and 10 of the patent, and offered in evidence copies of prior art patents, on the theory that they tended to

establish the invalidity of those claims. On appellee's objection all such evidence was ruled out, on the ground that appellant, as assignor of the application for the patent, was estopped as against his assignee from questioning its validity. Such ruling of the District Court constitutes ground of the appeal from the decree granting the relief prayed.

[1] The general rule of estoppel upon the assignor of a patent to deny its validity as against his assignee is too well established to require more than its statement. We see no reason for relaxation of the rule where the subject-matter of the assignment is a duly filed application, which eventuates in a patent. The rejection by the Patent Office of all the claims occurred in April, 1915, and up to the time of the assignment, nearly a year later, the file wrapper does not show any further proceedings. The application is of value only as it may form the basis for a patent grant thereon. Surely it was contemplated that something was here assigned, and plainly it must have been the right to present further claims under the application; for without claims there would be no patent. The salutary rule of estoppel by deed would be much impaired, if, as applied to assignments of applications for patents, it were held to be inoperative as against claims within the scope of the original disclosure, though not made in the application as filed. The District Judge clearly set forth the rule here applying when he said:

"Foltz assigned to the plaintiff everything which he invented that could be based upon the drawings, specifications, and claims set out in his application."

[2] We find no merit in the contention for appellants that the claims in question are not predicated upon disclosures of the application. The Patent Office manifestly found that they were so grounded, in allowing them without requiring further affidavit of the inventor; and our examination of the original application, and of the claims in question, convinces us that the District Court was right in its conclusion that they are fully disclosed by the specifications and drawings as filed. The assignment by Foltz included five other pending patent applications, and evidently he was no novice in the patent business. He must have contemplated and understood the very usual experience in the Patent Office that claims as originally made might be rejected or changed, and supplemented or abridged, before the final issue of patent. No fine line will be drawn in his favor, as against his assignee, between the claims as allowed upon the assigned application and those originally made upon the same description and drawings.

The decree of the District Court is right, and it is affirmed.

KINTNER et al. v. HOCH-FREQUENZ-MASCHINEN AKTIEN-GESELLSCHAFT FUR DRAHTLOSE TELEGRAPHIE et al.

(District Court, D. New Jersey. January 28, 1918.)

1. JUDGMENT ⇐953—RES JUDICATA—INFRINGEMENT OF PATENT—IDENTITY OF SUBJECT—STATEMENT OF COUNSEL.

In a suit for infringement of patent, a prior cause between plaintiffs and a third person cannot be considered res judicata, on the mere statement of plaintiffs' counsel that the apparatus involved was substantially the same as that now in use by defendant, and defendant is entitled to its day in court.

2. WAR ⇐10(2)—EFFECT ON ACTIONS—EXTENSION OF TIME TO ANSWER.

In suit for infringement of patent, defendant company's motion for an order extending its time to answer until after the cessation of hostilities and the reopening of communication between the United States and Germany held not to be denied on any ground that plaintiffs would suffer irreparable injury, in that for any recovery forthcoming they were entirely dependent on a fund in the hands of the United States government, realized from the operation of defendant company's plant after its taking over as a war measure by the government.

3. WAR ⇐10(2)—ALIEN ENEMY AS DEFENDANT—ORDER EXTENDING TIME TO ANSWER.

In suit for infringement of patent against a German company, operating a wireless telegraph station taken over by the government during the war, defendant company, on motion of its counsel, is entitled to order extending time to answer until after the cessation of hostilities and the reopening of communication between the United States and Germany, and it would be improper to force filing of answer or subsequent trial, when the company is in no position for either.

In Equity. Suit by Samuel M. Kintner and Halsey M. Barrett, receivers of the National Electric Signaling Company, against the Hoch-Frequenz-Maschinen Aktien-Gesellschaft fur Drahtlose Telegraphie, impleaded with Emil E. Mayer. On motion for an order extending defendants' time to answer until after the cessation of hostilities and the reopening of communication between the United States and the German Empire. Order directed, extending the time for defendants to file their answer until three months after the close of the war, or until the further order of the court.

Lindabury, Depue & Faulks, of Newark, N. J., for plaintiffs.

Robert H. McCarter of Newark, N. J., and Louis Marshall, of New York City, for defendants.

DAVIS, District Judge. Plaintiffs in the above-stated cause are receivers of the National Electric Signaling Company. They charge that the defendants infringed a patent, granted by the United States to the said company, in the operation of the wireless telegraph station at Tuckerton, N. J. The suit was instituted after Congress had declared that a state of war existed between the United States and the imperial government of Germany. Emil E. Mayer, made a party with the corporate defendant, was formerly in charge for the defendant corporation of the wireless telegraph station at Tuckerton, and while confined

in the immigrant station at Gloucester City, N. J., was served with process in this cause. He denies, as a matter of fact, that he was agent for or in any way represented the defendant company at the time process was served upon him. Mayer is now confined in Ft. Oglethorpe, Ga.

Counsel for defendants allege that they represented the defendant corporation prior to the declaration of a state of war between this country and that nation, and that they believe they have a good defense to the case upon the merits, and that it is impossible for them to confer with their clients at this time in order to file a proper defense. There is no probability that they will be able to confer with their clients until the war shall have come to an end. They therefore ask that the time be extended until three months after the end of the war to file their answer.

[1] This motion is opposed by the plaintiffs on the ground that the patents involved in this cause were found valid in a suit in the United States District Court for the Southern District of New York (241 Fed. 956), between the plaintiffs and the Atlantic Communication Company, and that "the apparatus involved in that action was substantially the same as that which is now being used in the wireless station of the defendant company at Tuckerton, N. J., and that the various defenses enumerated in the affidavit of Theodore Lemke were interposed" in that action. Upon the statement of counsel this cause cannot be considered, in my opinion, *res adjudicata*, and the defendant is entitled to its day in court.

[2] Plaintiffs further oppose the motion on the ground that they will suffer irreparable injury, in that for any recovery that may be forthcoming in this cause the plaintiffs are entirely dependent upon a fund in the hands of the United States government, amounting to some \$350,000, which according to the announcement of the government will be turned over to the winner of the above suit in the Chancery Court of New Jersey. It appears that a suit has been instituted in the Court of Chancery of New Jersey by a French company against the defendant corporation to determine the ownership of said wireless station; the French company claiming that the plant belongs to it, while the defendant company claims the same.

After war was declared between Great Britain, France et al., and Germany et al., the United States took over the operation of the said wireless station, and \$350,000 has been collected and is now held by the United States for the rightful owner of the plant. If the French company wins, the plaintiffs claim the money will be delivered to that company, and that there is no other fund out of which to satisfy any judgment that may be secured against the defendants. If it should be determined that the defendant corporation is the rightful owner of the plant, and said \$350,000, therefore, belongs to it, counsel have agreed that it shall not be turned over to the defendant, but may be retained by the United States to satisfy any judgment secured against the defendants in this cause. If it should finally be determined that the said French company owns the plant, then it would appear that the defend-

ant corporation is not liable in this action. It does not follow, therefore, that, if the defendants are granted relief, plaintiffs will suffer irreparable damage.

The right of an enemy, or ally of enemy, licensed to do business in this country, to prosecute and maintain any such suit or action so far as the same arises solely out of the business transacted within the United States, is recognized in "An act to define regulating and punishing trading with the enemy and for other purposes, approved October 6, 1917" (40 Stat. 411, c. 106 [Comp. St. 1918, §§ 3115 $\frac{1}{2}$ a-3115 $\frac{1}{2}$ j]). In the case of Harland & Wolff, Ltd., appellant, v. S. S. Kaiser Wilhelm II, appellee, 246 Fed. 786, 159 C. C. A. 88, L. R. A. 1918C, 795, recently decided by the Circuit Court of Appeals of this Circuit, the court said:

"If, as is no doubt the case, the counsel for the German claimant cannot at this time properly procure proofs and present his client's case, the court [District Court] can, and no doubt will, delay action until this can be done."

The court further said:

"This case is exceptional in its situation, and calls for the exercise of that range of discretion which the broad powers of a court of admiralty enable it to exercise. Such broad powers and range of discretion are, in our judgment, fittingly exercised by an order which will make due provision for, first, giving the German citizen and belligerent an opportunity to litigate his rights, if relations with his country are hereafter resumed; second, providing for adjudging, if the government hereafter so desires, its rights and liabilities, if any, in taking over libeled property of the German subject; third, adjudging hereafter what effect the taking of this ship by the government had on the claim of the British lienor and the further obligation of the German vessel owner as between themselves.

"In following this course, and protecting the unprotected rights of an absent German citizen while this country is at war with the imperial government of its country, we are impelled by three all-sufficient reasons: First, the innate sense of fairness, decency, and justice, which respects the rights of an enemy; second, the broad principles of international intercourse, which leads courts and nations that believe in international rights to be the more careful to observe them toward belligerents; and, lastly, because the awarding to this German citizen, with whom our country is at war, the careful preservation until times of peace of its rights, is in line with those high ideals of Anglo-Saxon justice which led the British courts years ago (In re Bousemaker, 13 Vesey, 71, decided in 1806) to allow the claim of an alien enemy to be proved in time of war and the dividends held by the British court until peace. Indeed, the fact that our country is now at war with Germany is all the more reason why this court should most scrupulously award to this German citizen those international and equitable rights which no fair-minded people ever deny, even to their enemies, in times of war."

[3] This opinion is dispositive of the question before me. It would manifestly be unjust to deny the relief sought by the defendants, and force them to file their answer, and subsequently to trial, when they are in no position to do either. If, at any time before peace is restored, communication may be had between citizens of this country and those of the imperial government of Germany, the plaintiffs may bring such fact to the attention of the court. Under the present conditions, however, the only course to pursue, as the court sees it, will be to make an order extending the time for defendants to file their answer until three months after the close of the war, or until the further order of this court.

THE G. A. FLAGG.

(District Court, D. Massachusetts. April 3, 1919.)

No. 1695, Civil.

1. SEAMEN ⇨29(5)—PURCHASE OF VESSELS BY UNITED STATES—EXEMPTION FROM LEGAL LIABILITY—STATUTE.

Under Comp. St. § 8146e, the Shipping Board Act, § 9, merchant vessels when employed solely as such, gain no exemption from ordinary legal liabilities, as for injuries to a seaman, because of any interest which the United States may have in them through their purchase by the Shipping Board and registry in the name of the United States.

2. EVIDENCE ⇨48—JUDICIAL NOTICE—REQUISITIONED SHIPPING.

It is a matter of common knowledge that a great part of the shipping of the country has been requisitioned by the Shipping Board.

3. ADMIRALTY ⇨43—ARREST OF GOVERNMENT VESSEL.

A government vessel is exempt from arrest.

4. SEAMEN ⇨29(5)—LIBEL FOR INJURY—EXEMPTION OF—ARREST OF VESSEL—BURDEN OF PROOF.

On libel against a steamer purchased by the Shipping Board and registered in the name of the United States, pursuant to Shipping Board Act, § 9 (Comp. St. § 8146e), to recover for personal injuries sustained by a seaman, libelant has the burden to establish that the vessel came within the excepted class of government vessels subject to arrest; that is, those in mercantile employment.

5. ADMIRALTY ⇨43—EXEMPTION OF VESSEL FROM ARREST—EMPLOYMENT IN MERCANTILE SERVICE.

A steamship purchased by the Shipping Board and registered in the name of the United States pursuant to Shipping Board Act, § 9 (Comp. St. § 8146e), while proceeding from the Great Lakes to New York, via Montreal and Halifax, "for entering upon the public service of the United States," was not employed solely as a merchant vessel, and was entitled to claim exemption from arrest as a government vessel.

In Admiralty. Libel by Norman McIntosh against the steamship G. A. Flagg. Warrant ordered recalled, and arrest discharged.

Berry & Bucknam, of Boston, for libelant.

Thomas J. Boynton, U. S. Atty., of Boston, Mass., for respondent.

MORTON, District Judge. The libelant was a seaman on the American steamship George A. Flagg. He has filed the present libel against the steamer to recover damages for personal injuries alleged to have been sustained in the course of his employment. The United States attorney has appeared specially and filed a suggestion that the Flagg is, and at the time of the collision referred to in the libel was, the property of the United States, and as such exempt from arrest. Pending a hearing on this suggestion, the warrant issued, and the vessel was taken into the custody of the United States marshal, where she now is. The present question is whether the vessel was subject to arrest, or was exempt therefrom as a government vessel. The facts on which it is to be decided are, by the stipulation of the parties, as stated in the suggestion filed by the United States attorney.

From this stipulation, supplemented by certain minor facts agreed to orally by counsel at the hearing before me, it appears that the Flagg,

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

being in the port of Cleveland, Ohio, was there requisitioned by the United States Shipping Board; that title to her was taken in the name of the United States, and the purchase price was duly paid. The Shipping Board caused her to be registered in the name of the United States.

Apparently the Flagg was too large to be taken to sea through the canals. She was therefore cut in halves, and in that condition taken to Montreal, where she was reassembled. At that point a crew which included the libellant, was shipped by the Shipping Board. Her officers and crew were employes of the United States, and as such entitled to the benefit of the federal compensation laws. The vessel was directed to proceed to New York "for entering upon the public service of the United States, for which she had been requisitioned and purchased." Suggestion of Want of Jurisdiction, p. 2. While so proceeding, without any cargo on board, she became in distress, and put into Halifax for repairs. It was on this part of the voyage that the accident for which damages are sought in the libel occurred.

After having been repaired at Halifax, the Flagg loaded as ballast 626 tons of coal belonging to the Shipping Board, and, so laden, proceeded to Boston for further repairs, which are still in progress, and upon the completion of which "she will continue her voyage aforesaid for the port of New York for her assignment to the public service of the United States." Suggestion of Want of Jurisdiction.

[1] A question somewhat similar to that here presented arose in *Matheson v. S. S. Lake Monroe* (Dist. Ct. Mass., November 29, 1918 [258 Fed. —], now pending on prohibition proceedings in the United States Supreme Court¹). For reasons there stated, the present case depends, in my opinion, upon the interpretation of section 9 of the Shipping Board Act (U. S. Comp. Stats. § 8146e). That section provides, in substance, first, that—

"Any vessel purchased, chartered, or leased from the board may be registered or enrolled * * * as a vessel of the United States and entitled to the benefits and privileges appertaining thereto."

This, when considered in connection with the rest of the statute, means, I think, nothing more than that the vessels are to be regarded as vessels of this country. Provision is then made for the admission of certain foreign built vessels to the coastwise trade, and the section continues:

"Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."

The present case seems to turn on whether the words, "such vessels," in the second sentence, mean only vessels which have been purchased, chartered, or leased from the board, or include also vessels operated by the board. The fact that a vessel had been purchased from a governmental agency would not make her immune from arrest in the hands of a private owner. As to such vessels, no statute

¹ See 249 U. S. —, 39 Sup. Ct. 460, 63 L. Ed. —.

was necessary to make them amenable to legal process. They are included out of abundant caution, an indication that Congress intended the sentence under discussion to have a wide scope. The Shipping Board Act did not permit the actual operation of vessels by the board unless it was unable to contract for the operation of them by citizens of the United States. Section 8146f. The business situation which Congress had in mind in passing section 9 was one in which vessels would be acquired by the board, and operated under charter or lease from it, or sold by it outright. The sentence under discussion covers that situation, and makes such vessels liable to legal process. It does not explicitly include the cases, evidently regarded as very exceptional, arising under section 8146f, in which the board would have to operate the vessels itself, because it could get no citizen to do so on satisfactory terms. But the basic intention seems clear, viz. that merchant vessels should gain no exemption from the ordinary legal liabilities because of any interest which the United States might have in them.

[2] It is common knowledge that a great part of the shipping of the country has been requisitioned by the Shipping Board. There is no provision in the Shipping Board Act for the recovery of damages caused by its vessels. If they are not amenable to ordinary legal process, the only method which has been suggested, by which persons injured by them can recover damages, would be to proceed in the same way as when injuries are inflicted by naval or other strictly government vessels. That method is so cumbersome as to result in many cases in a complete denial of justice. Congress never meant to leave persons injured at sea no other remedy. It seems to me that Shipping Board vessels, while employed solely as merchant vessels, are subject to all laws, regulations, and liabilities governing merchant vessels.

[3-5] The final question is whether the *Flagg* at the time of the arrest was employed solely as a merchant vessel. She was proceeding light to New York for orders. What she was to do on arrival there, had not been determined. She might have been put into strictly government employ, like carrying troops, or she might have been chartered or assigned into some mercantile employment. The general rule being that a government vessel is exempt from arrest, it devolves upon the libellant to establish that the *Flagg* came within the excepted class of them which was subject to arrest, i. e. those in mercantile employment. Inasmuch as she was not actually so engaged, and had not been assigned into that line of work, she was not, in my opinion, employed solely as a merchant vessel. She is therefore entitled to claim exemption as a government vessel. I appreciate the force of the suggestion by the libellant that to make exemption from arrest dependent on employment will cause uncertainty in the administration of the law; but the conclusive answer is, as it seem to me, that it is the distinction established by the statute.

It follows that the warrant should be recalled and the arrest discharged.

So ordered.

UNITED STATES v. ALLENTOWN TERMINAL R. CO.

(District Court, E. D. Pennsylvania. April 10, 1919.)

No. 4800.

CARRIERS ↔37—CARRIAGE OF LIVE STOCK—PENALTIES—VIOLATION OF REGULATIONS.

A carrier, which delivered a shipment of hogs at the proper place according to the car tickets before the time to unload under the Twenty-Eight Hour Law (Act June 29, 1906 [Comp. St. §§ 5159-5161]), which shipment the consignees refused to accept, because the car tickets made by a connecting carrier did not agree with the bills of lading, which called for delivery at another point, so that the time for unloading had expired before the shipment could be redelivered, and further delay was occasioned by the refusal of another connecting carrier to accept shipment after government inspector had ordered it unloaded for rest and feed, there was no willful disobedience of the act, or even negligence, and the carrier is not liable for the penalty.

At Law. Action by the United States against the Allentown Terminal Railroad Company to recover a penalty for violation of the Twenty-Eight Hour Law. On trial by the court without a jury. Judgment entered for defendant.

Francis Fisher Kane, U. S. Atty., and Robert J. Sterrett, Asst. U. S. Atty., both of Philadelphia, Pa.

William Clarke Mason, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. This was a suit brought by the United States to recover a penalty for alleged violation of Act June 29, 1906, c. 3593, 34 Stat. 607 (Comp. St. §§ 5159-5161), known as the Twenty-Eight Hour Law. There was no dispute as to the facts. From the stipulation filed and the testimony of witnesses, I find them to be as follows:

On or about August 14, 1916, 264 hogs, consigned by Henry Knight & Son, Louisville, Ky., to Arbogast & Bastian Company, at Allentown, were shipped from Louisville to Pittsburgh, Pa., where they were reshipped over the line of the defendant and connecting carriers to East Allentown, Pa. The owner and person in custody of the hogs requested in writing that their time of confinement be extended to 36 hours. They were loaded at Pittsburgh at 3 o'clock p. m. on August 16, 1916, and were confined in the cars during transportation until they were unloaded at East Allentown, Pa., at 12 noon on August 18, 1916, being a period of 45 hours. During that period they were not unloaded, as provided by the act of Congress, for rest, water, and feeding.

The billing called for Lehigh Valley Railroad delivery at Allentown, but the waybills did not accompany the cars or the car tickets. The car tickets, through an error made by a Pennsylvania Railroad clerk at Pittsburgh, were marked for Philadelphia & Reading delivery. The slaughterhouse of the consignees is reached by the Lehigh Valley Railroad. The consignees also have an unloading pen at Linden street, about four city blocks away from the slaughterhouse. The Linden

street pen is reached by the tracks of the defendant, running at about right angles to the Philadelphia & Reading track. The cars containing the hogs were delivered by the Philadelphia & Reading Railway to the Allentown Terminal Railroad at 12:30 a. m., August 18, 1916, on the regular interchange delivery track, known as the "tower track," located about a half mile west of Arbogast & Bastian's Linden street stock pen. The cars were moved from the "tower track" by the defendant's locomotive and placed at Linden street stock pen at 2:30 a. m. August 18, 1916. If the car tickets had conformed to the billing, the cars would not have been delivered to the defendant, but would have been delivered to the Lehigh Valley Railroad, and by it delivered at the slaughterhouse above referred to.

In billing, calling for Philadelphia & Reading delivery at Allentown, cars of hogs billed to Arbogast & Bastian are customarily delivered at their Linden street pens. Arbogast & Bastian were notified of the arrival and raised no objections to delivery at the Linden street pen until 7 a. m., 4 hours after the time limit had expired. Then they notified the agent of the Allentown Terminal Railroad that, as the cars were intended for delivery at the slaughterhouse, they would not unload at the Linden street pen, and ordered the cars delivered at the slaughterhouse on the Lehigh Valley tracks, about four squares from the Linden street pen. The railroad agent notified them that the 36-hour time limit had expired at 3 a. m. on that date. There is a Lehigh Valley transfer track connecting the Allentown Terminal tracks reaching Linden street with the Lehigh Valley tracks reaching the slaughterhouse.

The defendant moved the cars at 7:30 a. m. from the Linden street pen and delivered them to the Lehigh Valley Railroad on the transfer track at 7:45 a. m. on August 18, 1916. About 9 a. m. an inspector of the Bureau of Animal Industry notified the railroad agent that he would be obliged to feed and water the hogs, and the trainmaster for the Philadelphia & Reading Railway was then notified. He notified the agent of the Lehigh Valley Railroad to verify the information, and was advised by the Lehigh Valley Railroad agent that the railroad would not accept the hogs for delivery at the slaughterhouse, because of the refusal of the government inspector to permit further transportation without feeding and watering. If the government inspector had not stopped the shipment, the hogs would have been at the slaughterhouse within a half hour. A representative of the Philadelphia & Reading Railway Company arranged with the Central Railroad Company of New Jersey to have the hogs fed and watered at the East End yards, which are one mile from the Lehigh Valley transfer track. Owing to the congested yard conditions of the Central Railroad Company of New Jersey and the Allentown Terminal Railroad, and the fact that a special engine was required to be put in service to deliver the cars, and it was necessary for the Central Railroad of New Jersey to call in their sectionmen who were out on the road at regular duties on the track to aid in unloading the cars at the East End pens, and the fact that the tracks of the Lehigh Valley Railroad and the Central Railroad of New Jersey were at that time required to be kept open

for the movement of their express trains, the action of the government inspector resulted in the hogs not being unloaded for food, water, and rest until 12 o'clock noon August 18th, when otherwise they might have been cared for in a "humane manner" many hours earlier.

The question to be determined is whether the defendant railroad knowingly and willfully failed to comply with the provisions of the law. The fact that the hogs were delivered to the defendant company was due to the error of a clerk of the Pennsylvania Railroad Company at Pittsburgh in marking the car tickets for Philadelphia & Reading Railway delivery, instead of for Lehigh Valley delivery, in accordance with the waybills. When the cars were delivered upon the "tower track" at 12:30 a. m., the defendant was justified in delivering the cars at the Linden street pen. It did so, moreover, an hour before the expiration of the time limit, and under its obligations as a carrier, as indicated by the car tickets, its duty of taking care of the hogs was then at an end. Upon learning that the consignee refused to accept the consignment in accordance with the car tickets, but demanded performance in accordance with the waybills by delivery on the Lehigh Valley track, the defendant did what in its judgment was the best thing under the circumstances to do; that is, shifted the cars to the Lehigh Valley transfer track. The Lehigh Valley Railroad and the consignee were entirely satisfied to have the hogs shipped at once to the slaughterhouse pens, where they probably would have arrived not later than 8 o'clock a. m. The fact that they were not unloaded for feeding, watering, and rest until 12 o'clock noon was due to an unexpected situation, which compelled the Lehigh Valley Railroad to refuse to accept the hogs, and the only remedy was to carry them entirely out of their ordinary course of transportation to the East End pens of the Central Railroad of New Jersey.

There was no element of willful disobedience of the law in the action of the defendant in failing to unload the hogs prior to delivery to the consignee, for a delivery to the consignee, as it understood its obligations at the time, had been made prior to the expiration of the 36-hour period. It is apparent that the error of the clerk of another railroad company was the cause of the wrong delivery, and there was, therefore, not even negligence for which the defendant would be responsible.

Concluding that there was no failure knowingly and willfully to comply with the act, judgment will be entered in favor of the defendant.

In re RICE.

(District Court, S. D. New York. March 31, 1919.)

1. POST OFFICE Ⓒ26—IMPOUNDING MAIL—STIPULATION.

A stipulation under which a person against whom a fraud order had been prepared agreed that mail addressed to him might be impounded by the post office authorities pending hearing on the fraud order, approved.

2. BANKRUPTCY Ⓒ288(1)—ADVERSE CLAIMS—MOTIONS.

The postmaster's possession of a bankrupt's mail, which had been impounded pending hearing on a fraud order prepared by the Post Office Department, is an adverse claim, which cannot be disposed of by summary motion.

In Bankruptcy. In the matter of George Graham Rice, bankrupt. On motion by bankrupt's receiver that the post office authorities turn over to him certain mail of the bankrupt, or that he be allowed access to it. Motion denied without prejudice.

Irving L. Ernst and Bernard Naumburg, both of New York City, for the motion.

J. Julien Southerland, Sr. Asst. Atty. for P. O. Dept., of Washington, D. C. (Candler Cobb, Asst. U. S. Atty., of New York City, of counsel), opposed.

MAYER, District Judge. Rice has been adjudicated a bankrupt, and pending the selection of a trustee a receiver has been appointed.

In August, 1914, the postmaster at New York was instructed to hold Rice's mail; a fraud order memorandum and a fraud order having been prepared by the Post Office Department at Washington. While the department felt justified in making a fraud order, without notice, yet, as matter of fairness, the officials concluded to give Rice a hearing and "abundant opportunity to submit any matter he might desire to present upon the one condition that he would stipulate to have all mail addressed to him thereafter impounded, so that any delays incident to a hearing would not operate to the injury of the public."

Rice so stipulated on August 13, 1914. Various delays have occurred, so that there is not as yet a decision by the department as to whether or not a fraud order should issue, and the mail is still impounded pursuant to Rice's stipulation.

[1] The action of the department was fully justified. Its method of stipulating is to be encouraged. By this means, on the one hand, the public is protected, and, on the other, the person involved has a fair opportunity to be heard. The receiver now asks that the mail be turned over to him, or that he shall have access thereto.

[2] Counsel have presented arguments in favor of and against the ultimate right of the receiver to the possession of the mail; but these need not be considered at this time because the application, in any event, is premature. If no fraud order should issue, then the receiver or trustee will be entitled to the mail addressed to Rice; meanwhile the

mail by Rice's stipulation is in the possession of the postmaster. That possession cannot be disturbed by a receiver in bankruptcy, who, in this situation, is merely a custodian, and is not vested with title. The claim to the possession of the mail by the postmaster is an adverse claim, which cannot be disposed of by summary motion under the now well-settled practice in this circuit. True, the postmaster does not set up adverse title in himself; but he does deny right of possession on the law and on facts, which, in this case, present a situation analogous with a claim of adverse title.

If the matter were one of discretion, that discretion should be exercised to aid the Post Office Department in safeguarding the public against loss by fraudulent schemes, rather than to add a possible few dollars to the estate.

Motion denied without prejudice to such suit or proceedings as the trustee may bring, if so advised.

In re MADERO BROS.

Ex parte STRASSBURGER.

(District Court, S. D. New York. April 2, 1919.)

BANKRUPTCY ⇨234—EXAMINATION OF BANKRUPT—CONTRACTS OF TRUSTEE.

Bankruptcy Act, § 21a (Comp. St. § 9605), authorizing examinations before the referee "concerning the acts, conduct and property of the bankrupt," is inapplicable to an examination concerning an alleged contract regarding the bankrupt's property, made, not by the bankrupt, but by the trustee in bankruptcy.

In re Madero Bros., bankrupts. On motion by the trustee in bankruptcy for an order declaring respondent in contempt. Denied.

Motion by the trustee for an order on the referee's certificate declaring the respondent to be in contempt under the following circumstances: The trustee, having qualified, delivered goods to the respondent, alleging a contract of sale. The respondent, on the other hand, asserted that they were delivered only on consignment, to be sold for the trustee's account, and paid for only in case of such sale, for which reason he refused to pay. The trustee then sued in contract in the state court; the respondent answered, and the cause being at issue, the trustee obtained an order under section 21a (Act July 1, 1898, c. 541, 30 Stat. 551 [Comp. St. § 9605]) to examine the respondent before the referee. The examination could concern only the transactions which were the subject of the cause, because the respondent had no other dealings with the estate. He therefore refused to answer any questions, and was found in contempt by the referee. The single question is whether the examination can be extended to the matters so arising between the trustee and the respondent.

Irving L. Ernst, of New York City, for trustee.

Bick, Godnick & Freedman, of Brooklyn, N. Y., for respondent.

LEARNED HAND, District Judge (after stating the facts as above). So far as I have found, this is a case of first impression. It is quite true that it is no valid objection to an examination under section 21a that the evidence elicited may be pertinent to a suit pending between

the trustee and the witness. In re Cliffe (D. C.) 97 Fed. 540, 542. But the objection in the case at bar does not turn on the validity of that objection. The question rather is whether the examination concerns the "acts, conduct and property of the bankrupt"; for, if it does not, then it is not authorized. Certainly it does not touch the acts and conduct of the bankruptcy; so much is obvious. Nor does it properly touch his property either, for the trustee, having possession, sold it, as he claims, to the respondent, and he wishes to examine him about that transaction. When the trustee dealt with the property by selling or delivering it, he acted as any other owner, and in consequent litigation he stands in no different position from any other litigant. He must be content with those remedies which that forum gives him which he has chosen.

The meaning of the section is only that in securing possession of the estate of the bankrupt, even though he must have resort for that purpose to a plenary suit, the trustee shall be accorded the power of the bankruptcy court to learn all the facts. He is a newcomer into the bankrupt's affairs, and as such he is entitled to all available information. In dealings of his own with that property after securing possession he acts differently. There is no more warrant for drawing into the bankruptcy court the examination of witnesses in such litigations than there would be in trying the cases here originally. Verbally, perhaps, the examination touches the property of the bankrupt, but only so. The purpose of the provision certainly precludes such an interpretation.

The motion is denied.

In re PERLMUTTER et al.

(District Court, D. New Jersey. February, 1919.)

BANKRUPTCY \Leftrightarrow 341—REDUCTION OF CITY TAXES—DEDUCTION—STATUTE.

The District Court, pursuant to Bankruptcy Act, § 64a (Comp. St. § 9648), cannot reduce the city taxes of bankrupts by deducting, for purposes of taxation, from the value of personal property, money, effects, and credits during the years involved, all debts bona fide owing from the bankrupts to creditors residing in New Jersey, in the absence of the necessary claim therefor made by the bankrupts to the body charged with the assessment of taxes in the city, as required by New Jersey Tax Act, § 13, before the assessor is required by law to certify his tax duplicates to the body or bodies charged with the revision and correction of taxes, and the ascertainment of the tax rate.

In Bankruptcy. In the matter of Joseph Perlmutter and Harry Perlmutter, individually and as copartners trading as "Perlmutter's" and "The Quality Shop," bankrupts. On petition to review order of a referee allowing, as entitled to priority, the claim of the city of Jersey City in the sum of \$3,035.60. Order affirmed.

See, also, 256 Fed. 862.

Samuel Heyman, of Jersey City, N. J., for trustee.

Joseph F. Autenrieth, of Jersey City, N. J., for Jersey City.

HAIGHT, District Judge. The trustee's contention, broadly stated, is that the taxes assessed against the personal property of the alleged bankrupts by the city of Jersey City for the years 1908 to 1916, inclusive, are too high, and that they should now be reduced by this court, pursuant to section 64a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 563 [Comp. St. § 9648]). This contention is based on the proposition that, by sections 12 and 13 of the New Jersey Tax Act, which was in effect from 1908 to 1914, inclusive (Comp. Stat. N. J. vol. 4, p. 5093, §§ 12 and 13), the bankrupts were entitled to have deducted, for purposes of taxation, from the value of their personal property, money, effects, and credits, during those years respectively, all debts bona fide due and owing from the bankrupts to creditors residing in this state, and that such deductions were not made in reaching the valuation upon which the taxes for those years were assessed. Concededly the bankrupts were entitled to no such reduction for the years 1915 and 1916, because of the provisions of an act of the New Jersey Legislature approved April 15, 1914 (P. L. 1914, p. 353).

Assuming that this court, under the authority conferred by the before-mentioned section of the Bankruptcy Act, has the power to make such a reduction as is sought (for which the decision of the Supreme Court in *New Jersey v. Anderson*, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284, 17 Am. Bankr. Rep. 63, is claimed to be an authority), there still remains, in my judgment, an insurmountable obstacle to the making of any such reduction. Section 13 of the New Jersey Tax Act before mentioned, provides that—

"No such deduction shall be made unless the debtor shall make claim therefor in writing under oath and therein set forth the debts owing by him, when incurred, to whom owing and where the creditor resides, and also the total amount of personal property of the claimant, including debts owing to him from solvent debtors, and also that no part of such debt was incurred for the purpose of reducing the taxes of the claimant," etc.

There is no evidence that any such claim or statement was ever filed by the alleged bankrupts with the taxing authorities of Jersey City; in fact, the briefs of counsel seem to concede that they were never filed. It has been held several times by the New Jersey courts that a strict compliance with the requirements of the last-quoted provision of the statute is an essential prerequisite to the right to make or procure any such reduction. *State v. Grey*, 29 N. J. Law, 380; *State v. Johnson*, 30 N. J. Law, 452; *Mount v. Parker*, 32 N. J. Law, 341; *Tatum v. McChesney*, 34 N. J. Law, 63; *Forst v. Parker*, 34 N. J. Law, 71; *Young v. Parker*, 34 N. J. Law, 49; *Perkins v. Bishop*, 34 N. J. Law, 45.

The act construed in those cases was, in all material respects, the same as that which was in force when the taxes in question were levied, except in one particular: The former act provided that the statement or claim should be filed or delivered to the assessor on or before the time limited by law for closing the assessment. No such specific provision appears in either sections 12 or 13 of the latter act. It is entirely clear, however, when the other provisions of the Tax Act are taken into consideration, that it was the intention of the Legislature

that the claim and statement should be filed before the assessor is required by law to certify his tax duplicates to the body or bodies charged with the revision and correction of taxes, and the ascertainment of the tax rate. As one of the essential elements necessary to determine the tax rate in any given year is the value of the ratables in the municipality, it would be unwarranted to assume that it was intended that a claim for deduction on account of debts due and owing by the person subject to taxation, could be made at any time after that fixed by law, for the ascertainment of the tax rate. That this is the proper construction of the act, I think, is supported by the decision of the state board of equalization of taxes in *Re Nucoa Butter Co. et al.*, 36 N. J. Law J. 315.

As there is no evidence that the bankrupts made the necessary claim to the body charged with the assessment of taxes in Jersey City, either within or after the time when they should have done so, and thus, as there is no evidence that they complied with the statute which authorized the deduction to be made, a strict compliance with the terms of which was necessary in order to entitle the bankrupts to a deduction, my conclusion is that the trustee is not entitled to have the deduction which he claims made. No question is raised as to the correctness of the action of the referee in disallowing interest and advertising as a priority claim.

The order of the referee will accordingly be affirmed.

In re PERLMUTTER et al.

(District Court, D. New Jersey. April 30, 1919.)

1. BANKRUPTCY ⇨414(3)—DISCHARGE—ACTS PREVENTING—FRAUDULENT CREDIT AND TRANSFER OF PROPERTY—DEGREE OF PROOF.

The acts referred to in Bankruptcy Act, § 14b, cls. 3, 4 (Comp. St. § 9598), commission of which works denial of the bankrupt's discharge, are civil in their nature, and do not require for their establishment evidence beyond a reasonable doubt; a clear preponderance of the evidence being sufficient to prove them.

2. BANKRUPTCY ⇨414(1)—DISCHARGE—FRAUDULENTLY OBTAINED CREDIT—PRESUMPTION OF INTENT.

A member of a firm of tradesmen which subsequently became bankrupt is presumed to have intended the effect his statement of the financial condition of the firm produced upon a lender to it; the lender having a right to assume the statement was true.

3. BANKRUPTCY ⇨407(5)—DISCHARGE—LOAN FRAUDULENTLY OBTAINED—PRIMA FACIE CASE.

When creditors, objecting to the discharge of a bankrupt, showed that his statement of his firm's financial condition, presented to a lender to induce the loan, was untrue in a material respect, that the bankrupts had obtained money on its credit, and that its untruthfulness related to a subject within the knowledge of the bankrupt, who gave currency to the untruth, they made a prima facie case disentitling him to discharge.

4. BANKRUPTCY ⇨414(1)—DISCHARGE—LOAN FRAUDULENTLY OBTAINED—PRESUMPTION OF INTENT—BURDEN OF PROOF.

Where creditors, objecting to a bankrupt's discharge, had established facts from which was presumed his intent to deceive in issuing to a lender

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

to the firm a statement of assets, the burden to remove such presumption was on the bankrupt.

5. BANKRUPTCY ⇔414(3)—DISCHARGE—LOAN FRAUDULENTLY OBTAINED—SUFFICIENCY OF EVIDENCE.

Evidence held to show that a bankrupt, applying for discharge, in issuing a false statement of the financial condition of his firm to a lender, intended to and did deceive the lender, so that, under Bankruptcy Act, § 14b, cl. 3 (Comp. St. § 9598), discharge must be denied.

6. BANKRUPTCY ⇔408(3)—DENIAL OF DISCHARGE—CONCEALMENT OF ASSETS—INTENT.

A discharge in bankruptcy must be denied the bankrupt, under Bankruptcy Act, § 14b, cl. 4 (Comp. St. § 9598), for having concealed assets, even though no intent to defraud be proved; it being sufficient if the intent to hinder and delay creditors existed.

7. BANKRUPTCY ⇔414(1)—DENIAL OF DISCHARGE—CONCEALMENT OF ASSETS—PRESUMPTION.

The effect of a bankrupt's withdrawal of assets from his insolvent firm being to hinder and delay the creditors in securing payment of their debts, in the absence of contrary proof on his application for discharge, objected to by creditors, it is to be presumed that the withdrawal was so intended.

8. BANKRUPTCY ⇔414(1)—DENIAL OF DISCHARGE—WITHDRAWAL OF ASSETS—PRIMA FACIE CASE—BURDEN OF PROOF.

Where creditors, objecting to a bankrupt's discharge, made a prima facie case of unlawful abstraction of his firm's funds by him, within Bankruptcy Act, § 14b, cl. 4 (Comp. St. § 9598), the burden shifted to him to overcome the case so made.

9. BANKRUPTCY ⇔414(3)—DENIAL OF DISCHARGE—WITHDRAWAL OF ASSETS—SUFFICIENCY OF EVIDENCE.

Evidence of a bankrupt on creditors' objections to his discharge held insufficient to meet the burden to overcome the prima facie case made by the creditors by proof that he withdrew funds from his insolvent firm when the appointment of a receiver was imminent.

In Bankruptcy. In the matter of Joseph Perlmutter and Harry Perlmutter, individually and as copartners trading as "Perlmutter's" and "The Quality Shop," bankrupts. On exceptions to the special master's report, recommending that discharges be granted. Discharges denied. See, also, 256 Fed. 860.

Heyman & Heyman, of Jersey City, N. J., for objecting creditors.
Mark Townsend, Jr., of Jersey City, N. J., for bankrupts.

RELLSTAB, District Judge. [1] The special master, to whom was referred the objections to granting discharges to the individual bankrupts, Joseph Perlmutter and Harry Perlmutter, recommends that the objections be dismissed and the discharges granted. Of the assigned objections to granting the discharges, it is necessary to refer to only two. These are based upon clauses 3 and 4, respectively, of section 14b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [Comp. St. § 9598]). The acts enumerated in these clauses, the committing of which works a denial of the bankrupt's discharge, are civil in their nature and do not require for their establishment evidence beyond a reasonable doubt; a clear preponderance of the evidence is sufficient to prove them. United States v. Regan, 232 U. S. 37, 34 Sup. Ct. 213, 58 L. Ed. 494; Troeder v. Lorsch (C. C. A. 1) 150 Fed. 710,

80 C. C. A. 376, 17 Am. Bankr. Rep. 723; Klein v. Powell (C. C. A. 3) 174 Fed. 640, 98 C. C. A. 394, 23 Am. Bankr. Rep. 494; Garry v. Jefferson Bank (C. C. A. 5) 186 Fed. 461, 108 C. C. A. 439, 26 Am. Bankr. Rep. 511; In re Howden (D. C.) 111 Fed. 723, 7 Am. Bankr. Rep. 191; In re Greenberg (D. C.) 114 Fed. 773, 8 Am. Bankr. Rep. 94; In re Leslie (D. C.) 119 Fed. 406, 9 Am. Bankr. Rep. 561; In re Atlas (D. C.) 219 Fed. 783, 34 Am. Bankr. Rep. 44; In re Brincat (D. C.) 233 Fed. 811, 37 Am. Bankr. Rep. 587; In re Garrity, 247 Fed. 310, 159 C. C. A. 404, 40 Am. Bankr. Rep. 664.

As to the objection based on clause 3: It is charged that the bankrupt firm obtained a loan of \$5,000 from the New Jersey Title Guarantee & Trust Company upon a materially false statement in writing, dated February 28, 1916, made by Joseph Perlmutter on behalf of such firm, for the purpose of obtaining that money from the Title Company. It is conceded that Joseph Perlmutter, on behalf of the firm, rendered a statement in writing, which was untrue in failing to state the firm's indebtedness to Elizabeth Perlmutter and to Eva Perlmutter, the former the wife of Joseph, and the latter the sister of both Joseph and Harry, Perlmutter. This indebtedness, representing loans made to the firm, aggregated \$8,800 principal, besides several years' accrued interest, of which principal there was owing to Joseph's wife \$7,000 and to his sister \$1,800. On behalf of these bankrupts it is contended that the Title Company did not rely upon the statement in making the loan, and that it was not willfully and knowingly false.

The master did not make any finding as to the first proposition, and as to the second he held that the objecting creditors had not borne the burden of proof cast upon them, and had not proved that the statement was knowingly false.

As to the first of these contentions: It is sufficient to say that the evidence clearly establishes that the Title Company relied upon the statement in making the loan, and that if it had known that the bankrupts owed the sums in question, the loan would not have been made.

As to the second contention: Both partners knew that the firm owed their sister, Eva, and Joseph's wife the sums stated, and that it had paid interest thereon for a number of years. The statement of the firm's financial condition was made for the purpose of securing a loan from the Title Company following an unsuccessful effort by Joseph, on behalf of the firm, to secure a loan of \$5,000 from the First National Bank of Jersey City, with whom the firm for many years had done its banking business. This statement was prepared by the firm's bookkeeper at Joseph's request and while the latter was at the office of an attorney at law, to whom he had been referred by an officer of that bank, and whose aid he had solicited in securing the loan after he had made the unsuccessful effort just referred to, and after this attorney had had an interview with an officer of the Title Company. Upon the receipt of such statement, and after talking it over with this attorney, and at the latter's suggestion, the value of the real estate was reduced from \$150,000 to \$110,000. The statement was thereupon redrawn and signed by Joseph and forwarded by the attorney to the Title Company, who then made the loan in question.

This financial statement expressly distinguishes between the firm's merchandise and loan creditors. As to the former, it gave no names and stated the amount due them in gross; but as to the latter, it gave the names of each, with the amount due them, respectively, and, as noted, it failed to include the names of the sister and Joseph's wife and the amounts due them.

The discharge authorized by the Bankruptcy Act is not for all bankrupts. It is expressly withheld from those whose conduct brings them within the provisions of section 14 of the Bankruptcy Act.

In *Gilpin v. Merchants' National Bank* (C. C. A. 3) 165 Fed. 607, 91 C. C. A. 445, 20 L. R. A. (N. S.) 1023, 21 Am. Bankr. Rep. 429, it was held by the Circuit Court of Appeals of this circuit that the word "false," used in clause 3 of that section, "means more than merely erroneous or untrue, being used in its primary legal sense as importing an intention to deceive, and such a statement, in order to constitute a bar to a discharge, must have been knowingly and intentionally untrue." This narrower meaning here given to the word "false" has been uniformly adopted by the federal courts. Of the later cases so holding, I note the following: *Aller-Wilmes Jewelry Co. v. Osborn* (C. C. A. 8) 231 Fed. 907, 146 C. C. A. 103, 36 Am. Bankr. Rep. 714; *Firestone v. Harvey* (C. C. A. 6) 174 Fed. 574, 98 C. C. A. 420, 23 Am. Bankr. Rep. 468; *Doyle v. First National Bank* (C. C. A. 4) 231 Fed. 649, 145 C. C. A. 535, 36 Am. Bankr. Rep. 331; *In re Augspurger* (D. C.) 181 Fed. 174, 25 Am. Bankr. Rep. 83; *In re Arenson* (D. C.) 195 Fed. 609, 28 Am. Bankr. Rep. 113; *In re O'Callaghan* (D. C.) 199 Fed. 662, 29 Am. Bankr. Rep. 304; *In re Stafford* (D. C.) 226 Fed. 127, 35 Am. Bankr. Rep. 747; *In re Smith* (D. C.) 232 Fed. 248, 37 Am. Bankr. Rep. 230; *In re Landersman* (D. C.) 239 Fed. 766, 38 Am. Bankr. Rep. 685.

In the *Gilpin Case* the bankrupt had signed the statement (a printed blank) before it was filed in, and directed his bookkeeper to complete it and send it to the bank. This the bookkeeper did, indorsing on the filled-in statement the word "approximate." There was no evidence that the bankrupt ever saw it after he had signed it in blank, or that he was thereafter interrogated in regard thereto.

It is to be observed that in the *Gilpin Case* the word "approximate," indorsed on the filled-in blank, tended to negative that the statement was intended to be accurate, and further that, unless the bankrupt was to be held responsible for what his bookkeeper did within the scope of his authority and in response to a duty he imposed upon him, the bankrupt could not be held to have issued the statement in the form that it was delivered to the bank. In both of the recited particulars that case differs from the instant one. The *Perlmutter* statement was signed by Joseph after it was revised by his attorney, with whom he had discussed it, and there was nothing on its face or in the letter transmitting it to the Title Company that would suggest that it was not to be taken as a true statement of the firm's financial condition.

[2, 3] As to the proof of intention: A rational being is presumed to intend the natural and probable consequences of his words and conduct, and Joseph *Perlmutter*, in issuing the statement, is presumed to

have intended the effect it produced upon the Title Company. The latter had a right to assume that the statement was true, and, as it parted with its money on the strength of the statement, the person responsible for the untruth, in the absence of proof showing the contrary, will be presumed to have intended to hide from the lender the firm's true financial condition. In re Goldich (D. C.) 164 Fed. 882, 21 Am. Bankr. Rep. 249; In re Schachter (D. C.) 170 Fed. 683, 22 Am. Bankr. Rep. 389; In re Augspurger, supra; In re Müller (D. C.) 192 Fed. 730, 27 Am. Bankr. Rep. 606; In re Arenson, supra; In re Simon (D. C.) 201 Fed. 1004, 29 Am. Bankr. Rep. 808; In re Janavitz (C. C. A. 3) 219 Fed. 876, 135 C. C. A. 546, 34 Am. Bankr. Rep. 105; In re Arnold (D. C.) 228 Fed. 75, 35 Am. Bankr. Rep. 740; In re Josephson (D. C.) 229 Fed. 272, 36 Am. Bankr. Rep. 505; In re Landersman, supra; In re Amster (D. C.) 249 Fed. 256, 41 Am. Bankr. Rep. 249. When the objecting creditors showed that this statement was untrue in a material respect, that the bankrupts had obtained money from the bank on the credit of it, and that its untruthfulness related to a subject within the knowledge of Joseph who gave currency to the untruth, they had made a prima facie case disentitling him to a discharge. Had the proofs closed with this showing of facts, they and the inferences arising therefrom would have necessitated the denying of a discharge to Joseph. Kelly v. Jackson, 31 U. S. (6 Pet.) 622, 8 L. Ed. 523; Lilienthal's Tobacco v. U. S., 97 U. S. 237, 266, 24 L. Ed. 901; In re Greenberg, supra; In re Arenson, supra.

Was this prima facie case displaced or impaired? From the other testimony it appears that these claims of Elizabeth and Eva Perlmutter were of many years' standing; that they had from their beginning been carried as liabilities on the firm's books and the trial balances which were frequently made; but that their names, as creditors, or the amounts due them, were never mentioned in the two financial statements which the firm gave to the Mercantile Agency, and which were signed by Joseph Perlmutter. These mercantile statements were dated, respectively December 31, 1915, and January 1, 1917. Why include the wife and sister, as creditors, in the trial balances, and not in the financial statements issued to the mercantile agency? Honest dealing would require that they be inserted in the financial statements, whether they were included in the trial balances or not. Neither Joseph nor Harry Perlmutter needed to be reminded by the trial balances of the existence of their indebtedness to their sister and Joseph's wife. Facts of that character would never be forgotten by a normal being thus related to creditors. But the inclusion of the amount of the indebtedness owing to them would be necessary in a financial statement issued to a mercantile agency, if it, or those for whose interest such statement was being sought, were to have knowledge of the actual financial condition of the bankrupt firm.

How came the bookkeeper to include these debts in the trial balances and to exclude them from the financial statements? He testified that these debts were in existence and appeared on the books in 1913, when he entered the bankrupt firm's employ, and that Joseph's wife and sister were carried as creditors on the books, down to the institution of

the bankruptcy proceedings; that he never got any specific instructions how he should do his work; that he understood he was to follow the custom of his predecessor; that in making the monthly and annual trial balances he included the debts owing to the wife and sister of Joseph as liabilities, but that he omitted them from the financial statements made for the mercantile agency, and that he did so because that was the way it had been done before, and he felt that if that was wrong he would be corrected; that, as he recalled it, he made out the statement of February 28, 1916, the one made to secure the loan from the Title Company, from the mercantile statement of December 31, 1915 and the "small memorandum book in which notes were carried," and sent it to Joseph at his request; that he recalled no specific instructions to omit the claims of Joseph's wife and sister from that statement, but that he was told by Joseph to "make an itemized statement," and that the only reason they were not included in these statements was because they had never been included in any previous statement. He also said that the trial balance of January 31, 1916, showed a loan indebtedness of \$1,000 made by Joseph Perlmutter March 5, 1915, and which he had been informed had been advanced to the firm by his wife, and that he considered it had the same status as her and Eva Perlmutter's claims; that in the trial balance for the firm at the end of the year Harry Perlmutter also appeared as a creditor for \$1,750, but that neither that claim nor Joseph's for \$1,000 appeared in the financial "statements given out."

What does Joseph say about these omissions? With reference to the statements issued to the Mercantile Agency: He says that they were made by the bookkeeper on his order, that he did not compare them with the books, and that he signed them, not knowing them to be untrue, and without any intent "to give out a false or untrue statement."

As to the one sent to the Title Company: At first, though admitting that he signed the statement, Joseph disclaimed any knowledge as to when it was drawn, the purpose for which it was given, that he had any attorney at that time, or that he gave it to any one to give to the Title Company. Subsequently he recalled that, while he was at the office of the attorney before mentioned (who has since deceased) and to whom he had been referred by an officer of the First National Bank of Jersey City, he telephoned to the firm's bookkeeper to make such statement; that this attorney went over it and made him cut down the real estate value; that it was then rewritten by the attorney's stenographer, and that, after he had the attorney add to the statement that he (Joseph) "still valued the property at \$150,000, which he had cut down to \$110,000, or something like that," he signed it and left it with him. He further said that he did not know then (at the time of testifying) whether his wife's or sister's indebtedness was shown on that statement or not; that he assumed that the bookkeeper had put down everything that was on the books and that the statements so furnished him were correct; that he never gave a thought to the indebtedness due his wife and sister when he made the statement that went to the Title Company, and that they were not left out willfully, and that he had no intention of deceiving the Title Company or any one else.

It is to be noted that Joseph does not say that at the time of giving out this statement he did not consider these relatives as creditors, as has been unsuccessfully said by other bankrupts who failed to name their relatives in financial or mercantile statements. In *re Augspurger*, supra; In *re Arenson*, supra; *Josephs v. Powell & Campbell* (C. C. A. 2) 213 Fed. 627, 130 C. C. A. 291, 32 Am. Bankr. Rep. 222. He would have the court believe that at that time his mind was oblivious to the fact that the firm was debtor to his wife and next of kin. A suggestion of that character must have more behind it than appears in this case to receive judicial acceptance. Debts owing to near relatives stand out in the mind more distinctly than any other kind. In *re Brenner* (D. C.) 166 Fed. 930, 931, 20 Am. Bankr. Rep. 644; In *re Arenson*, supra. And the experience of general creditors in bankruptcy matters shows that the minds of failing debtors are not any different in this respect.

Reverting to this particular financial statement, we note that there was set before Joseph, not a statement showing the liabilities in gross, as was the case in the financial statements rendered to the Mercantile Agency, but one that was itemized, giving the names of the loan creditors and the amounts due them respectively. A glance at the list of these creditors seemingly ought to have brought home to him the fact that the names of his near relatives, as loan creditors, were not included.

But, if that did not do it, how can we escape the conclusion that the absence of these names must have come to his knowledge during the time this statement was considered by him and his attorney, and from which it emerged in the amended form that it reached the Title Company's hands? In its amended form the statement showed only a net worth of \$12,800. If the omitted indebtedness, with accrued interest, had been added, this net worth would have been practically eliminated, and the statement as a basis for credit useless.

Thus environed, Joseph's disclaimer of any intention to deceive the Title Company, lacking corroboration, is valueless. As was said by this court in *Re Arenson*, supra, in regard to a like disclaimer: "It is a defense at the command of any one, and, in the absence of corroborating circumstances, is entitled to little weight." The Title Company was entitled to a true statement, and Joseph, in the absence of convincing evidence that the omission of his wife's and sister's indebtedness from the statement in question was unintentional, must be held to have intended to conceal from this prospective lender a knowledge of such indebtedness, and also all the consequences normally flowing from such deception.

[4] The master did not certify that he considered Joseph's explanation on the question of intent as convincing, but he recommended Joseph's discharge on the ground noted, viz., that the objecting creditors had not sustained the burden of proof cast upon them. In so holding the master cast a greater burden on them than the law requires. They had established facts from which the intent to deceive was presumed. The burden to remove such presumption was on Joseph. Whether this shifted burden was sustained was a question of fact. In the present case Joseph's denial of intent to deceive is not supported by any of the

other evidence, but, as shown, is contrary to all the probabilities flowing naturally from the proven facts. The burden cast on the objecting creditors at the outset was fully met when they established the prima facie case referred to, and the uncorroborated disclaimer by Joseph of any intention to deceive did not displace or even impair it.

[5] It follows that the master's recommendation, so far as Joseph Perlmutter is concerned, cannot be approved, and that his application for a discharge must be denied.

[6] As to the objection based on clause 4 of section 14b of the Bankruptcy Act: This is that Harry Perlmutter, within two days preceding the filing of the petition in bankruptcy, withdrew \$1,700 in cash from the funds of the bankrupt firm, which he concealed and refuses to pay to the trustee. To conceal is "to hide, withdraw, remove or shield from observation; cover or keep from sight." Century Dict. & Cyc. In section 14b (4) of the Bankruptcy Act the word "conceal" is associated with transfer, remove, and destroy, and any of these, when done with intent to hinder, delay, or defraud creditors, works a denial of the discharge. In re Shoemith (C. C. A. 7) 135 Fed. 684, 687, 68 C. C. A. 322, 13 Am. Bankr. Rep. 645; In re Glazier (D. C.) 195 Fed. 1020, 1021, 28 Am. Bankr. Rep. 391. It is not necessary that intent to defraud be proved. If the intent to hinder and delay exists, it is sufficient. In re Hughes (D. C.) 183 Fed. 872, 874, 25 Am. Bankr. Rep. 556; In re Condon (D. C.) 198 Fed. 947, 950, 29 Am. Bankr. Rep. 907. See, also, Collier on Bankruptcy (11th Ed.) pp. 90-98, 395-396.

The petition in bankruptcy was filed on August 3, 1917, and on the 6th of that month both Harry Perlmutter and his brother, Joseph, filed separate admissions of inability to pay their debts, either as individuals or copartners, and consented to be adjudged bankrupts on that ground. The firm's books show, and Harry Perlmutter admitted, that on the 1st day of August, 1917, he withdrew approximately the sum of \$1,700 from the funds of the firm. He testified that he had previously loaned that amount to the firm, and that he paid a gambling debt with it. No contention is made in Harry's behalf that he had a right to withdraw that sum from the firm's funds, and as the firm was a copartnership, of which he was one of the copartners, it is immaterial whether he had previously loaned that amount to it or not. As the firm at that time was insolvent, that sum, as well as other funds and property of the firm, should have been kept for the payment of the firm's debts.

On August 2, 1917, the day following the withdrawal of this money, a bill was filed in the New Jersey Court of Chancery against Harry Perlmutter by his brother Joseph, and a receiver was appointed on that day to take charge of the copartnership property. The filing of this bill was due in part to the firm's financial difficulties and in part to differences that then existed between these brothers. Seemingly the application for a receivership was the result of an understanding between them; but, whether that is so or not, it is clear that Harry knew that such application was to be made before he withdrew the money in question.

[7] He had never drawn any large sums from the funds before, and the unprejudiced mind is constrained to the conclusion that the irrimi-

nence of the taking over of the firm's property by a court receiver was the controlling reason which prompted him to withdraw the money at that particular time. As against the creditors of the bankrupts, the withdrawal of such money was unlawful, and, if traceable, is recoverable by the trustee. The effect of such withdrawal was to hinder and delay the creditors in securing the payment of their debts, and, in the absence of proof to the contrary, it is to be presumed that it was so intended. *In re Hughes*, supra; *In re Condon*, supra; *In re Singer* (C. C. A. 2) 251 Fed. 51, — C. C. A. —, 41 Am. Bankr. Rep. 503.

[8] The master gave scant consideration to this ground of objection to Harry's discharge. He does not say that he believed his explanation of what he did with this money. He dismissed this objection with the statement that "the creditors have failed to sustain their objections by proper proof." In so determining the master overlooked the fact that, when the objecting creditors had shown, as they did, that Harry withdrew this money from an insolvent firm on the very eve of the appointment of the receiver, the imminence of which appointment was known to him, and that he refused to turn it over to the trustee, they had made a prima facie case of unlawful abstraction of the firm's funds, within the meaning of section 14 of the Bankruptcy Act, and that the burden was shifted to him to overcome the case so made. *In re Leslie*, supra; *Seigel v. Cartel* (C. C. A. 8) 164 Fed. 691, 90 C. C. A. 512, 21 Am. Bankr. Rep. 140; *In re Nisenson* (D. C.) 182 Fed. 912, 24 Am. Bankr. Rep. 915. Until he did this, nothing further was required of the objecting creditors.

[9] How did he meet this burden? He furnishes nothing but his bald statement that he used this money to pay a gambling debt of many years' standing. This is a defense easily concocted and as easily expressed, and carries little weight unless corroborated.

The burden of overcoming a prima facie case is not satisfied by such evidence. To hold otherwise would be to put a burden on the objecting creditors generally impossible for them to carry and to put them at the mercy of any unscrupulous debtor's say-so. *In re Leslie*, supra. In the *Nisenson* Case and the cases cited therein at page 916, viz. *Schweer v. Brown* (C. C. A. 8) 130 Fed. 328, 64 C. C. A. 574, 12 Am. Bankr. Rep. 178, *In re Lasky* (D. C.) 163 Fed. 99, 20 Am. Bankr. Rep. 729, and *In re Henderson* (D. C.) 130 Fed. 385, 12 Am. Bankr. Rep. 351, and in the later cases of *In re Silverman* (D. C.) 206 Fed. 960, 30 Am. Bankr. Rep. 798, and *In re Vyse* (D. C.) 220 Fed. 727, 34 Am. Bankr. Rep. 378, the courts were concerned with "turn-over" orders. Yet even in these cases, admittedly requiring stronger proof to sustain such orders than is necessary in proceedings to withhold the bankrupt's discharge, because of the drastic means that might be invoked to enforce the "turn-over" orders (imprisonment for contempt), the uncorroborated testimony of the bankrupt that he had gambled the money away, and therefore was unable to comply with such orders, was deemed insufficient to set them aside.

The prima facie case made against Harry Perlmutter has not been overcome, and he also is denied his discharge.

ATHERTON et al. v. BEAMAN.

(District Court, D. Massachusetts. January, 1919.)

1. BANKRUPTCY ⇨188(1)—PLEDGE—VALIDITY.

Borrower corporation's agreement of pledge of 50 carloads of lumber stored with a storage company, with provision for substitution of carloads, a "carload" being either the load of a particular car or lumber of the value of \$200, was valid, as against the objection of indefiniteness of designation of the property affected by the pledge, and entitled the pledgee to the equivalent of 50 carloads of lumber in the possession of the storage company, as against the corporation's trustees in bankruptcy, although a great part of the lumber had not been received by the storage company in cars, but had been shipped by water, and such part had never been appropriated from the larger mass by the storage company.

2. PLEDGES ⇨11—SUFFICIENCY OF DELIVERY—APPROPRIATION BY WAREHOUSEMAN.

A warehouseman, if authorized by lender and borrower, may make the appropriation of goods to a pledge, though such action involves the exercise of judgment and discretion.

3. CORPORATIONS ⇨432(5)—OFFICER'S INDIVIDUAL INDEBTEDNESS—PAYMENT FROM CORPORATE FUNDS—BURDEN OF PROOF.

Although the presumption is against the regularity of payments of his individual debts by a corporate officer by checks drawn directly upon the corporation, the question is one of fact, and it devolves upon a trustee in bankruptcy of the corporation, litigating as to the amount owing by the corporation to the creditor of such corporate officer, who was also a creditor of the corporation, to establish that the payments were in fact unauthorized by the corporation, and that the creditor had notice of that fact when he received them, and that they have never been ratified.

4. CORPORATIONS ⇨426(7)—IRREGULAR PAYMENT BY CORPORATE OFFICER—RATIFICATION—SILENCE.

Silence and inaction of a corporation's officers and stockholders concerning a payment by a corporation officer of his individual indebtedness by checks drawn directly upon the corporation *held* to amount to a ratification of such payments.

5. BANKRUPTCY ⇨155—TRUSTEE—IRREGULAR PAYMENT BY CORPORATE OFFICER.

Where officers and stockholders of a corporation in effect ratify irregular payments by a corporate officer of his individual indebtedness by checks drawn directly upon the corporation, by remaining silent and thus preventing the creditor from proceeding against the corporate officer, trustee in bankruptcy of corporation could not contend that corporate officer was not authorized to draw such checks.

6. BANKRUPTCY ⇨287(3), 293(1)—BILL IN EQUITY.

Trustees in bankruptcy may resort to a bill of equity in the District Court to protect their right to the possession of lumber belonging to the bankrupt, as against one claiming a right to possess 50 carloads out of a larger lot, who interfered with the efforts of the trustees to obtain possession of any of the lumber; and the fact that, in order to determine to what extent the defendant's action was justified, it is necessary to decide the controversy, does not oust the jurisdiction of the court.

In Equity. Bill by Percy A. Atherton and others, trustees in bankruptcy, against Nathaniel P. Beaman, to obtain certain lumber in possession or custody of a storage company, and seeking an injunction against the defendant, who had taken action to prevent the delivery of the lumber to the trustees. The matter having been referred to a ref-

eree as special master to state the facts, the case comes before the court on exceptions to his report and on a motion for a decree made by the defendant. Decrees ordered to be entered overruling all exceptions to the master's report and confirming said report, except as to certain matters, and dismissing the bill upon the merits. See, also, 243 Fed. 930.

Foster & Turner, of Boston, Mass., for Nathaniel P. Beaman.
Swift, Friedman & Atherton, of Boston, Mass., for trustees.

MORTON, District Judge. This is a bill in equity, brought by the trustees in bankruptcy of the Parsons Manufacturing Company to obtain certain lumber in the possession or custody of the Eastern Storage Company. Beaman, the defendant, claimed a large part of the lumber on the ground that it had been pledged to him by the bankrupt as security for a loan of \$10,000, and he had taken action to prevent the delivery of any of it by the storage company to the trustees. The bill seeks an injunction against such action by him. The storage company makes no claim to the lumber, except for its proper storage charges, which all parties are willing should be paid. The case was referred to Referee Olmstead as special master to state the facts. The questions now before the court arise on exceptions to his report, and on a motion for a decree made by the defendant. Pending the case, by agreement of parties, the lumber has been sold, the proceeds to stand like the original property.

The material facts, which for the most part are not seriously in controversy, are as follows: About 2½ years before the petition in bankruptcy, against the Parsons Manufacturing Company was filed, Beaman, who owned practically all of its stock, sold out his holdings. One of the buyers, Gerrish, who had previously been associated with Beaman in the company, continued as its treasurer. In connection with this transaction, Beaman loaned the company \$10,000. This loan was secured in the following manner: The Parsons Manufacturing Company habitually carried on storage with the Eastern Storage Company large amounts of lumber. This lumber came to the storage company by rail. Each carload was piled by itself, and the pile was marked with the carload number and the initial "P. M. Co." The Parsons Manufacturing Company gave Beaman the order on the Eastern Storage Company, which is stated in full in the referee's report, and which was accepted by the storage company as therein stated. In further protection of the security, the agreement of September 4, 1914, which also appears in full in the referee's report, was entered into between the parties.

Briefly stated, the Parsons Manufacturing Company directed the storage company to hold at all times 50 carloads of its lumber to the order of Beaman, and agreed to keep that amount of lumber in the storage company's possession subject to his order, and the storage company accepted the order. The Parsons Manufacturing Company reserved the right to use any carload of lumber thereby covered by substituting another equally valuable one for it. No specific carloads or piles of lumber were appropriated to this pledge by the storage com-

pany until November, 1916, shortly before the failure. At the time when this arrangement was entered into, the learned referee finds—and, though his finding is attacked by the trustees, I see no sufficient reason to doubt the correctness of it—that the Parsons Manufacturing Company was doing a prosperous business and was entirely solvent. The fact that Gerrish and his associates, who were familiar with the company's affairs, paid \$20,000 for its capital stock, is nearly conclusive evidence on these points. In November, 1916, it was undoubtedly insolvent.

Following the Beaman transaction above described, the Parsons Company continued to do business as before with the storage company, shipping in and taking out comparatively large quantities of lumber, and keeping at all times a considerable stock with the storage company. From time to time it pledged certain specified carloads of lumber in the possession of the storage company to various banks for loans. In such instances the storage company was notified, was given a list of the carloads affected by the pledge, and agreed to hold them for the account of the pledgee. Beaman does not attack those transactions, and no question arises as to them.

In November, 1916, the manager of the storage company called the attention of the Parsons Company to the fact that there was not enough of its lumber with the storage company to fill the pledge orders which had been given to various banks and Mr. Beaman, which had been accepted by the storage company. At that time the Parsons Manufacturing Company had a cargo of water-borne lumber on the wharf of the Hall Lumber Company, and it at once arranged with the storage company that this lumber should be put at the latter's order to make up the deficiency. The wharfingers were duly notified, and the effect of what was done was to bring the lumber on the wharf into the control and constructive possession of the storage company. Aside from the wharf lumber, there were several carloads of lumber in the possession of the Storage Company pledged to nobody, unless to Beaman. With the wharf lumber there was more than enough to make up 50 carloads applicable to him.

There was no actual appropriation by the storage company of any particular lumber at the wharf to the Beaman order at that time; but there can be no doubt that the storage company supposed that it was holding 50 carloads on storage for Beaman's account. A carload is referred to in the agreement as representing \$200 in value, and was so treated by the parties. Beaman was not notified of the arrangement made between the Parsons Manufacturing Company, the storage company, and the wharfingers concerning that lumber. He never at any time took formal possession of any specified lumber. He relies on a constructive possession, or right of possession, arising out of the bankrupt's order of September, 1914, and the acceptance thereof by the storage company.

[1] The situation last described continued until the filing of the involuntary petition against the Parsons Manufacturing Company on December 9, 1916; and the question is whether at that time Beaman had a valid and enforceable pledge or lien on 50 "carloads" of the lumber in the possession or control of the storage company. The only

possible doubt arises out of the indefiniteness of the designation of the property affected by the pledge. As above noticed, a "carload," as used by the parties, represented either the load of a particular car, which was kept separate by the storage company, or lumber of the value of \$200. As to the lots which had come in on cars, and were capable of identification, and were not appropriated to other pledges, there seems to be no doubt that Beaman is entitled to them.

[2] As to whether the storage company may separate out enough of the water-borne lumber to make up the 50 carloads, no decision has been called to my attention covering the point. The question appears to be whether a warehouseman may be authorized to make the appropriation of goods to a certain pledge, where such appropriation involves the exercise of judgment and discretion. The original agreement provided for the substitution of cars, and also introduced the element of value; i. e., "of the average value of \$200 per car." (Agreement of September 4, 1914.) Both parties authorized changes in the pledged property, and in permitting them the storage company acted with the assent of both. Such an arrangement does not seem to me legally objectionable or ineffective; it is not radically different from what is regularly done with reference to grain stored in elevators. Lumber is a recognized article of commerce, and has a value ascertainable within close limits. If that from the wharf had been carted to the storage company's place, and had there been separated out into so-called "carload" lots, and some of these lots had been appropriated by the storage company to Beaman's pledge, it seems to me that he would be entitled to them, as against the trustees. There being no fraud or bad faith, I see no sufficient reason why that appropriation might not be made by the storage company at the wharf at any time before it relinquished custody of the property. As the arrangement was unobjectionable when entered into, I think that the parties should be protected as long as they acted in good faith in carrying it out.

[3-5] A further question has been argued as to the validity and amount of Beaman's claim. The trustees seek to offset against the amount due on his loan (for which a promissory note was given) certain payments made—improperly, it is alleged—by Gerrish to Beaman from the funds of the Parsons Company. Gerrish was indebted to Beaman personally. Checks were drawn by Gerrish directly from the company to Beaman and were delivered in payment of Gerrish's personal obligation. The plaintiffs contend that at the time when Gerrish made these payments he was already indebted to the Parsons Company, that the presumption from the way in which the payments were made is against their validity, and that Beaman was put upon notice that Gerrish was using the company's money in a way in which he had no right to use it.

I agree with the plaintiffs that the presumption is against the regularity of such payments as have just been described (*Fillebrown v. Hayward*, 190 Mass. 472, 77 N. E. 45; *Johnson v. Longley Luncheon Co.*, 207 Mass. 52, 92 N. E. 1035); but the question is one of fact, and it devolves upon the plaintiffs in this instance to establish that the payments were in fact unauthorized by the Parsons Company, that Beaman had notice of that fact when he received them, and that they

have never been ratified. Those facts are not established by the evidence. The weight of a presumption of this character is greatly lessened when all the circumstances of the transaction are before the court. Gerrish testified, and various other witnesses. On all the evidence, and giving due weight to the presumption, it does not appear that, in using the funds of the Parsons Company to pay his personal debt to Beaman, Gerrish was acting in fraud of other persons interested in the company. Moreover, he had been making such payments for several years. There is no evidence that they were not known to his fellow officers and directors, who owned nearly all the stock, and who did not object. In justice to Beaman, if objection was to be made, it should have been made seasonably in order that he might proceed against Gerrish. The silence and inaction of the company's officers and stockholders amounted to a ratification by it of said payments. The trustees have, under such circumstances, no greater rights than the corporation. In *re National Piano Co.* (D. C.) 42 Am. Bankr. Rep. 111, 252 Fed. 950, citing cases, to which may be added *Ratcliff v. Clendenin*, 36 Am. Bankr. Rep. 561, 232 Fed. 61, 146 C. C. A. 253.

[6] The defendant contends that this court has no jurisdiction of the controversy. The general title to all the lumber was in the trustees, subject only to the rights of the pledgees. The storage company never made any adverse claim to it. Beaman did not claim certain specified piles or separate lots of lumber; he made a general claim to 50 carloads out of a larger lot. As to so much of the lumber as is not covered by pledges, there can be no doubt, on the record before me, of the right of the trustees to an immediate possession. Beaman having interfered with the efforts of the trustees to obtain possession of any of the lumber, they were, I think justified in bringing their bill here to prevent interference with the property of a bankrupt estate. The fact that, in order to determine to what extent Beaman's action was justified it is necessary to decide the controversy, does not oust the jurisdiction.

Decrees may be entered, overruling all exceptions to the master's report, and confirming said report, except as above stated, and dismissing the bill upon the merits.

In re AMERICAN STEEL SUPPLY SYNDICATE, Inc.

Petition of DALTON ADDING MACHINE CO.

(District Court E. D. Michigan, S. D. April 8, 1919.)

No. 4171.

1. SALES Ⓒ464—**CONDITIONAL SALES—VALIDITY.**

A contract of conditional sale, whereby the title remains absolutely and fully in the vendor, to be transferred to the vendee, when and only when the latter has paid in full the amount called for by the contract, and upon default by the vendee in the performance of such contract the vendor to be entitled to reclaim such property in accordance with the terms of the contract, or to sue the vendee for breach of contract to buy, is valid in Michigan.

2. BANKRUPTCY Ⓒ151—**CONDITIONAL SALES—RIGHT OF TRUSTEE IN BANKRUPTCY.**

A receiver or the trustee in bankruptcy of a vendee in a conditional sale stands in the shoes of the vendee.

3. BANKRUPTCY Ⓒ140(1)—**RECLAMATION—CONDITIONAL SALES.**

A vendor of property under conditional sale contract to one subsequently adjudicated a bankrupt is entitled to reclaim the property.

4. BANKRUPTCY Ⓒ184(2)—**CHATTEL MORTGAGES.**

One who sells in Michigan an article to one subsequently adjudicated a bankrupt, reserving only a lien for the purchase price, cannot reclaim such property as against the receiver of the bankrupt, where the contract of sale was not filed under Comp. Laws Mich. 1915, § 11988.

5. CHATTEL MORTGAGES Ⓒ6—**CONDITIONAL SALES—CONSTRUCTION.**

Whether a contract of sale of an article evidences a conditional sale, or a transfer of title with the reservation of a lien or a chattel mortgage, depends upon the intention of the parties making the contract, as ascertained by the correct construction of its terms.

6. COURTS Ⓒ89—**STARE DECISIS—CONSTRUCTION—INTENTION.**

If it has been authoritatively decided that certain language in one contract indicates a certain intention, such intention must be inferred from the use of such language in other similar contracts.

7. CONTRACTS Ⓒ144—**WHAT LAW GOVERNS.**

A contract of sale of property sent to, and to remain in, a certain state, in the conduct of business in operation there, is governed, as to its construction, by the established law of that state.

8. COURTS Ⓒ366(14)—**BANKRUPTCY COURTS—FOLLOWING STATE LAW.**

In considering, in bankruptcy proceedings, the construction and legal effect to be given to a contract of a certain state, the federal court will follow the settled rule in force in such state.

9. CHATTEL MORTGAGES Ⓒ6—**SALES—TITLE RETAINING CONTRACT.**

In Michigan, title retaining contract of sale, reserving right in vendor to bring action to recover purchase price from vendee, constitutes an absolute sale with retention of title, operating merely as a chattel mortgage lien to secure the payment of such price.

In Bankruptcy. In the matter of the American Steel Supply Syndicate, Incorporated, Bankrupt. On petition of the Dalton Adding Machine Company for reclamation. Petition denied.

Frank Lawhead, of Detroit, Mich., for petitioner.

Clark, Emmons, Bryant & Klein and Welsh, Bebout & Kahn, all of Detroit, Mich., for receiver.

TUTTLE, District Judge. This matter is before the court in reclamation proceedings originally brought before the referee for this division, in which the referee has filed a report certifying to this court a certain question arising in the proceedings and involving the construction and effect to be given to the contract under which the machine sought to be reclaimed by the petitioner was delivered to the bankrupt. The referee states the question involved and certified by him as follows:

"The question presented for determination is whether or not the contract in question is a conditional sale contract, or an absolute transfer of title with a reservation in the seller by way of security or chattel mortgage."

It is undisputed that on or about May 10, 1918, the petitioner and the bankrupt entered into a contract which was in the form of an order by the bankrupt, expressly approved and accepted in writing by the petitioner, the material language and terms of which are as follows:

"To the Dalton Adding Machine Company, Cincinnati, Ohio: Please enter our order for the following, and deliver, f. o. b. Detroit, one Dalton adding, listing, and calculating machine, for which we agree to pay to the order of the Dalton Adding Machine Company, Cincinnati, Ohio, \$360.00 [here appear the words "list price of equipment must appear here"], thirty (30) dollars herewith and thirty (30) dollars each month hereafter until paid in full. Payments to be made the 1st of the month. A discount of 2 per cent. shall be allowed on the net amount of this order for full cash payment within 10 days from date of invoice. The conditions printed on the reverse side hereof constitute a part of this order."

On the back of this contract appear the following provisions:

"(1) The said Dalton adding machine equipment is to be covered by our written guaranty, whereby you shall agree to make good any defects of material or workmanship for the period of one year from date of purchase.

"(2) Title to the within described property shall remain in you until the purchase price or any judgment therefor has been paid in full, and the within signer hereby agrees not to remove the said property from the place of original delivery so long as any part of the purchase price remains unpaid, without first securing the written consent of the Dalton Adding Machine Company. The within signer further agrees to assume the risk of loss and damage to said property.

"(3) In case of failure to make any payment in time and manner as herein provided, the entire unpaid balance of the purchase price shall become immediately due and payable; and you may, without legal process, retake said property, and in such event the within signer hereby agrees to make delivery thereof to you immediately upon request.

"(4) In event of your retaking said property as above provided, any amount that may have been paid thereon shall be considered as payment for use, ordinary wear and depreciation of said property while in the possession of the within signer, and in the absence of specific provision of law to the contrary, shall be retained by you. If the amount so paid does not cover the reasonable rental value of said property, the within signer hereby agrees to pay you on demand the balance of such reasonable rental. Nothing in this order shall be construed as obligating you to accept return of property tendered in lieu of purchase price agreed to be paid.

"(5) All statutory provisions as to retaking and resale of the property within described are hereby expressly waived. If a claim hereunder is placed in an attorney's hands for collection, ten per cent. shall be added thereto and paid as attorney's fees.

"(6) This order covers all agreements between the within signer and the Dalton Adding Machine Company, either express or implied; and when ap-

proved by said company at its executive office becomes a contract between the parties as purchaser and seller respectively. It is expressly agreed that this order shall not be countermanded."

It appears that \$90 has been paid on this contract, and the balance of \$270 remains unpaid. It is also undisputed that subsequent to the delivery of said machine numerous creditors, without knowledge or notice of said contract, extended credit to the bankrupt for goods sold and delivered in a total amount exceeding the balance due thereon, that the contract had not been filed in accordance with any of the recording laws of the state of Michigan, and that the petitioner demanded the return of the property, which was refused. Shortly after the adjudication of the bankrupt on an involuntary petition, the petitioners herein filed this petition, praying for an order requiring the receiver to deliver to it the machine covered by this contract or to pay to it the balance due for said machine, \$270. The referee was of the opinion that petitioner was entitled to the order prayed for, but instead of entering such order he certified the question involved to the court, as already stated.

[1, 2] The question presented then, is whether the contract in question is one of conditional sale (that is, of bailment), or of absolute transfer of title with a retention of title in the seller merely by way of security (that is, a chattel mortgage). If the transaction constituted a conditional sale, the title remained absolutely and fully in the vendor, to be transferred to the vendee when, and only when, the latter had paid in full the amount called for by the contract; and upon default by the vendee in the performance of such contract the vendor would be entitled to reclaim such property in accordance with the terms of the contract, or to sue the vendee for breach of contract to buy, if he had agreed to buy the property. That such a contract of conditional sale is valid in Michigan, and that the receiver or the trustee in bankruptcy of the vendee therein stands in the shoes of the latter in regard to such contract, are, of course, propositions too well settled to require discussion.

If, however, this contract should be construed, not as one of conditional sale, but as one of absolute sale, under which the legal title was transferred from the petitioner to the bankrupt, with a reservation of title in the vendor by way of security merely, in that event the title to the property became, by such contract of sale, vested in the vendee, the bankrupt, subject to a right of lien in the vendor, the petitioner, to secure payment of the purchase price (that is, a chattel mortgage), and upon the adjudication in bankruptcy and the appointment of the receiver the latter succeeded to the rights of such vendee in this property, subject to this outstanding chattel mortgage.

[3, 4] Section 11988, Michigan Compiled Laws of 1915, provides that "every mortgage or conveyance intended to operate as a mortgage of goods and chattels * * * shall be absolutely void as against the creditors of the mortgagor, * * * unless the mortgage or a true copy thereof shall be filed" in accordance with the provisions of the statute.

As the contract in question was never recorded under this statute, it becomes important to determine whether it constituted a conditional

sale or an absolute sale from vendor to vendee, with chattel mortgage from the latter to the former to secure the purchase price. If it be an instrument of the character first mentioned, petitioner is entitled to reclaim its property; if, however, the contract be of the kind last indicated, the petition of the vendor should be denied, for the reason that in that case it has already sold this property to the bankrupt, and holds no valid lien thereon, as against the receiver.

[5] The answer to this question depends upon the intention of the parties making the contract under consideration, as ascertained by the correct construction of its terms. *Atkinson v. Japink*, 186 Mich. 335, 152 N. W. 1079; *Holcomb & Hoke Mfg. Co. v. Cataldo*, 199 Mich. 265, 165 N. W. 941; *John Deere Plow Co. v. Mowry*, 222 Fed. 1, 137 C. C. A. 539 (C. C. A. 6); *In re Stoughton Wagon Co.*, 231 Fed. 676, 145 C. C. A. 562 (C. C. A. 6); *Ford Motor Co. v. Union Motor Sales Co.*, 244 Fed. 156, 156 C. C. A. 584 (C. C. A. 6).

[6] In this case, therefore, as in similar cases, it is necessary to determine what was the intention of the parties in entering into the contract involved and under consideration. If, however, it has been authoritatively decided that certain language in one such contract indicates a certain intention, such intention must be inferred from the use of such language in other similar contracts.

It is claimed by the receiver herein that according to the rule laid down in recent decisions of the Michigan Supreme Court the contract involved in the present case must be held to be an absolute sale, subject to a retention of title in the vendor merely by way of security and that such contract therefore is, in legal effect, a sale to the bankrupt together with a chattel mortgage from the latter to the petitioner herein. This contention is strenuously disputed by the petitioner, and was rejected by the referee, as hereinbefore indicated.

[7] Inasmuch as the contract in question concerned property which was sent to, and was to remain in, Michigan thereunder, in the conduct of a business in operation there, it must be held to be a Michigan contract, and as such should be construed according to the established law of that state. *Union Trust Co. v. Bulkeley*, 150 Fed. 510, 80 C. C. A. 328 (C. C. A. 6); *Title Guaranty & Surety Co. v. Witmire*, 195 Fed. 41, 115 C. C. A. 43 (C. C. A. 6).

[8] It is, of course, well settled that in considering, in bankruptcy proceedings, the construction and legal effect to be given to a contract of a certain state, the federal court will follow the settled rule in force in such state. *Bryant v. Swofford Bros. Dry Goods Co.*, 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997; *In re Ducker*, 134 Fed. 43, 67 C. C. A. 117 (C. C. A. 6); *Potter Mfg. Co. v. Arthur*, 220 Fed. 843, 136 C. C. A. 589, Ann. Cas. 1916A, 1268 (C. C. A. 6); *In re Bettman-Johnson Co.*, 250 Fed. 657, — C. C. A. — (C. C. A. 6).

What, then, is the rule according to the law of Michigan on the construction of such a contract? Until recently the decisions of the Michigan Supreme Court on this subject seemed to furnish no such clear and definite rule as would be controlling in this court. *John Deere Plow Co. v. Mowry*, supra.

[9] Since, however, the decision of the Michigan Supreme Court in the case of *Atkinson v. Japink*, supra, and particularly since its re-

cent decision in *Young v. Phillips*, 202 Mich. 480, 168 N. W. 549, and, on rehearing, 203 Mich. 567, 169 N. W. 822, I am satisfied that the rule is now settled in Michigan that an agreement providing for the transfer of goods whereby title thereto is retained in the transferor, but the latter reserves the right to bring an action against the transferee for the recovery of the purchase price of such goods, should be construed as an absolute sale with a reservation of title for security merely, and therefore in legal effect a chattel mortgage.

Being further satisfied that this present rule is not so inconsistent with any well-established rule of property previously in force in Michigan as to warrant this court in refusing to follow it, I am of the opinion that it should be followed in the present case. In *Atkinson v. Japink*, supra, the rule governing the construction of title retaining contracts was laid down and announced as follows:

"When the absolute title is reserved, retention thereof by the vendor is inconsistent with an action to recover the debt."

In *Young v. Phillips*, supra, the question whether a certain contract was a conditional sale or an absolute sale with reservation of title merely as security was involved. The third clause of the contract provided:

"That the title to said property and right of possession thereto shall be and remain in said first party until said sum of \$750 [the purchase price] and interest, and any judgment rendered therefor shall be paid in full."

The question of the admissibility of certain testimony as to the intention of the parties in executing such contract was argued by counsel before the Supreme Court, which declined to consider such question, in the following language:

"In our opinion it becomes unnecessary to discuss the question of the admissibility of the testimony of Mutchler, or its effect, as from an examination of the contract of sale it appears that the title to the property was reserved to the vendor as security merely, and that the conditions therein did not amount to an absolute reservation of title in the vendor. In the recent case of *Atkinson v. Japink*, 186 Mich. 338, 152 N. W. 1079, this court, speaking through Mr. Justice Ostrander, said with reference to this legal question: 'An examination of our own and of the decisions of other courts leads to the conclusion that they sustain, in the main, two propositions: First, that when the absolute title is reserved retention thereof by the vendor is inconsistent with an action to recover the debt.' * * *

"An examination of the third clause of the contract here in question shows that it was the intention of the parties that an action might be brought to recover the debt, and that the title to the property might still remain in the vendor to secure the payment of the debt, because it says in terms that: 'The title to said property and right of possession thereto shall be and remain in said first party until said sum of \$750, and interest and any judgment rendered therefor, shall be paid in full.' * * *

"The court might therefore very well have directed the jury that the contract in question showed that the title to the property was retained in the vendor simply for security, and have thus determined the very question, which was submitted to the jury to determine under the special question, against the contention of the plaintiff and appellant.

"It being admitted that the contract, which we hold was taken as security, was never filed with the city clerk of the city of Detroit, it became absolutely void as against creditors of the mortgagor, or the person giving the security, by virtue of the terms of section 11988 of the Compiled Laws of 1915.

"Being, therefore, of the opinion that the defendant Phillips had a right

to levy upon the property, and was rightfully in possession thereof, it follows that the judgment must be and is hereby affirmed."

After the filing of this opinion a rehearing was requested and granted. As the court stated in its opinion on such rehearing:

"Counsel representing other interests than those immediately involved" were "permitted to file briefs as amici curiæ, and the various contentions advanced by counsel were fully argued and ably briefed."

After carefully reviewing the subject, and pointing out that the question whether such instrument is a conditional sale or an absolute sale with reservation of title as security, depends upon the intention of the parties, the court adhered to its former opinion, using the following language:

"It may be conceded that the state of the law was somewhat confusing before the decision in *Atkinson v. Japink*, supra, and it may be difficult to harmonize the various decisions of the court on this question; * * * but with the tests so clearly announced in the *Atkinson Case*, it seems to us that there should be no difficulty encountered in attempting to determine the character of any of this class of instruments by applying the tests therein set forth.

"We think that decision announced a rule and tests which can be readily applied, and was of distinct value because of that fact. If, of the two elements, reservation of title and the right to maintain an action to recover the debt, the latter is missing, there is no inconsistency, and * * * the conclusion may be immediately drawn that there was no intention to make an absolute sale with the reservation of lien by way of security. Such a contract becomes a pure conditional sale, under which the goods can be retaken by the vendor, even from third parties, and the vendor may still have an action for damages for breach of contract against his vendee, if he has suffered any such damage. But if the instrument purports to reserve title, and to give a right of action to recover the debt without passing title, the two being inconsistent according to the test in *Atkinson v. Japink*, it must be concluded that the intent of the parties was to make an absolute sale with the reservation of lien by way of security."

This language is plain and positive, and it seems clear that it is now the settled rule in Michigan that, where a title retaining contract reserves the right in the vendor to bring an action to recover the purchase price from the vendee, such a contract must be held to constitute an absolute sale, with the retention of title operating merely as a chattel mortgage lien to secure the payment of such price. Applying this rule to the contract involved in this case, it is plain that such contract provides for the reservation by the petitioner of the right to sue the bankrupt for the purchase price fixed therein. It will be noted that it is provided that "title to the within-described property shall remain" in the petitioner "until the purchase price or any judgment therefor has been paid in full." This is substantially the same language as that used in the contract involved in *Young v. Phillips*, supra, and which was there held to render the contract one of absolute sale. It is also provided in the contract in the instant case that "in case of failure to make any payment in time and manner as herein provided the entire unpaid balance of the purchase price shall become immediately due and payable." This contract further provides that—

"nothing in this order shall be construed as obligating" the petitioner "to accept return of property tendered in lieu of purchase price agreed to be paid."

Finally, it is provided that the instrument, "when approved by said company at its executive office, becomes a contract between the parties as purchaser and seller, respectively." These provisions in the contract sufficiently indicate an intention on the part of the parties thereto that the vendor should have the right to recover the purchase price, *as such*, from the vendee. Under the rule now settled in Michigan the reservation of such right is inconsistent with the retention of the absolute title to the property, and such retention must be regarded as intended merely as security for the payment of the purchase price and in effect a "conveyance intended to operate as a chattel mortgage," within the meaning of the Michigan statute providing for the recording of such an instrument. As, therefore, such instrument was not recorded as so required, the part thereof intended to operate as a mortgage was void as against creditors of the bankrupt becoming such after its execution, as represented by the receiver herein.

The question certified for determination must be answered in accordance with the terms of this opinion, and an order entered denying the petition for reclamation.

MATARAZZO v. HUSTIS.

(District Court, N. D. New York. March 18, 1919.)

1. REMOVAL OF CAUSES ⇔94—PETITION—AMENDMENT.

Where defendant alleged in his petition for removal that plaintiff, who described himself in the complaint simply as a resident of the state, was a citizen of the United States, and thereafter learned that plaintiff was an alien, he can amend his petition to accord with the facts.

2. REMOVAL OF CAUSES ⇔11—SUIT BY ALIEN.

A suit by an alien against a citizen of a state is within the judicial power of the United States under Const. art. 3, § 2, and within the original jurisdiction of the District Court as defined by Judicial Code, § 24 (Comp. St. § 991), and is therefore a suit which may be removed to the federal court under Judicial Code, § 28, subd. 2 (Comp. St. § 1010), authorizing removal of suits of which the federal courts are given original jurisdiction.

3. REMOVAL OF CAUSES ⇔12—"PROPER DISTRICT."

The "proper district" to which a suit may be removed from a state court under Judicial Code, § 24 (Comp. St. § 991), is the district and division in which is situated the county from which removal is made, as provided by section 53 (Comp. St. § 1035), not the district in which the suit could have originally been brought.

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

4. REMOVAL OF CAUSES ⇔1—NATURE OF RIGHT.

The right to remove a cause commenced in the state court is purely statutory.

5. COURTS ⇔276—DISTRICT IN WHICH SUIT MUST BE BROUGHT—WAIVER.

The right to be sued in a particular District Court of the United States is a personal privilege, which may be waived.

6. COURTS ⇨276—DISTRICT IN WHICH SUIT MUST BE BROUGHT—WAIVER.
In actions of a local nature which by Judicial Code, § 55 (Comp. St. § 1037), must be brought in the district where the property is situated, neither consent of the parties nor assumption of jurisdiction can confer jurisdiction on the court of another district.
7. REMOVAL OF CAUSES ⇨12—SUITS REMOVABLE—RESTRICTIONS AS TO DISTRICT.
An alien cannot, by starting an action for personal injuries in the court of a state in which defendant did not reside, deprive defendant of his right to removal, because the district in which the cause is removed under Judicial Code, § 53 (Comp. St. § 1035), is, not a district in which plaintiff could have originally brought suit in the federal court.
8. REMOVAL OF CAUSES ⇨21—SUIT AGAINST COURT OFFICER—SUIT BY ALIEN.
Judicial Code, § 34 (Comp. St. § 1016), authorizing removal of suits by aliens against civil officers because in state not the residence of defendant, does not impliedly prohibit the removal of a suit by aliens against an officer of the court brought in a state not the defendant's residence, under the authority of Judicial Code, § 33, as amended by Act Aug. 23, 1916, c. 399 (Comp. St. § 1015), providing for removal of suits against federal court officers for acts in performance of their duties.
9. REMOVAL OF CAUSES ⇨21—"OFFICER OF THE COURT"—RECEIVERS.
A receiver of a railroad originally appointed by the federal court in another district where he resided, and later reappointed in ancillary proceedings in the court to which a suit brought against him in a state in which he did not reside was removed, was an officer of the court to which the suit was removed within Judicial Code, § 33, as amended by Act Aug. 23, 1916, c. 399 (Comp. St. § 1015), authorizing removal of suits against officers of the court.
10. REMOVAL OF CAUSES ⇨21—SUIT AGAINST OFFICERS—POWER OF CONGRESS.
Congress has the power to provide for the removal of suits against officers appointed by its courts as such, or for acts done in the discharge of their duties.

At Law. Action by Emilio Matarazzo, as administrator of Raffelo Matarazzo, deceased, against James H. Hustis, as receiver of the Boston & Maine Railroad. On motion by the plaintiff to remand the case from the state court, from which it was removed by defendant. Motion denied.

Motion by the plaintiff to remand this cause from the United States District Court of the Northern District of New York, to which court it was removed by the defendant, a citizen and an inhabitant of the state of Massachusetts, to the Supreme Court of the state of New York, Saratoga county, from whence it was removed. The motion is made on the ground that the plaintiff, Emilio Matarazzo is an alien, a citizen and subject of the kingdom of Italy, and not a citizen of the United States. It is not questioned that the plaintiff is an actual resident and inhabitant of said county of Saratoga, N. Y., where he, as administrator, commenced his action.

Leary & Fullerton, of Saratoga Springs, N. Y., for plaintiff.
Jarvis P. O'Brien, of Troy, N. Y., for defendant.

RAY, District Judge. The plaintiff, Emilio Matarazzo, is, as yet, a citizen and subject of the kingdom of Italy, but now is and for some years has been an actual resident and inhabitant of the county of Sara-

toga, state of New York. He has applied for citizenship by filing his first papers. He was appointed administrator of the estate of his deceased son, Ruffelo Matarazzo, by the surrogate and Surrogate's Court of the said county of Saratoga, N. Y., and as such brought this action under the provisions of the New York Code of Civil Procedure to recover damages alleged to have been sustained by him by reason of the death of said son, a resident of said county, caused, as alleged, by the negligence of the defendant, who as receiver appointed by the federal court in the state and district of Massachusetts was and is operating the Boston & Maine Railroad, which is a corporation of the said state, and of which state the defendant James H. Hustis is a citizen and a resident. The damages are laid at the sum of \$15,000. The said railroad operates to some extent in the state of New York. The venue of the action so brought was laid in the said county of Saratoga, N. Y., which county is in the Northern district of New York. In the complaint the plaintiff stated he was a resident of said county of Saratoga.

[1] The defendant, from the allegations of the complaint and the information he then had, assumed that the plaintiff was a citizen of the United States and of the state of New York, and such were the allegations of the petition of removal. On this motion to remand the plaintiff states he is not a citizen of the United States, but an alien, a citizen and subject of the kingdom of Italy, and a resident and an inhabitant of said county of Saratoga, N. Y. The defendant moves to amend his petition of removal to accord with the facts, and that motion to amend is granted. *Wilbur v. R. J. C. C. & C. Co.* (C. C.) 153 Fed. 662, 664; *Southern Pac., etc., v. Stewart*, 245 U. S. 359, 363, 38 Sup. Ct. 130, 203, 62 L. Ed. 345, 472.

[2] On the main question the plaintiff contends that the cause is not a removable one, as the plaintiff is not a citizen of the United States or of the state of New York, but, as stated, a citizen and subject of the kingdom of Italy.

Under the Constitution of the United States (section 2, art. 3) the judicial power extends to all cases in law and equity "between a state, or the citizens thereof and foreign states, citizens or subjects." The Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091 [Comp. St. § 968 et seq.]) provides (section 24 [Comp. St. § 991]) that—

"The District Courts shall have original jurisdiction as follows: * * * Where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, * * * or * * * is between citizens of different states, or * * * is between citizens of a state and foreign states, citizens, or subjects."

Hence this is a case to which the judicial power of the United States extends, and one of which the United States District Court has original jurisdiction. There is no chance for quibble over this language. The plaintiff is a citizen and a subject of the kingdom of Italy, a foreign state, and defendant is a citizen of the state of Massachusetts. The cause of action alleged arose in the Northern district of the state of New York, of which the plaintiff is an actual resident and inhabitant, and the suit is of a civil nature. The plaintiff brought his action in the county of Saratoga in that judicial district.

What suits may be removed from the state court to the United States court? The Judicial Code, defining removable causes, provides:

"Any other suit of a civil nature, at law or in equity, of which the District Courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any state court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state." Section 28, Judicial Code, subdivision 2, title, The Judiciary, c. 3 (Comp. St. § 1010).

The first subdivision of the section relates to "any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority of which the District Courts of the United States are given original jurisdiction by this title," etc. This suit, clearly, is one of the class "any other suit of a civil nature," and it is an action at law, and one of which the District Courts of the United States is given jurisdiction by "this title." Title, "The Judiciary."

[3] Section 53 of the Judicial Code (Comp. St. § 1035) provides:

"In all cases of the removal of suits from the courts of a state to the District Court of the United States such removal shall be to the United States District Court in the division in which the county is situated from which the removal is made."

Hence this case, if removable, was removed to the proper District Court. It is now settled that the words "for the proper district," used in section 28 of the Judicial Code, refer to the "proper district" to which a cause may be removed as stated in section 53 of the Judicial Code, and not to the "proper district" for bringing such a suit originally, if brought in the District Court of the United States in the first instance. *Ostrom v. Edison* (D. C.) 244 Fed. 228. It would seem that the decided cases settle the question of the removability of the instant case. *Matter of Tobin, Petitioner*, 214 U. S. 506, 29 Sup. Ct. 702, 53 L. Ed. 1061. See, also, *Matter of Nicola*, 218 U. S. 668, 31 Sup. Ct. 228, 54 L. Ed. 1203; *Rones v. Katalla Co.* (C. C.) 182 Fed. 946, 947; *Morris v. Clark Construction Co.* (C. C.) 140 Fed. 756; *Sherwood et al. v. Newport News & M. V. Co. et al.* (C. C.) 55 Fed. 1; *Manufacturers' Com. Co. v. Brown A. Co.* (C. C.) 148 Fed. 308; *Iowa L. G. M. Co. v. Bliss et al.* (C. C.) 144 Fed. 446; *James v. Amarillo C. L. & W. Co.* (D. C.) 251 Fed. 337; *Louisville & N. R. Co. v. Western Union Tel. Co.* (D. C.) 218 Fed. 91.

The Judicial Code not only fixes the place or district in which suits in the United States District Court are to be brought or commenced (sections 40 to 56 inclusive [Comp. St. § 1022-1038]), but fixes the place or District Court into which a cause commenced in the state court of a state must be removed, if removed (section 53, Judicial Code).

[4] The right to remove a cause commenced in a state court is purely statutory. *Great Northern Ry. Co. v. Alexander*, 246 U. S. 276, 38 S. Ct. 237, 62 L. Ed. 713; *Ostrom v. Edison* (D. C.) 244 Fed. 228. The place where suits brought in the United States courts must be brought is fixed by statute.

[5] The right to be sued in a particular District Court of the United States is a personal privilege, and may be waived so far as jurisdiction of the person is concerned.

[6] When the suit is of a local nature and involves reaching real estate or property of a fixed nature or character, it must be brought in the district in which such property is situated, if wholly in one district, but if such property is partly one one district and partly in another district of the same state, then the suit may be brought in either of such districts, and the court in which such suit is brought has jurisdiction of all the property in both districts. Section 55, Judicial Code (Comp. St. § 1037).

In the case of actions of a local nature neither consent of the parties nor assumption of jurisdiction by the court, nor both together, can confer it. *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 62, 24 Sup. Ct. 598, 48 L. Ed. 870; *Mansfield 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.

But this is outside the questions here.

[7] If the plaintiff sues in the state court outside the jurisdiction in which he must have brought suit had he sued in the United States District Court, he cannot thereby defeat removal pursuant to section 53 of the Judicial Code for "in all cases of the removal of suits from the courts of a state to the District Court of the United States such removal shall be to the United States District Court in the division in which the county is situated from which the removal is made." In this case the removal was made from the state court in Saratoga county in the Northern district of New York, in which county the plaintiff resided and in which county he laid the venue and commenced his action to the United States District Court of the Northern District of New York, and this was done pursuant to and in strict accordance with the provisions of section 53, Judicial Code. The right of removal was absolute even if the plaintiff could not have sued in that district. *M. Hohenberg & Co. v. Mobile Liners (D. C.)* 245 Fed. 169. In that case plaintiff sued defendant in the state court in a state of which defendant was not a resident. The defendant removed it to the United States District Court of the district in which the county in which the suit was brought was situated. The plaintiff moved to remand the cause. Held, he could not contest the removal on the ground that he could not have brought the suit in the District Court of the United States of that district over the defendant's objection.

Where an alien sues a citizen in a state court in which state such defendant does not reside, the defendant may remove the case into the United States court, and it will not be remanded. *H. J. Decker, Jr., & Co. v. Southern Ry. Co. (C. C.)* 189 Fed. 224. Having there brought his suit, and defendant not objecting, the plaintiff cannot then complain that he could not have sued defendant in such district, and that hence the cause was improperly removed. *H. J. Decker & Co. v. Southern Ry. Co.*, *supra*. In *Rones v. Katalla Co. (C. C.)* 182 Fed. 946, it was held that an action brought by an alien in a state court against a nonresident of such state in which the suit was brought may be re-

moved to the United States District Court. *O'Connor v. Texas*, 202 U. S. 501, 26 Sup. Ct. 726, 50 L. Ed. 1120, is not a decision to the contrary. There the state of Texas sued an alien, Thos. O'Connor, domiciled in the republic of Mexico, in the state courts of Texas, to recover the possession of a large tract of land in said state. No constitutional question was involved, nor any question under any treaty or law of the United States. The alien was defendant, and of course was not a citizen of the United States, nor was he a resident of or domiciled in the United States. The action was local in its nature and character, and the United States courts had no jurisdiction of the case, as it was not one between citizens, or a citizen of a state and a foreign state, or a citizen or a subject of a foreign state. The plaintiff was the state of Texas, not a citizen of Texas, nor of any state, and hence the case was not within section 24 of the Judicial Code.

In *re Tobin*, 214 U. S. 506, 29 Sup. Ct. 702, 53 L. Ed. 1061, followed in *Ex parte Nicola*, 218 U. S. 668, 31 Sup. Ct. 228, 54 L. Ed. 1203, can hardly be considered an authority controlling on the question involved here. The judge below had refused to remand the cause. He had performed his duty by deciding the question involved. It was sought to compel him to change that decision and make another by mandamus. The Supreme Court discharged the rule and refused to grant the writ, but did not indicate on what ground it made its decision. It remained silent on the questions whether or not the cause was a removable one and whether or not it should have been remanded. We may infer that the court was of the opinion the case was a removable one, and that remand was properly refused, or we may infer that the court was of opinion that mandamus was not the proper mode of correcting the error, if there was error, in refusing to remand the cause.

[8] But irrespective of the many conflicting decisions on this subject and of section 34 of the Judicial Code (Comp. St. § 1016), from which it may be implied that such a case as this, brought by an alien, cannot be removed, inasmuch as it is not brought against a civil officer of the United States, the question of the removability of this case is settled by section 33 of the Judicial Code as amended by the act approved August 23, 1916 (Act Aug. 23, 1916, c. 399, 39 Stat. 532 [Comp. St. § 1015]), and which, as amended, provides:

"That when any civil suit or criminal prosecution is commenced in any court of a state against * * * or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer, * * * the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the District Court next to be holden in the district where the same is pending upon the petition of such defendant to said District Court and in the following manner," etc.

This provision as to suits against "any officer of the courts of the United States," etc., was inserted by the amendment of 1916.

[9] Receivers appointed by the United States court are "officers of the court appointing them." James H. Hustis was first appointed receiver by the District Court of the District of Massachusetts, and then in ancillary proceedings by this court, so he is "an officer of this court"

duly appointed by it, and also of the United States District Court of the District of Massachusetts, but the removal is to be into the District Court of the Northern District of New York, as the suit is "pending" in that district. He is sued for acts done by him while performing his duties in conducting the business of the railroad which he was authorized and directed to do.

Receivers are officers of the court appointing them. *Railroad Co. v. Soutter*, 2 Wall. 510, 519, 17 L. Ed. 900, where the Supreme Court said, "The receiver is the officer of the court;" *Chicago Union Bank v. Kansas City Bank*, 136 U. S. 236, 10 Sup. Ct. 1017, 34 L. Ed. 341, where the court said, speaking of a receiver, "And the utmost effect of his appointment is to put the property from that time into his custody, as an officer of the court;" *Booth v. Clark*, 17 How. 322, 331, 15 L. Ed. 164, where the Supreme Court said, "A receiver is an indifferent person between parties appointed by the court; * * * he is an officer of the court;" *Stannard v. Reid & Co.*, 118 App. Div. 304, 314, 103 N. Y. Supp. 521, 527, where the court said, "The general rule is that receivers are officers of the court;" *Ahern v. Steele*, 115 N. Y. 203, 232, 22 N. E. 193, 203 (5 L. R. A. 449, 12 Am. St. Rep. 778), where the court said, "The receiver thus appointed was not their agent; * * * he was the agent and officer of the court, bound to obey its direction, and subject to its control;" *Smith on Receivers*, § 35; *Adderson on Receivers*, §§ 5-301; *High on Receivers*, § 188; 34 Enc. L. & Proc. 236 (Cyc.), where it is said, "A receiver by his appointment does not become a litigant in the action, but he is an officer and representative of the court appointing him," citing numerous cases decided in many of the states of the Union; *Scott, Collector, etc., v. Western Pac. R. R. Co.*, 246 Fed. 545, 546, 58 C. C. A. 515, 516, where the court said, "Receivers are officers of the court, and by all authority may properly ask instructions from the court concerning the administration of the property in their hands;" *Harrison et al. v. J. J. Warren Co.*, 183 Mass. 123, 124, 66 N. E. 589, 590, where the court said, "A receiver is merely a ministerial officer of the court;" *Vandalia v. St. L. & T. H. R. R. Co.*, 209 Ill. 73, 80, 70 N. E. 662, 664, where it is said, "He [a receiver] is the officer of the court appointed on behalf of all parties to take the possession and hold it for the benefit of the party ultimately entitled; *Coates v. Cunningham*, 80 Ill. 467;" *Kreling v. Kreling*, 118 Cal. 422, 50 Pac. 550, where the court says, "A receiver is an officer or representative of the court, appointed to take the charge and management of property which is the subject of litigation before it, for the purpose of its preservation and ultimate disposition according to the final judgment therein;" *Vermont, etc., R. Co. v. Vermont Central R. Co.*, 46 Vt. 792, where it is held that a receiver and manager are both "officers of the court, and entitled to its protection while in the proper discharge of their duty;" *Bausman v. Dixon*, 173 U. S. 113, 114, 19 Sup. Ct. 316, 317 (43 L. Ed. 633), where it is held, "It is true that the receiver was an officer of the Circuit Court, * * * and, certainly, an officer of the Circuit Court stands on no higher ground than an officer of the United States;" *Gableman*

v. Peoria, etc., Ry. Co., 179 U. S. 335, 340, 21 Sup. Ct. 171, 45 L. Ed. 220, where the above language was cited and approved.

A receiver appointed by the courts of the United States by this amendment was put on the same footing with officers created specifically by statute, and was enacted because of conflicting decisions as to suits against receivers and their removability.

[10] Congress, which creates the subordinate federal courts and prescribes their powers and jurisdiction (within constitutional limitations of course), also fixes the jurisdiction within which suits in such courts shall or may be brought, and specifies the cases which may be removed into the federal courts, assuming federal jurisdiction of the subject-matter, and also the mode and manner of such removal. It has power to say by statute that all suits against officers of the United States or against officers of or appointed by its courts, as such, or for acts done by them in the discharge of their duties, shall be brought in the federal courts, or if brought in the state courts that such suits may be removed into the United States courts for trial, irrespective of amount involved or in controversy, and irrespective of citizenship or nationality or of residence of the parties. Of course the suit must involve a matter to which the judicial power of the United States extends. Of course an alien coming into the United States and residing here, even temporarily, is entitled to the protection of, and is subject to the provisions of, the statutes of the United States and of treaties made which, while in force, are the supreme law of the land. Congress has the undoubted right to legislate specially in regard to aliens and grant them privileges denied to citizens of the United States by saying that suits brought by them in our state courts shall not be removed in any case into the courts of the United States, but, unless an exception is made in their favor, when the alien comes into the United States and invokes the aid or protection of the courts, it would seem he must accept the laws as they are, including those relating to procedure and removal of causes. The act of August 23, 1916, amending section 33 of the Judicial Code, makes no reservation in favor of aliens or any reservation in any way affecting them, and it makes no reference to amount in controversy, or citizenship, or residence. It is a plain declaration that "when any civil suit or criminal prosecution is commenced in any court of a state" against revenue officers, etc., "or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer," the said suit may at any time be removed to the United States District Court for trial.

Citizenship and residence and amount in controversy are immaterial under this section as amended, when the suit is against "any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer." This amendment was made to protect officers of the courts of the United States from suits in the state courts in any such case by enabling such officers when sued for the cause specified to remove the case. It applies when the action is commenced by an alien the same as when brought by a citizen, and there is no reason why it should not.

It had been held by the Supreme Court of the United States in *Gableman v. Peoria D. & E. R. Co.*, 179 U. S. 335, 21 Sup. Ct. 171, 45 L. Ed. 220, that a receiver of a state corporation appointed by the courts of the United States could not remove a case brought against him in the state court on the ground he was such receiver, as the fact he was appointed by the United States court did not make it a case arising under the Constitution or laws of the United States. This, in effect, had been held in *Echols v. Smith*, 101 Ky. 707, 42 S. W. 538; *People v. Bleecker St., etc.* (C. C.) 178 Fed. 156, and other cases.

Before the insertion of the amendment quoted, as now, the first part of section 33 read:

"That when any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law," the said suit or prosecution may be removed, etc.

The constitutionality of this provision was upheld in *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648. It was enacted to facilitate the enforcement of the revenue laws of the United States, and because one of the states of the Union had attempted to make penal the collection by officers of the United States within the state of duties under the revenue laws. *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648; *People's United States Bank v. Goodwin* (C. C.) 162 Fed. 937. Its purpose was to protect the revenue officers of the United States and all who might be engaged in aiding and assisting them in the performance of their duties. *Johnson v. Wells Fargo & Co.* (C. C.) 98 Fed. 3, 8; *Davis v. South Carolina*, 107 U. S. 597, 2 Sup. Ct. 636, 27 L. Ed. 574; *Commonwealth of Virginia v. De Hart* (C. C.) 119 Fed. 626. See, also, *City of Philadelphia v. Collector*, 72 U. S. (5 Wall.) 720, 18 L. Ed. 614, and *Venable v. Richards*, 105 U. S. 636, 26 L. Ed. 1196; *Downes v. Bidwell*, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088. Prior to the amendment of 1916, suits against United States commissioners for acts done as such (*Benchley v. Gilbert*, Fed. Cas. No. 1,291), and United States marshals for seizure of property under process issued by a federal court in a suit between individuals (*Mayo v. Dockery* [C. C.] 108 Fed. 897) could not be removed to the United States court except on the grounds stated in the general removal act; that is diversity of citizenship and requisite amount in controversy must exist. The increasing frequency of annoying and vexatious suits against officers of the United States courts, including receivers and commissioners appointed by such courts, induced and made necessary the amendment to the statute above quoted.

It was also necessary, or at least proper, to settle the question whether receivers appointed by a United States court and marshals and clerks of the court, where sued in the state courts for their official acts or acts done under color of their offices and in the discharge of their duties, might remove the case into the United States court for trial

irrespective of the question of amount involved and diversity of citizenship. In *Betts v. Bisher*, 213 Fed. 581, 130 C. C. A. 161, following *Gableman v. Peoria, etc., Ry. Co.*, 179 U. S. 335, 342, 21 Sup. Ct. 171, 45 L. Ed. 220, it was held that—

“Where a receiver of a corporation was appointed by a federal court, an action against the receiver for injuries to an employé was maintainable in such court, though there was no federal question involved nor diversity of citizenship.”

This because such a suit is ancillary to the original suit, and the judgments are payable from the property in the hands of the receiver.

In *Gableman v. Peoria, etc., supra*, the court held (179 U. S. 342, 21 Sup. Ct. 174, 45 L. Ed. 220):

“It should be added that while these actions against receivers may be brought in other courts, they may nevertheless also be brought in the court by which the receiver was appointed, inasmuch as the judgments recovered are payable from the property or funds in the course of administration, and the actions may be regarded as ancillary in the sense of subordination to such administration.”

In *White v. Ewing*, 159 U. S. 36, 39, 15 Sup. Ct. 1018, 1019 (40 L. Ed. 67), the court said:

“The Circuit Court obtained jurisdiction over the Cardiff Coal & Iron Company by the filing of the original creditor’s bill by Bosworth, a citizen of Massachusetts, and by the appointment of a receiver, and any suit by or against such receiver, in the course of the winding up of such corporation, whether for the collection of its assets or for the defense of its property rights, must be regarded as ancillary to the main suit, and as cognizable in the Circuit Court, regardless either of the citizenship of the parties or of the amount in controversy. *Freeman v. Howe*, 24 How. 450, 460 [16 L. Ed. 749]; *Krippendorf v. Hyde*, 110 U. S. 276 [4 Sup. Ct. 27, 28 L. Ed. 145]; *Dewey v. West Fairmont Gas Coal Co.*, 123 U. S. 329 [8 Sup. Ct. 148, 31 L. Ed. 179]; *In re Tyler*, 149 U. S. 164, 181 [13 Sup. Ct. 785, 37 L. Ed. 689]; *Root v. Woolworth*, 150 U. S. 401, 413 [14 Sup. Ct. 136, 37 L. Ed. 1123]; *Rouse v. Letcher*, 156 U. S. 47, 49 [15 Sup. Ct. 266, 39 L. Ed. 341].”

There can be no doubt that suits against a receiver appointed by a court of the United States brought in the state court may be removed for trial to the United States District Court of the district where pending when diversity of citizenship and requisite amount in controversy exist, and that such a suit, when such facts exist, brought by an alien, may be removed, unless it be held that section 34 specifies the only case in which a suit brought by an alien can be removed. But no such construction can reasonably be given, for section 34 must be read in connection with section 33, and, so read, it merely provides that when an alien sues a citizen of the United States who is or who, when the alleged cause of action accrued, was a civil officer of the United States and a nonresident of the state in which the suit was brought, irrespective of the amount involved or in controversy, the suit may be removed by the defendant. Section 33 does not embrace in its terms “civil officers” of the United States, and hence a civil officer of the United States, when sued in the state court, cannot remove the cause, except when it comes within section 34, that is, when plaintiff is an alien, irrespective of the amount in controversy.

A defendant in such a case as is mentioned in section 34, that of a

civil officer of the United States and nonresident, when the plaintiff is a citizen, cannot remove the case from the state court to the United States court irrespective of amount in controversy, but if the plaintiff is an alien he may. I cannot agree with the remarks of the learned judge in *Hall v. Great Northern Ry. Co.* (D. C.) 197 Fed. 488, 490, 491, on this subject.

As I understand, the main contention of the plaintiff's counsel is that the plaintiff, having brought his action in the Northern district of New York, where he could not have brought it, being an alien, had the defendant objected, he thereby deprived the defendant, a nonresident of the state of New York, of the right to remove the cause to the United States District Court, a right he would have had had the suit been brought in the state court of the district of Massachusetts. Section 51 of the Judicial Code (Comp. St. § 1033) provides:

(A) "No civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant," and (B) but where the jurisdiction is founded only on the fact that the action is between citizens of different states suit shall be brought "only in the district of the residence of either the plaintiff or the defendant."

This is not a case that comes under B above, as it is not a suit between citizens of different states. The plaintiff is not a citizen of any state. The defendant is not an inhabitant or citizen of the Northern district of New York, and if he had objected, the plaintiff could not have obtained jurisdiction of his person by suing him there. But the defendant did not object. He waived the personal privilege of being sued in the district of Massachusetts, of which district he was an inhabitant. The subject-matter of the suit is within the jurisdiction of the District Court of the Northern District of New York. The plaintiff, an alien, having come into the Northern district of New York and there brought his suit against defendant, who did not object to being sued in that district, and the cause being one of which any District Court of the United States has jurisdiction and of which the District Court of the Northern District of New York would have had jurisdiction had it been brought in that court originally, it does not lie with the plaintiff to say the cause cannot be removed to the District Court specified in section 53. The suit was brought by the plaintiff in the state court, and is now pending, and it is one of which "the District Courts of the United States are given jurisdiction," and the defendant is a nonresident of the state of New York. It is therefore a suit of a civil nature, at law, of which the District Courts of the United States are given jurisdiction by the title "The Judiciary," and was brought after section 28 of the Judicial Code was enacted, and defendant is a nonresident of the state in which the suit was brought. In *Park Square, etc., v. American Locomotive, etc.* (D. C.) 222 Fed. 979, this court held that the words "proper district," used in section 28, meant the district in which the suit should have been brought, and refused to remand.

It is true that the writ of error was dismissed and the Supreme Court of the United States denied mandamus (244 U. S. 412, 37 Sup. Ct. 732,

61 L. Ed. 1231) to compel this court to change its decision, but, plainly, I think, intimated the decision of this court should have been the other way, and that "proper district" is the one into which removal is directed by the Judicial Code when removal is ordered. See section 29 (Comp. St. § 1011) and section 53, which last section says:

"In all cases of the removal of suits from the courts of a state to the District Court of the United States such removal shall be to the United States District Court in the division in which the county is situated from which the removal is made"

—and section 29 provides that the petition for removal under section 28, except in case of removal sought on the ground of local prejudice, shall be "for the removal of such suit into the District Court to be held in the district where such suit is pending," referring to the pending of the suit in the state court.

As the provisions for the bringing of a suit in personam (not local in its character) in the United States District Court in a particular district is one for the benefit and protection of the defendant, and which does not go to the jurisdiction of the court over the subject-matter of the suit (when in personam), and such right may be waived, and in this case has been waived, I am constrained to hold that the case was a removable one irrespective of section 33 of the Judicial Code, and was properly removed, and that the motion to remand must be denied.

I am also of the opinion that this case is one within the provisions of section 33 of the Judicial Code, and may be removed by the defendant into the District Court of the United States at any time before trial.

In re Moore, 209 U. S. 506, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164, is not a holding that this cause cannot be removed. In that case Moore, an infant and a citizen of the state of Illinois, by one Safford, a citizen of Missouri, appointed his next friend by the state court of the Eastern district of Missouri for the purpose of bringing the suit, brought suit against the Louisville & Nashville Railroad Company, a corporation created and existing under the laws of the state of Kentucky in the state court of the state of Missouri. On its petition and in proceedings in due form the defendant thereupon moved the cause into the United States District Court for the Eastern Judicial District of Missouri on the ground of diversity of citizenship. The plaintiff could not have sued defendant in that district, but defendant did not object and raise the question. Thereafter the plaintiff filed an amended complaint in the United States District Court to which the case had been removed. By stipulation of the parties defendant was given additional time to answer the amended complaint, and by other stipulation between the parties the trial was postponed from time to time. Thereafter the plaintiff moved to remand the cause to the state court. This motion was denied by the court, whereupon the plaintiff sought to compel a remand of the case by mandamus. Mandamus was denied. The court held that while consent of all parties cannot confer jurisdiction of the subject-matter of a suit, the suit in question was one relating to a subject-matter of which the District Courts of the United States generally are given jurisdiction, and therefore the Dis-

trict Court into which the suit was removed had jurisdiction of the subject-matter of the suit. The court further held that the provisions of law as to the district in which a suit shall be brought when in personam is a personal privilege or exemption, and may be waived, and that defendant did waive it, and consented and submitted to the jurisdiction of the court into which the cause was removed. Several cases were cited, especially *Ex parte Schollenberger*, 96 U. S. 369, 379, 24 L. Ed. 853, where the court said:

"The act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he had consented."

See, also, the several cases on this subject quoted from *In re Moore*, supra. The court there (page 506 of 209 U. S., at page 591 of 28 Sup. Ct. [52 L. Ed. 904, 14 Ann. Cas. 1164]) says:

"As we have seen in this case, the defendant applied for a removal of the case to the federal court. Thereby he is foreclosed from objecting to its jurisdiction."

The court then said:

"In like manner, after the removal had been ordered, the plaintiff elected to remain in that court, and he is, equally with the defendant, precluded from making objection to its jurisdiction."

The court then expressly repudiates the statement in the *Wisner Case* at page 460 of 203 U. S., 27 Sup. Ct. 150, 51 L. Ed. 264. *In re Moore* does not hold, even by necessary implication, that where an alien, not a citizen of any state, selects the state court in which he will sue a defendant, and sues, and defendant waives the right to be sued in a particular district, such defendant may not remove the cause into the District Court of the district in which such suit is brought and is pending at the time of removal, under the specific language of section 28 of the Judicial Code. There is nothing in the removal statutes which forbids the removal of such a case as this, and it seems to me that when this alien plaintiff sued the defendant outside the district of his residence he submitted himself to and consented to the consequences of such action. Diversity of citizenship is not involved in this case. I cannot see that any further consent of the alien plaintiff to accept the jurisdiction of the United States District Court was necessary. If I am not correct in my conclusions, then *Matter of Tobin*, 214 U. S. 506, 29 Sup. Ct. 702, 53 L. Ed. 1061, followed in the *Matter of Athanasi Nicola*, 218 U. S. 668, 31 Sup. Ct. 228, 54 L. Ed. 1203, is a snare for the unwary practitioner and the lower courts. The court in *Matter of Tobin*, supra, says:

"It is conceded that the plaintiff was and is an alien, and that the defendant is not a resident or citizen of the state of Minnesota," in the state court of which state the suit was commenced.

This language and statement of fact has significance. The court might have indicated the cause was not removable had that been its

opinion, but did not do so. This is significant. It did not intimate even the court was in error in refusing to remand, and then decide that mandamus was not the proper remedy to correct the error.

But irrespective of all this this receiver, an officer of the United States District Court of the District of Massachusetts may, as stated, remove the case at any time into the United States District Court under the provisions of section 33 of the Judicial Code.

Motion to remand is denied.

THE ICE KING. PETITION OF CORNELL STEAMBOAT CO. Interventions of MORRIS & CUMINGS DREDGING CO. et al.

(District Court, S. D. New York. June 21, 1916.)

1. TOWAGE Ⓒ11(5)—INJURIES TO TOW—NEGLIGENCE OF TUG PILOT.

The stranding and injury of two barges, which dragged their anchors and went ashore in a gale, *held* due to the gross negligence of the tug's pilot, who because of standing an extra watch, so that the master could go ashore, and of having become partly intoxicated, went to sleep on duty, and when awakened by the scraping of the tug against a buoy or reef ordered the engines reversed, so that the hawser fouled the propellers and left the tug and tow helpless.

2. SHIPPING Ⓒ207—LIMITATION OF LIABILITY—PERSONAL CONTRACT—SUFFICIENT CREW.

Where the owner of a tug chartered her by the month to a dredging company, the owner to furnish the crew, there was a continuing personal contract that the tug would be properly manned, and the owner cannot limit liability for loss occasioned by the absence of the master and the intoxication of the pilot left in charge, though it had used due diligence in selecting the crew and had no knowledge of the facts.

3. SHIPPING Ⓒ208—LIMITATION OF LIABILITY—IMPLIED WARRANTY—FITNESS OF CREW.

Implied warranty of fitness of crew in the charter of a tugboat applies to the condition at the commencement of the voyage, and the unauthorized absence of the master and intoxication of the pilot without the knowledge of the owner are faults in the management of the vessel occurring without his privity.

4. SALVAGE Ⓒ30—AMOUNT OF AWARD—RESCUE OF STRANDED BARGE.

The owner of a wrecking tug *held* entitled to \$1,000 salvage for pulling from an exposed beach and towing into harbor a stranded barge, valued at about \$7,000, where the tug was engaged for about 12 hours on the work, and neither she nor her crew were exposed to any great danger.

In Admiralty. Petition of the Cornell Steamboat Company, as owner of the steam tug Ice King, for limitation of its liability, in which the Morris & Cumings Dredging Company intervened, claiming damages for injuries to two barges occasioned by the negligent navigation of the tug, and the Merritt & Chapman Derrick & Wrecking Company, intervened to recover salvage against one of the barges. Petition for limitation of liability denied, and decree entered against the owner for full amount of damages, and amount of salvage determined.

Kirlin, Woolsey & Hickox, of New York City (J. Parker Kirlin, of New York City, of counsel), for petitioner.

Burlingham, Montgomery & Beecher, of New York City (Chauncey

I. Clark and Ray Rood Allen, both of New York City, of counsel), for intervener Morris & Cumings Dredging Co.

Everett, Clarke & Benedict, of New York City (A. Leo Everett, of New York City, of counsel), for intervener Merritt & Chapman Derrick & Wrecking Co.

SMITH, District Judge (Eastern District of South Carolina, sitting in New York). This is a proceeding for limitation of liability, filed November 5, 1915, under the fifty-fourth rule in admiralty (29 Sup. Ct. xiv), by the Cornell Steamboat Company, as the owner of the steam tug Ice King. Upon the filing of the petition the Morris & Cumings Dredging Company, as the sole owner of the scows M 47 and M 48, filed its claim, setting out that the Cornell Steamboat Company, as the owner of the steam tug Ice King, was indebted to it in the amount stated in the intervention, and alleging further that the Cornell Steamboat Company was not entitled to any limitation of liability under the terms of the statute. The Merritt & Chapman Derrick & Wrecking Company, who claims a right for salvage against the scow M 48, have also intervened, setting up their claim of salvage, and praying that salvage be adjudged them as against the scow M 48. No question has been raised as to the right of the Merritt & Chapman Derrick & Wrecking Company to intervene in this proceeding for such purpose. As the amount of the salvage decreed may be an important element in determining the amount that may be decreed in favor of the Morris & Cumings Dredging Company against the Cornell Steamboat Company, it would seem entirely pertinent that the question of salvage should be also passed upon in this proceeding.

The parties have all appeared, the testimony has been taken on the issues between the Cornell Steamboat Company and the Morris & Cumings Dredging Company, and between the Morris & Cumings Dredging Company and the Merritt & Chapman Derrick & Wrecking Company, and the advocates on behalf of all parties have been heard. The issues in the case to be determined divide, first, into the issues between the Cornell Steamboat Company, upon its petition, and the Morris & Cumings Dredging Company, as to whether there was any fault committed in the operation of the steam tug Ice King which would render the Cornell Steamboat Company, as the owner of the steam tug Ice King responsible to the Morris & Cumings Dredging Company, and then whether, the fault having been committed, whether or not the Cornell Steamboat Company is entitled to a limitation of its liability to the value of its interest in the steam tug Ice King and the freight pending, and, second, into the issue as to the question of salvage to which the Merritt & Chapman Derrick & Wrecking Company is entitled.

From the testimony it appears that the Morris & Cumings Dredging Company was engaged in doing some dredging which required the dredged material to be put upon their mud scows, which were then to be towed without the harbor and bay of New York, and emptied or dumped upon what is known as the dumping ground, at a point at sea about two miles southeast of the Scotland Light vessel and between about four or five miles off the shore of Sandy Hook. The Morris &

Cummings Dredging Company was possessed of scows which it used for the purpose of carrying off the dredged material, but it did not possess tugs for the towing of these scows, and it made an agreement with the Cornell Steamboat Company, first to charter a tug called the Bismarck, and then for the charter of the tug Ice King for its towing operations in and about the work. A part of the terms of the charter is shown in a letter dated October 29, 1913, from the Cornell Steamboat Company to the Morris & Cummings Dredging Company, in which the size and capacity of the Ice King is stated, together with the consumption of coal, and it is admitted that the parol agreement made in connection with the representations that this letter made, was that the Morris & Cummings Dredging Company would charter the Ice King for its purposes at a hire of \$2,200 per month. The Cornell Steamboat Company was to furnish the tug and all her crew or employés; but the Morris & Cummings Dredging Company was to supply coal and water. The tug Ice King was accordingly put in condition and delivered to the charterer in November, 1913, and continued in its employ until she was wrecked as hereinafter mentioned.

The testimony shows that the Ice King was repaired so as to be, according to the testimony of the witnesses, tight, staunch, seaworthy, and in good condition, and at the same time she was manned by a crew sufficient in number. The testimony is that the general manager of the Cornell Steamboat Company furnished the Ice King with a licensed captain, pilot, and mate, as to whom he made, according to his testimony, due inquiry. In the case of the master, he knew him, as the master had been an old employé of the Cornell Steamboat Company, and that he knew him to be a perfectly competent and capable man, and there is no testimony questioning the competency and capability of this master. With regard to the pilot, he had not been employed by the Cornell Steamboat Company, nor was he known to the manager; but the testimony of the manager is that the pilot, who was named Walsh, was sent to him by a man by the name of Pierce, in whom he had confidence as to his ability in procuring competent and efficient men, and who was acquainted with and had dealings with men engaged in the furnishing of pilots for such purposes. The manager testified that he also made inquiry at the offices of two other concerns which were engaged in towage operations, and in the employment of steamboat masters and pilots, viz. he inquired of one Conner, who was in the office of Moran & Co., and also inquired of some one in the employ of Peter Cahill, also a tug owner, and employer of such officers; that conjoined with this, he made a personal inspection of the man Walsh, who applied for the position of pilot, and being satisfied with what he heard in his favor, as well as with his personal appearance, he engaged him as pilot, and the Ice King, therefore, was manned by a crew and officers supplied by the Cornell Steamboat Company to the charterer.

The Ice King proceeded and performed the work for which she was chartered up to December 24, 1913. On that day she was to carry out two scows loaded with dredged material, to be dumped during the night of December 24, 1913. The master, desiring to be at home with his

family on Christmas Eve, arranged with the pilot that the pilot should remain in charge of the boat and do the master's watch in his absence, thus enabling the master to go home to his family. The arrangement was that the pilot, whose watch ran from 12 to 6, and who had been on service from 12 midnight to 6 in the morning of the 24th of December, and who was to go again on service at 12 o'clock noon of December 24th, should, in lieu of going on service at 12 noon, go on service at 6 p. m. on December 24th and remain on service until at least 6 a. m. the morning of December 25th, thus taking a double watch or period of duty. The evidence is that during the day and up to the departure of the captain the boat was employed on various matters about the harbor, and that the captain left about 7 o'clock p. m., leaving the boat in charge of the pilot, and that prior to that time they had each had at least three to four drinks of beer. There was also some evidence tending to show that the pilot had been drinking whisky and had carried whisky on board with him. The assistant engineer, with the permission of the chief engineer, also left the boat to go home in the afternoon of December 24th, so that the Ice King, when she started to perform her duty of towing the scows to sea on the afternoon or evening of December 24th, was deficient two members of her crew, viz. the master and the assistant engineer.

There was no evidence introduced to show notice to, or knowledge by, the Cornell Steamboat Company that these two members of the crew had left the Ice King without leave; but there was evidence introduced showing that by the rules of the Cornell Steamboat Company no master or pilot or engineer was permitted to leave this boat without first reporting to the steamboat company's office. The pilot took the tug in charge, took up his tow of two loaded scows, carried them down the harbor and through the bay out to sea, arriving at the dumping ground between 11 p. m. and 12 midnight, dumped the loads, and then proceeded to return. On his return the pilot went to sleep in his wheelhouse. The tug and her tow seem to have got completely out of their course. There was no lookout on the deck or in charge of the tug, the lookout whose watch it was to perform the duty was still asleep, not having been called; and while the pilot was asleep in the wheelhouse his vessel either collided with a buoy or thumped and scraped on a shoal, probably the shoal marked on the chart as "oil spot," and the pilot being awakened by the concussion or collision immediately gave orders to reverse, without apparently taking any soundings or knowing whether the order to reverse was proper, and when the order was given and the engines reversed the hawser upon which his tows were hung was slackened, and, falling in the water around the propeller, became involved or entangled in the propeller of the tug, so involved and entangled as to completely wind up and put a stop to all movement on the part of the propeller, and bind it beyond any possibility of extrication at sea where the tug was, so that the tug with her tow lay in a perfectly helpless position at a point which, according to the best testimony, appears to have been in the channel marked on the chart as the False Hook Channel.

Although the wind had not been very heavy when in the evening the

tug started out to the dumping grounds, it had freshened so that at the time of this occurrence it was blowing at a good rate, and, the tug being perfectly helpless through the choking of her propeller, the pilot cast anchor and directed his tows to do the same. The wind increased very much during the early morning, and attained such force with the sea as to compel the tug and her tows to drag the anchors, and finally in the early morning, about 5 or 6 o'clock of the 25th of December, the tug and her tows were stranded upon the sea beach of Sandy Hook, where later in the surf and sea caused by a violent storm the tug was inextricably stranded and broken to pieces, so as eventually to become a total loss. The crew of the tug went from the deck of the tug to the scow M 47, which had been hauled alongside of the tug, and at low water descended from the scow upon the beach, and then walked to the high land, where the pilot proceeded to telephone to the Cornell Steamboat Company's office the news of the disaster. The Merritt & Chapman Derrick & Wrecking Company, hearing of the stranding, came down and brought to the scene of disaster a powerful tug. During the day they carried out a heavy hawser to scow M 48, which was the scow lowest down on the beach, and at high water succeeded in extricating it from the beach and towed it into safety in the harbor of New York, being occupied, in going to the place, and being at the place, putting out the hawser, attaching it to the scow, waiting for high tide, pulling the scow off at high tide, and towing her to a safe place, for about 12 hours. The other scow, M 47, was by the heavy gale which succeeded the stranding (during which the wind attained great velocity) cast up high upon the beach, whence it was some time later extricated by the Morris & Cumings Dredging Company at a cost of some \$6,884.50.

[1] Upon consideration of the whole testimony the court is satisfied that the disaster was due to the gross negligence of the pilot in charge. From his own statements as put in evidence it would appear that he had been drinking, and was probably either under the influence of drink at the time, or in a condition in which the amount of alcohol taken disposes a person to sleep. To this was conjoined the strain of having been on duty for his full term ending at 6 o'clock in the morning of December 24th, and continuing after 6 o'clock that evening for a period after 12 midnight. In consequence of all this he went to sleep, got completely out of his course, was suddenly awakened and frightened by the collision or grounding of the tug, and without due precaution or care reversed his engines, causing the hawser to suddenly slacken and then become involved and entangled with the propeller, rendering his tug helpless. He was then forced to anchor where he was, and thereafter the storm caused his tug to be stranded upon the beach and destroyed. The tug, when it went out to sea on the evening of December 24th, not only was insufficiently manned through the absence of both the master and the assistant engineer, but was in charge of a pilot who at the time was under the influence of drink, and careless and negligent in the performance of his duties, and whose negligence was the proximate cause of the disaster.

[2] The Morris & Cumings Dredging Company insists that for the damage inflicted upon it under these circumstances it should be en-

titled to recover from the owner of the tug *Ice King*, as the owner is not entitled to a limitation of liability in this case; that under the charter party there was an implied warranty in the nature of a personal contract that the vessel would be tight, staunch, and seaworthy, and furnished with a competent and sufficient crew at the starting of the voyage, and in this case, when the vessel started on her voyage from Brooklyn to tow the scows to the dumping grounds outside of the harbor of New York on the evening of December 24, 1913, she was neither manned by a sufficient crew, nor was she in charge of a competent pilot. The *Amos D. Carver* (D. C.) 35 Fed. 665; *Great Lakes Towing Co. v. Mill Transportation Co.*, 115 Fed. 11, 83 C. C. A. 607, 22 L. R. A. (N. S.) 769; *The Loyal*, 204 Fed. 930, 123 C. C. A. 252; *Benner Line v. Pendleton*, 217 Fed. 497, 133 C. C. A. 349. The charter in this case was a time charter per month. The tug was chartered for the purposes of general use in the bay and harbor of New York, as well as out to sea as far as the dumping grounds. The *Ice King* seems to have been employed, not only in carrying the scows to the dumping grounds, but also in going to and from different points on the New Jersey shore, the Manhattan shore, and the Brooklyn shore. What constitutes a voyage or separate adventure under these circumstances it is difficult to say.

[3] The charter carried an implied warranty that the *Ice King* should during the term of the charter (except of course subsequent to any injury caused by any maritime or other peril) be seaworthy and manned and equipped with a competent and sufficient crew. The furnishing of the officers and the crew was the duty and entirely under the control of the Cornell Steamboat Company. From the testimony it appears in this case that the owner of the *Ice King*, at the commencement of the charter party in November, 1913, had furnished the *Ice King* with a crew under the charter party, and had used all reasonable and sufficient diligence to put the *Ice King* in a tight, staunch, and seaworthy condition, and that she was in such condition when she began her service under the charter party, and also when she began her voyage from Brooklyn to the dumping grounds on the afternoon of December 24, 1913. It also appears that the owners had exercised reasonable and due diligence to furnish the boat with a competent, skillful, and sufficient crew at the time of the commencement of the service under the time charter; that the pilot was, according to the information furnished to the owners upon its inquiry, a competent and skillful pilot. It further appears that the absence of the master and the assistant engineer, when the tug started on the voyage to the dumping grounds on the evening of the 24th of December, 1913, was not known to or permitted by the owner of the tug; nor was the condition of the pilot known to it at the time. In other words, the action of the master and assistant engineer in leaving the boat, and the condition of intoxication and the consequent negligence of the pilot, were faults in the management of the vessel which occurred without the privity or knowledge of the owner.

If, however, the contract in this case is to be treated as a personal contract in the nature of a warranty that the crew and officers should

at all times during the continuance of the time charter be sufficient and competent and skillful, then inasmuch as, on the evening of December 24, 1913, the Ice King left for her voyage with an insufficient crew and a pilot in the condition which rendered him neither competent nor capable, that would appear to be a breach of the warranty. Under the principles of the reasoning in the cases above referred to, the rule in this district would seem to be settled by the Circuit Court of Appeals for this circuit to the effect that under a charter party of this kind there is a continuing personal contract of warranty, both as to the seaworthiness of the vessel and as to her proper manning and equipment, and that for damages consequent on a breach of this personal contract the shipowner is not entitled to the benefit of the statutory limitation of liability. This would clearly appear from the reasoning in the case of *Benner Line v. Pendleton*, as reaffirmed in the later decision handed down by the Circuit Court of Appeals for this Circuit in the case of *McCahan Sugar Refining Co. v. Steamship Julia Luckenbach et al.*, 235 Fed. 388, 148 C. C. A. 650, declaring the rule in this district. The charterer, therefore, the Morris & Cumings Dredging Company, is entitled to a decree against the Cornell Steamboat Company for the full amount of the damages caused to it through the negligence of the pilot and the consequent stranding of the tug and tows. A reference will be ordered to ascertain these damages, and a decree will be entered therefor.

[4] On the question of the quantum of the salvage which should be awarded to the Merritt & Chapman Derrick & Wrecking Company, the evidence before the court is very unsatisfactory. There is no doubt that the salvors proceeded with very commendable celerity to the place of the impending disaster, and were successful in the salvage. There is no satisfactory evidence as to what was the value of the scow M 48, which is one of the essential elements in the percentage to be awarded as representing salvage. The services were performed without any apparent risk whatsoever to the lives of the salvors or to the property engaged in performing the salvage service, which occupied about 12 hours. The fairest inference from the testimony as to the value of the property salvaged would appear to be about \$7,000, and the court holds that under the circumstances of this case, and in view of the fact that, unless the property had been salvaged, it might have been entirely destroyed by the succeeding storm, a fair salvage allowance will be \$1,000, for which amount and costs a decree may be entered up in behalf of the Merritt & Chapman Derrick & Wrecking Company against the Morris & Cumings Dredging Company.

In re CAMPION et al.

(District Court, N. D. New York. April 1, 1919.)

1. BANKRUPTCY \Leftrightarrow 166(3)—PREFERENCE—KNOWLEDGE OF INSOLVENCY.

Statements by a debtor to the creditor's agent, who was seeking to collect past-due debts for which the debtor had given checks that the banks dishonored, that the debtor had not and could not obtain money to pay the debts, that its real estate was mortgaged for all it was worth, and that there were judgments outstanding against it, gave the creditor reasonable cause to believe that the debtor was insolvent, so that he knew that the enforcement of a chattel mortgage then taken by him would be a preference, under Bankruptcy Act July 1, 1898, § 60b (Comp. St. § 9644).

2. BANKRUPTCY \Leftrightarrow 166(1)—PREFERENCE—INTENT OF PARTIES.

The intent of a debtor to give a preference and the intent of the creditor to obtain a preference are immaterial, in determining whether a preference was actually obtained.

3. BANKRUPTCY \Leftrightarrow 166(3)—PREFERENCE—KNOWLEDGE OF CREDITOR—SUSPICIOUS FACTS.

A creditor is chargeable with knowledge of all facts of debtor bankrupt's insolvency which its agent would have obtained, had he made the inquiries which the facts he knew required.

4. BANKRUPTCY \Leftrightarrow 228—FINDINGS OF REFEREE—CONCLUSIVENESS.

A decision of the referee in bankruptcy, who saw the witnesses and heard their testimony on a question of fact, should not be disturbed, if it is sustained by the evidence.

5. BANKRUPTCY \Leftrightarrow 303(1, 3)—PREFERENCE—BURDEN OF PROOF.

The burden is on the trustee in bankruptcy to show that a creditor, to whom transfer was made shortly before bankruptcy, had reason to believe that a preference would result; but the mere fact that the creditor's agent testified differently from the debtor on that issue does not leave the trustee's case unproved.

6. BANKRUPTCY \Leftrightarrow 166(3)—PREFERENCE—KNOWLEDGE OF CREDITOR—DUTY TO INQUIRE.

A creditor, who has knowledge of facts giving him reasonable cause to believe that the enforcement of a transfer would effect a preference, has a duty to inquire as to the solvency of the debtor, and cannot willfully remain in ignorance thereof.

In Bankruptcy. Proceeding against George A. Campion, Sr., and others, as individuals and as copartners of the firm of Campion & Sons. On review of a decision of a referee awarding a fund of about \$1,217 to the trustee as against the claim of the William Klein Company under a chattel mortgage. Order of the referee affirmed.

George J. Hatt, 2d, of Albany, N. Y., for trustee.

George H. Zwick, of Albany, N. Y., for claimant.

RAY, District Judge. October 18, 1916, the now bankrupt, Campion & Son, of Albany, N. Y., a copartnership, was insolvent within the meaning of the Bankruptcy Act, which fact is conceded by its attorney in his brief in the following language:

"The William Klein Company admits (1) that Campion & Sons were insolvent October 18, 1916, but not that they knew the fact."

October 18, 1916, the now bankrupt was doing business as an undertaker in the city of Albany, and was indebted to the claimant, William

Klein Company, a corporation of the state of Connecticut, having its principal place of business at Thomsonville, in that state, in the sum of about \$1,000, which was all past due. The claimant's representative, William Klein, Sr., visited the place of business of the now bankrupt on said 18th day of October and demanded payment, and was very urgent and insisted for immediate payment, or in default of payment for security. The Klein Company, so called for brevity, had some knowledge that Campion & Sons were in financial embarrassment to some extent, as it then held past-dated checks of that firm and other checks, one or more of which had been dishonored by nonpayment. The past-dated checks were given to Mr. Klein, Sr., about two weeks before the 18th day of October, on an occasion when he visited the place of business of Campion & Sons and asked for money on account. One or more of these checks was in place of other checks given before that which had not been paid. The nonpayment of the checks resulted in the visit of October 18, 1916. On that day the representative of the Klein Company threatened the Campion Company that if they "did not do something that day [referring to payment] they would close our [that of the Campion Company] place up." John E. Campion says Klein said that day:

"Mr. Klein told me that something had to be done immediately or he would close us up. * * * I pleaded with him that I did not have any money; I could not get any money; I could not borrow any money, and also that I could not raise any money, because I had enough of judgments against me at that time. I said, also, that one of them was with the Allen & Arnink Company, Miller & Co., and the Champion Chemical Company. I said I could not raise any money for them. He said, 'How about putting a mortgage on the house?' I said, 'I don't think it is worth anything, on account of the other two mortgages on there.' I told him, 'I could not get any money, because I had no money to get, or no money that I could get; I knew the condition I was in, and I told him that there was no need of my promising him, that I could not get it.'"

In fact, the house referred to was mortgaged to its full value, and there were three judgments docketed against the copartnership of Campion & Sons. These were of record and gave notice to all the world. The judgments, aggregating over \$2,500, were docketed October 5 and 13, 1916.

[1] No representations were made as to the actual solvency or insolvency of the firm of Campion & Sons, or as to the solvency or insolvency of its individual members, but Klein, representing the Klein Company, made no inquiries on that subject. However, Klein was informed that Campion & Sons had no money to pay with, and could not pay that day, or raise money, and that the real estate was mortgaged. The Klein Company held the dishonored checks, and very clearly had information that day which would put a man of ordinary intelligence having an interest in the matter on inquiry as to the solvency of the firm of which it was asking and about to take security for an antecedent and past-due indebtedness. If the facts known to Klein and the statements made to him under the circumstances would not put a creditor urging payment, and, in default of payment, security for a past-due indebtedness, on inquiry, it is difficult to imagine what would. The Klein Company was chargeable with notice

of the provisions of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. §§ 9585-9656]). It is presumed that the Klein Company knew the law and acted with reference to such knowledge. Section 60a (section 9644) of the act provides:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, * * * procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Section 60b of the act provides:

"If a bankrupt shall have * * * made a transfer of any of his property, and if, at the time of the transfer, * * * and being within four months before the filing of the petition in bankruptcy * * * the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

That giving a chattel mortgage is a transfer within the meaning of the Bankruptcy Act is settled. That the effect of the enforcement of the chattel mortgage given on the 18th day of October would be to pay that company, a creditor, in full, and give that firm a greater percentage of its debt than any other of its creditors of the same class, of which *Campion & Sons* had a number, is beyond all question.

On the 18th of October, 1916, being urged as stated, *Campion & Sons* finally gave the Klein Company a third mortgage on the house and lot, accompanied by a bond, and as further or collateral security gave it the chattel mortgage in question under which it claims. There is nothing in the real estate security for the Klein Company. It seeks to hold the proceeds of the personal property mortgaged. These mortgages were given within four months of the filing of the petition in bankruptcy.

In *Nichols v. Elken et al.*, 225 Fed. 689, 140 C. C. A. 563, the court held:

"Mere suspicion that a debtor was insolvent is not sufficient to charge creditors with notice of insolvency and make the debtor's payments a preference; but there must be evidence of facts sufficient to put a prudent person on inquiry, which, if pursued, would show insolvency. When the chancellor has considered conflicting evidence, and made his findings and decrees thereon, they are presumptively correct, and unless an obvious error of law or some serious mistake in the consideration of the evidence appears the findings must stand."

In *Re States Printing Co.*, 238 Fed. 775, 151 C. C. A. 625, the court (C. C. A. 7th Circuit), held:

"Under Bankruptcy Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (Comp. St. 1913, § 9644), making void a transfer within four months before the filing of the petition in bankruptcy, if the bankrupt was then insolvent, and the transfer operated as a preference, and the person receiving it had reasonable cause to believe that it would effect a preference, it is not necessary that the creditor actually knew that the debtor was insolvent, but the preference is void if he had information sufficient to have put an ordinary business man

on inquiry as to facts which would show insolvency, and his failure to make such inquiry, is no excuse."

At page 777 of 238 Fed., at page 627 of 151 C. C. A., the court said:

"Failure actually to investigate will afford no excuse, where the creditor's information was sufficient to have put the ordinary business man upon inquiry. In re McDonald & Sons (D. C.) 178 Fed. 487; Rogers v. Page, 140 Fed. 596, 72 C. C. A. 164; McElvain v. Hardesty, 169 Fed. 31, 94 C. C. A. 399; Iuttig Mfg. Co. v. Edwards, 160 Fed. 619, 87 C. C. A. 521."

[2] Intent to give a preference and intent to obtain a preference have nothing to do with the question of actually obtaining a preference. The questions under the act as amended are: (1) Was the debtor insolvent? (2) Within four months of filing the petition did he make a transfer of any of his property? (3) Would the effect of the enforcement of such transfer be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class would receive? (4) Did the person receiving it, or to be benefited thereby, or his agent acting in the matter of obtaining it, then have reasonable cause to believe that the enforcement of the transfer, here the taking or enforcement of the mortgage, would effect a preference; that is, give to the creditors receiving the transfer a greater percentage of his debt than any other of such creditors of the same class would or will receive? Answer these questions in the affirmative, and we have a preference voidable by the trustee. Reasonable cause to believe assumes that the one receiving the transfer, or his agent, had knowledge of the insolvency, or such information on that subject as would put a man of reasonable intelligence on inquiry, and that means of obtaining knowledge was at hand and knowledge obtainable, and that knowledge would have been obtained if inquiry had been made.

It is not to be assumed that the creditor will refuse to give information, or that he will give false information. Here the partner in the firm of Campion & Sons did almost everything he could, except to say outright: "We are insolvent and cannot pay our debts in full." He told of the mortgage or mortgages on the real estate, and of the judgments they could not pay, and the fact they had no money, and the further fact they had no means of getting it, whereupon the agent of the Klein Company insisted on and took a third mortgage on the real estate and a chattel mortgage on all the personal property, subject to a prior mortgage, and made no inquiries as to solvency or insolvency—no inquiries as to the value of the entire assets of the firm or the total of its liabilities.

[3] The circumstances were such that if Klein had inquired, as it was his duty to do, he might and probably and undoubtedly would have obtained all necessary and full information and knowledge. The Klein Company is chargeable with all such knowledge as it might and probably would have received and obtained, had its representative inquired; that is, with knowledge of the actual insolvency of Campion & Sons.

In Grant v. National Bank, 97 U. S. 81, 24 L. Ed. 971, the court in the opinion said:

"It is not enough that a creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt."

That decision was rendered under the act of 1867, but it was before the committee on the judiciary and Congress when the act of 1898 was passed, and the language of the two acts in this regard are the same, or substantially so. However, in the instant case Mr. Klein had much more than suspicion. Mr. Klein was informed of unpaid mortgages and of unpaid judgments recently obtained and docketed, and of the absence of money wherewith to pay, and of credit wherewith to obtain money, and of lack of credit at the bank, as the Klein Company then held unpaid and dishonored checks of Campion & Sons. This last fact alone would not give reasonable cause to believe necessarily, but in the instant case it was one of several facts of which Klein was informed, all pointing to actual insolvency. "One swallow does not make a summer," but when we see the sky full of swallows homeward flying, and are not aware of the season of the year, we well many inquire, "Is not summer here?"

[4] This case presented a question of fact for the decision of the referee, and his finding and decision should not be disturbed, as it is sustained by the evidence. He saw the witnesses and heard them give their testimony. He was to judge of their credibility and the accuracy of their testimony. He, far better than the court is, was able to judge what the facts were as to the transaction of October 18th.

I have not commented on the claim to this money of the Rock Falls Manufacturing Company, which held a prior chattel mortgage on most of the property covered by the chattel mortgage given to the Klein Company, but which had not been properly renewed, so as to make it good against the trustee in bankruptcy. The existence of that mortgage, of which the Klein Company was informed, was further reason for reasonable cause to believe on the part of the agent of the Klein Company. The invalidity of that mortgage as to the trustee does not help the Klein Company in this case. The Rock Falls Company has accepted the decision of the referee.

[5, 6] It is true that the burden of showing the existence of reasonable cause to believe was on the trustee, but it is not true that the two witnesses, Klein and Campion, who testified as to the transaction of October 18th, stood or stand on an equal footing, and were and are of equal credibility, and that therefore the testimony of the one "offsets" that of the other, and leaves the case of the trustee unproved. Neither is it true that no duty rests on a creditor, seeking payment or security, to make inquiry as to solvency or financial conditions until he has received such information as gives him reasonable cause to believe that insolvency exists and that the transfer will operate as a preference. When facts come to the knowledge of a creditor, seeking payment or security, which do give him reasonable cause to believe that the enforcement of the transfer would effect a preference, he has such knowledge as will avoid the transfer. A person cannot willfully remain in ignorance of the fact of insolvency, when he has rea-

sonable cause to believe that insolvency exists. He may not have reasonable cause to believe at a given time, and still have knowledge of such facts as would put a reasonable man of intelligence on inquiry as to financial condition; and if he does have such knowledge, it is his duty to inquire, and such inquiry may disclose the facts which give him the necessary reasonable cause to believe the enforcement of the transfer would work a preference.

In this case the facts actually disclosed and made known to the Klein Company, and Klein, the agent, made it the duty of the agent, Klein, to inquire, if not already satisfied the Campion Company was insolvent, as to the actual facts. If in doubt about the mortgages and judgments, and want of credit, and inability to pay, etc., he could have inquired. Every disclosure made indicated insolvency. Klein, who was urging and insisting on security by mortgage, actually avoided receiving the information which was at hand by failing to make the inquiry a reasonably prudent man would have made.

The order of the referee is affirmed.

There will be an order accordingly.

In re J. F. GROWE CONST. CO.

(District Court, N. D. New York. March 31, 1919.)

1. SALES ⇨101—RESCISSION BY SELLER—ELECTION—KNOWLEDGE OF FACTS.

One who was induced by fraud to sell goods to an insolvent corporation does not lose his right to rescind for the fraud by filing notice of lien before he had knowledge of the fraud, though the filing of such notice with knowledge of the facts would be a binding election.

2. BANKRUPTCY ⇨140(2)—TITLE OF TRUSTEE—GOODS FRAUDULENTLY BOUGHT.

A trustee in bankruptcy acquires no greater rights than the bankrupt himself had to goods purchased by the bankrupt through fraudulent representations as to solvency, where there has been no conveyance or incumbrance of the property void against the trustee by some positive provision of the Bankruptcy Act.

3. SALES ⇨201(4)—DELIVERY—POSSESSION BY CARRIER.

Where goods sold were shipped by rail to the buyer and held by the carrier at their destination for payment of transportation charges by the buyer, there was no delivery to the buyer, and the title never passed to it.

4. SALES ⇨100—REMEDIES OF SELLER—ANTICIPATORY BREACH.

The bankruptcy of the buyer, whether voluntary or involuntary, is an anticipatory breach of an executory contract of sale, which justifies the seller in rescinding.

5. SALES ⇨96—RESCISSION BY SELLER—FRAUD—MATERIALITY.

False statements as to the buyer's insolvency, made to seller's agent while the goods were in a carrier's possession at their destination waiting delivery to buyer, relied on by the seller, so that he lost his right of stoppage in transit, were material, and authorized a rescission by the seller.

6. SALES ⇨296—STOPPAGE IN TRANSIT—"TRANSIT."

"Transit" includes, not only carriage of goods to destination, but delivery there according to the terms of the contract, so that neither arrival of the goods at destination nor seizure on attachment by a creditor of consignee terminates the right of stoppage in transit.

7. SALES ⇐111—RIGHTS OF SELLER—RESCISSION—SALE OF MATERIAL FOR BUILDING.

One who sold steel to a contractor for incorporation into a building, after rescission for fraud of the buyer, is entitled to the property as against the owner of the building, who had taken possession thereof to complete his building after breach by the contractor; the agreement between the contractor and owner not being recorded or filed, so as to become effective as a chattel mortgage.

In Bankruptcy. Involuntary proceedings against the J. F. Grove Construction Company. On application for confirmation of the report of Edwin A. King, as special master, finding that claimant, the Truscon Steel Company, formerly the Trussed Concrete Steel Company, was entitled to certain property as against both the trustee in bankruptcy and William C. Vrooman, adverse claimant. Report confirmed. See, also, 253 Fed. 981.

Geo. J. Hatt, 2d, of Albany, N. Y., for trustee.

Thos. R. Tillott, of Schenectady, N. Y. (Chas. A. Riegelman, of New York City, of counsel), for claimant Truscon Steel Co.

Miller & Golden, of Schenectady, N. Y., for claimant Vrooman.

RAY, District Judge. The J. F. Grove Construction Company, here called Construction Company for brevity, entered into a written contract with William C. Vrooman, owner of certain real estate in the city of Schenectady, on the 17th day of February, 1917, to "provide all the materials and perform all the work for the erection and completion of a two and one story commercial building to be located at 247 Dock street, Schenectady, N. Y." The said contract contained the following provisions, viz.:

"Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect, or failure being certified by the architects, the owner shall be at liberty, after three days' written notice to the contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architects shall certify that such refusal, neglect, or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools, and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor, and in case of such discontinuance of the employment of the contractor — shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor; but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties."

Also the following:

"Under this contract the owner has the privilege to occupy part or parts of the building as soon as such is or are ready for occupancy."

The said Construction Company entered on the performance of such contract, taking possession of the premises for the purpose, and February 17, 1917, entered into a contract with Trussed Concrete Steel Company, of Youngstown, Ohio, now Truscon Steel Company, and hereafter called Steel Company for brevity, by which said Steel Company was to furnish for use in the construction of such buildings certain steel Kahn bars, rib bars, Floretype, Hy-Rib and round rods, f. o. b. cars at its works, Youngstown, Ohio, freight allowed to Schenectady, N. Y., at the agreed price of \$2,025, "net cash 30 days from date of such invoice or 1 per cent. for cash 15 days after deducting freight."

The Steel Company shipped the steel to the Construction Company in two lots, one March 21, 1917, and the other March 23, 1917, over the New York Central Railroad lines, consigned to J. F. Growe Construction Company, at Schenectady, N. Y., as per agreement.

One shipment, that of March 23d, reached Schenectady April 2d, and was unloaded and placed on the premises where such buildings were being erected April 3 or 4, 1917; the other shipment, that of March 21st, reached Schenectady April 9th, but was not placed on such premises, but was unloaded by the railroad and placed in its freight house, under its rule that part of a carload of freight shall be unloaded at the freight house, regardless of shipping directions to the contrary.

The carload last shipped, but first to arrive at Schenectady, was invoiced at \$1,445.34, and the part of a carload first shipped, and received at Schenectady April 9th, invoiced at \$579.66. When this contract was made between the Steel Company and the Construction Company, the latter was actually insolvent and knew the fact, but the Steel Company was ignorant of such fact, as was Vrooman.

In 1915 the Construction Company, through the Bradstreet and Dun commercial agencies, had communicated to the trade generally, or put in the way of being communicated to the trade, or all who should inquire, materially false and untrue statements and representations as to its financial condition and ability, representing its total assets as \$36,671.74 and its total liabilities as \$7,846.35. Before entering into the contract the Steel Company procured from the said commercial agencies reports as to the financial condition of the Construction Company, which, based on such financial statements made by the Construction Company and subsequent information, showed its assets as \$38,671.74 and its liabilities as \$30,825.39.

The agent of the Steel Company testified that in originally making the contract of sale of this steel he relied wholly on these reports. It is undoubtedly true that he did. In fact, the Construction Company was insolvent then and at all subsequent dates, and knew it.

Shortly before April 2, 1917, Smith, the duly authorized agent of the Steel Company, learned that a lien had been placed on some of the

property of the Construction Company. He made an unsuccessful search for Growe, of the Construction Company, and, being unable to find him, he went to Mr. Shaffer, who was the treasurer of the Construction Company, for information as to its financial condition, when the following conversation took place:

"A. I went to the office of the Growe Construction Company in Albany. I asked for Mr. Growe, and I was told that he was not there, but that the treasurer, Mr. Shaffer, was there. I had a talk with Mr. Shaffer. I asked him what there was to the lien that had been filed against the property in Albany on which the Growe Construction Company were doing the work. He said that that lien meant absolutely nothing; that it was merely a petty misunderstanding between Mr. Crannell and Mr. Growe; that Mr. Crannell and Mr. Growe had between themselves, verbally agreed upon the settlement of it, which Mr. Crannell afterwards put into a letter and sent to Mr. Growe, asking Mr. Growe to verify their understanding by signing it; that Mr. Growe had been too busy to take it up, or overlooked sending it back to Mr. Crannell; and that Mr. Crannell had filed this lien, or caused this lien to be filed. I said: 'I want to know what effect that has on the company.' 'Why,' he said, 'that has no effect on the company.' I said: 'I am here as the Credit Department, because we have got some goods on the way here to you, and I want to know about that lien.' He said: 'I know; the goods are there in the freight sheds.'

"Q. Had the goods been delivered at that time?"

"Mr. Hatt: I object to that as calling for a conclusion."

(Sustained. Exception.)

"Q. Did Mr. Shaffer say whether or not they had received the goods which you had shipped to them?"

"Mr. Hatt: I object to that as improper. He has testified that Shaffer told him that the goods were at the freight house."

(Overruled. Exception.)

"A. He specifically said the goods were still at the freight house, and I called his attention to the part of our contract, as a reason for my being there—

"Mr. Hatt: I object to that as improper and move to strike it out."

(Overruled. Denied.)

"Q. State anything you said, Mr. Smith, or he to you, on the subject of this shipment or their credit. A. When he said that the lien had no effect upon the company, I said that I wanted to know its bearing upon the company, because we had some goods on the way that if there was trouble, I could stop in the delivery, and he answered not to do that; that they had had trouble enough with the strike, and their goods were a couple of weeks late in getting here anyway. Then he went on to tell about the strike; that the workmen had asked for more money, and he had refused to grant it, but that he was going over the next day, and he was quite confident he could compromise with them and get them back on the job at once. But I kept at him on the effect on the company of the lien.

"Mr. Hatt: I move to strike that out as improper."

(Granted.)

"Mr. Riegelman: I consent to it.

"Q. State what you said and he said about anything that took place, but not the effect. A. I asked him, 'How about the payment of our account?' and he said, 'Don't you worry about the account. The company is financially responsible. We have property. We have money to take care of your bill when it is due, or within a very few days, and the strike is the reason, if there is any delay.'

"Q. Did you do anything at that time to stop the delivery of the goods?"

A. No, sir."

This conversation and the statements then made must be considered in connection with the information before received by Smith from the

commercial agencies and which had been communicated to them by the Construction Company. The Construction Company was then insolvent, and it and its officers, including the treasurer, knew that fact. The Steel Company, represented by Mr. Smith, relied on the statements made by its treasurer, sustained, as he believed they were, by the prior representations obtained through the commercial agencies, and took no steps to protect its rights with respect to such property, believing the Construction Company was solvent and that the steel would be paid for as the bills came due, and that the Construction Company had the financial ability to pay. The steel was then en route to Schenectady, and if the truth had been told by the treasurer to Mr. Smith it could have been stopped, and would have been stopped in transit before reaching the premises of Vrooman as to the one shipment, or the freighthouse of the railroad company as to the other shipment. April 11, 1917, Vrooman served the following notice on a bookkeeper of the Construction Company, but it is not shown that such bookkeeper was authorized to receive same, or that it ever came to the notice or knowledge of any officer of the Construction Company. Such notice was as follows:

"J. F. Growe Construction Co., Albany, N. Y.: You are hereby informed, that I, the owner of the property designated as 247 Dock street, Schenectady, N. Y., do hereby give you notice to continue work and resume same, for which work you are under contract with me, and which contract is dated February 17, 1917. You are further informed that according to the terms of said contract, as set forth in article V of that instrument, I shall terminate your employment, shall enter and take possession of the premises, for the purpose of completing the work included under this contract, of all materials, tools, and appliances thereon, and shall employ any other person or persons to finish the work and furnish materials therefor, at your expense, unless you proceed with such work within three days from this date.

"[Signed] Wm. C. Vrooman.

"April 11, 1917, Schenectady, N. Y."

April 14th Vrooman took possession of the property placed on such premises by the said Construction Company, including the steel received from the Steel Company that had been placed there. On the same day, April 14th, a creditor, through Miller & Golden, attorneys, who also represented Vrooman, brought suit against the Construction Company, and in such suit attached the steel in the railroad freight house. The freight charges were not paid, but the agent of the railroad company was notified of the attachment and such steel was segregated.

On the same day, April 14th, a petition in bankruptcy against the Construction Company and an application for the appointment of a receiver of its property were duly executed, and on the 16th of April presented to and filed with the clerk of the United States District Court, Northern District of New York, and on the same day B. J. Savage, of Albany, N. Y., was duly appointed receiver of the property by the District Judge, and on the same day he duly qualified and took possession of the property of the alleged bankrupt situated at Albany, N. Y. He made an inventory April 18th, and an appraisal, and claimed and demanded all of such steel.

April 14th, Mr. Smith, the said agent of the Steel Company, learned that the Construction Company was in financial difficulties, and directed Mr. Tillott, an attorney, to file a mechanic's lien on all such steel, which he did on the 16th of April, but after such receiver was appointed. The order appointing the receiver authorized him to take possession of all property of the alleged bankrupt, and contained the usual injunction clause against all suits and interference with its property. The attachment suit went to judgment April 20th, and a sale was advertised, but not made; but I do not see as that is material, as no one claims title under or through that suit, and the attachment clearly was vacated by the bankruptcy proceedings, in which adjudication followed in due course.

The Steel Company had no knowledge of the insolvency of the Construction Company until after the petition in bankruptcy was filed. It had some information which put it on inquiry, and it applied for information to the officer of the company who should have known, and who did know, and who made to it false and misleading statements and representations, upon which it relied, and because of which, as stated, it failed to act for the protection of its rights and stop the steel in transit. March 30th, on a certificate of work done, Mr. Vrooman paid the Construction Company, now bankrupt, the sum of \$1,581, the amount due from him on the contract at that time. This did not include any estimate or payment on account of any of this steel. It had not then been received at or on the premises. The railroad company notified the Construction Company of the arrival of the steel at its freight house, which was unloaded there; but that company did not pay the freight or charges or take it away. April 18th the Steel Company filed a second notice of lien, and on April 23d a third notice of lien, on this steel. April 25th the Steel Company notified the railroad company of its election to stop in transit all the steel shipped by it to the Construction Company, tendered payment of all transportation and other charges thereon, and demanded delivery of same, which the railroad company refused. The attachment suit and proposed sale thereunder was subsequently abandoned. April 28th the Steel Company commenced a replevin suit against the railroad company and its agent, paid the charges and demurrage, and obtained possession of the steel at the freight house.

On or about May 2d the Steel Company, through Mr. Smith, its credit agent, who had been making inquiry, obtained further information as to the situation and information as to the insolvency of the Construction Company, and May 4th served on Vrooman, and May 5th on the receiver, due notice of claim of title to all of such steel. The Construction Company had ceased work on the contract as early as April 11th or 12th.

May 5th the Construction Company was duly adjudicated a bankrupt on the petition filed April 16th, and in due course Mr. B. J. Savage, the receiver, was appointed trustee and duly qualified. The replevin action was then discontinued, and the steel seized in that action by agreement was stored in the name of the receiver, where it now remains, subject to adjudication as to ownership. In the meantime, with-

out prejudice to the rights of the parties or claims of ownership, Mr. Vrooman had been permitted to use the steel placed on his premises in the construction of his building.

A stipulation in writing was entered into by Vrooman, the Steel Company, and the trustee as follows:

"Whereas, a petition in involuntary bankruptcy was filed herein April 16, 1917, and on the same day order was duly made appointing B. Jermain Savage receiver herein, who on the same day duly qualified as such; and whereas, Trussed Concrete Steel Company, of Youngstown, Ohio, had made two shipments to said J. F. Growe Construction Company of steel bars, metal lath, hy-ribs, foretyle, and the like, for use in a certain contract between said J. F. Growe Construction Company and William C. Vrooman for the construction of a building on Dock street, in the city of Schenectady; and whereas, at the date of the appointment of a receiver aforesaid one of said shipments had been delivered on said job, and the other of said shipments was contained in the freight house of the New York Central Railroad Company at Schenectady, New York; and whereas, said Vrooman claims title to the aforesaid material delivered on the job; and whereas, said Trussed Concrete Steel Company claims title to all of the aforesaid material; and whereas, the receiver, pursuant to the terms of the order appointing him receiver, has asserted and claims title to the aforesaid property; and whereas, it is in the interest of all parties that the question of the ownership and right to possession of said property should be speedily determined:

"Now, therefore, said Trussed Concrete Steel Company, by Thomas R. Tillott, its attorney, said William C. Vrooman, by Arthur S. Golden, Esq., his attorney, and said receiver, by George J. Hatt, 2d, his attorney, hereby stipulate that an order of reference may be obtained forthwith, without further notice, referring it to Edwin A. King, Esq., referee in bankruptcy, as special master, or such other special master as the court may appoint, to hear the testimony of the parties hereto and of any witnesses that may be called before said special master, and determine the question of the ownership and right of possession to all of the aforesaid material so shipped by said Trussed Concrete Steel Company to the bankrupt, reserving all rights to review and appeal from decision of said special master to all higher federal courts and judges, and that property be held to await the decision of appeal, if any be taken.

"Dated May 9, 1917.

T. R. Tillott,
"Attorney for Trussed Concrete Steel Company.
"Arthur S. Golden,
"Attorney for William C. Vrooman.
"George J. Hatt, 2d,
"Attorney for Receiver."

Mr. Vrooman claims, first, as to the steel delivered on his premises, that under his contract with the Construction Company he had the right to take possession of such steel on his premises as against it and as against the Steel Company, and hold same, and that he had and has an equitable lien thereon in any event, as he took possession of same prior to the filing of the petition in bankruptcy. His contract was not filed as a chattel mortgage, and there was never any delivery to Vrooman, and the property was not in existence when the contract was made. It was after-acquired property. As to the steel delivered on Vrooman's premises, the trustee claims it was sold under a valid contract of sale, and shipped and delivered to the Construction Company; that on adjudication and his appointment as trustee the title vested in him as of the date of filing the petition or adjudication, at least

and that Vrooman has no title or claim superior to his; and also that there were no fraudulent representations or statements which justified a rescission of the sale, and that, had there been in the first instance, the sale was not rescinded for fraud, but that the Steel Company elected one of two remedies, that of filing a lien, thereby recognizing title in the Construction Company, and must pursue that remedy or none.

The Steel Company claims that it was induced to enter into the contract of sale by fraudulent representations; that it had the right of stoppage in transit; that it was induced by fraud and fraudulent representations and concealment of the truth to forego the pursuit and enforcement of such remedy at that time, and that on discovering the facts it had the right to rescind the contract for fraud and reclaim the property and that it could have done this against the Construction Company, and would have done so in the first instance but for the misrepresentations made about April 2d, and that the trustee has no greater rights than the Construction Company had; also that on learning all the facts, which it was diligent in doing, it had the right to abandon its liens, or notices of liens, and pursue its true remedy, justified by the facts which subsequently came to its knowledge, and rescind the contract of sale for fraud. As to the steel unloaded at the freight office the Steel Company makes the same claim of fraud and that it had the right of stoppage in transit and exercised the right while the steel was in transit, it never having reached or been delivered to the Construction Company.

The trustee in bankruptcy claims, first, there was no fraud which would justify such action, and, second, that the steel was in legal effect delivered when put in the freight house, and title then passed, and, third, that the Steel Company had and has elected another remedy, that of lien filed, thereby recognizing title in the Construction Company, and must abide by such election.

[1] First. When a party has two remedies, one being inconsistent with the other, and he knows all the material facts and elects to pursue one of such remedies, he cannot afterwards turn around and pursue the other; but an election made in ignorance of material facts does not bind and preclude the party from abandoning the one and pursuing the other. *Dickson v. Patterson*, 160 U. S. 584, 591, 592, 16 Sup. Ct. 373, 40 L. Ed. 543; *Hays v. Midas*, 104 N. Y. 602, 11 N. E. 141; *E. C. Foundry Co. v. Hersee*, 103 N. Y. 25, 9 N. E. 487; 15 Cyc. 261, and cases there cited.

If a contract to sell and deliver property is induced by materially fraudulent representations, the seller, on discovery of the fraud, has the right to rescind and refuse to perform further, and even reclaim the property already delivered. He may waive the fraud, of course, and sue on contract for the purchase price, or pursue any of the ordinary remedies, and thereby treat the sale as valid and as having passed the title. But if he acts in ignorance of the facts, and acts promptly on discovery thereof, he has not lost his right to rescind, even if he had instituted other proceedings on the assumption the contract was valid and free from fraud. See cases cited.

In *Dickson v. Patterson*, supra, Mr. Justice Harlan delivered the opinion of the court and said:

"But there are other considerations which preclude Patterson from insisting that Dickson made his election of remedies, and must abide by that election. During the correspondence that took place between the parties in 1886, Dickson, so far as the record shows, was not aware that the sale and conveyance to Boehme was merely fictitious, and in execution of Patterson's scheme to defraud him. Patterson assured him that that sale was a real one, and there is no proof to show that Dickson, at the time, knew or believed anything to the contrary. If it was a real sale, Dickson, having joined in the deed to Boehme, could not go behind it, unless he could show that the latter did not purchase in good faith. But, from what Patterson wrote to him, he had no reason to doubt the validity of the sale to Boehme. Besides, Patterson induced Boehme to inform Dickson by letter that the amount paid was only \$6,000, and that it was changed in the deed to \$10,000 at his (Boehme's) request, and that Patterson was an honest man, with a good reputation. All this was well calculated to make the impression upon Dickson that the only relief he could have against Patterson was to obtain an accounting, and a decree or judgment for such additional sum as was justly due him.

"After the correspondence between the parties ended in the latter part of the year 1886, the plaintiff, as we must assume from the record, ascertained for the first time all the facts as they are now disclosed, and, without unreasonable delay, commenced the present suit. We should not be justified by the record in saying that he had, for any considerable time before the bringing of this suit, such knowledge of all the circumstances of this transaction as enabled him to know with certainty what his rights were, and to determine what course should be taken to vindicate them. If, as the evidence shows, the real facts were concealed from him by one from whom he had reason to expect a frank disclosure of all the material circumstances as they occurred, he is not, for that reason—no rights of innocent third parties having intervened—to be denied the fullest relief to which according to the principles of equity he is entitled."

In *E. C. Foundry Co. v. Hersee*, supra, the Court of Appeals of New York held:

"The mere bringing of an action for the price of goods sold * * * is not a binding election of remedies, or a waiver of right to rescind the sale on the ground of fraud," unless the action was brought with knowledge of the fraud.

In *Hays v. Midas*, supra, the same court held:

"Where a vendor brought an action to recover the price of goods sold, and obtained an attachment therein, on the ground that the defendant had removed and disposed of his property with intent to defraud his creditors, which was levied on property of the defendant, but nothing was obtained by plaintiff under the attachment, and said action was subsequently discontinued, by order of the court, on notice to the defendant, held, that plaintiff was not precluded thereby from rescinding the sale, on the ground that it was induced by fraud on the part of the vendee, and from bringing an action to recover the goods sold, in the absence of proof that the vendor brought the first action with knowledge of the fraud."

[2] In the instant case the evidence shows that when the Steel Company filed its liens it was not fully informed as to the facts. It knew the representations made, but did not know their falsity. The company has not tried to enforce such liens. On learning the facts, it gave notice of rescission and claimed the property. If the treasurer of the Construction Company, as was his duty, had informed Mr. Smith of

the facts as to the financial condition of the company, instead of making materially untrue and misleading statements, the Steel Company would have been in position to act intelligently, rescind the sale at that time (April 2d), and stop the steel then in transit, which had not been received and none of which was in the freight house. It was on April 3d or 4th that the larger shipment was unloaded on Vrooman's premises. Of course as to that steel the representations made April 2d by the treasurer materially affect the question of stoppage in-transit. Misled by untrue statements, the Steel Company was groping in the dark, and is not now estopped to assert the right of rescission and reclaim the property as between itself and the trustee in bankruptcy. No right of creditors represented by the trustee have intervened. The rights of the trustee to hold the property are precisely the same as the rights of the Construction Company would have been, if bankruptcy proceedings had not been instituted. *Thompson v. Fairbanks*, 196 U. S. 516, 526, 25 Sup. Ct. 306, 49 L. Ed. 577; *Hurley, as trustee, etc., v. Atchison, etc.*, 213 U. S. 126, 133, 29 Sup. Ct. 466, 53 L. Ed. 729, where the Supreme Court quoted with approval from *In re Chase*, 124 Fed. 753, 755, 59 C. C. A. 629, 631, as follows:

"It is settled that a trustee in bankruptcy has no equities greater than those of the bankrupt, and that he will be ordered to do full justice, even in some cases where the circumstances would give rise to no legal right, and, perhaps, not even to a right which could be enforced in a court of equity as against an ordinary litigant. *Williams' Law of Bankruptcy* (7th Ed.) 191. Indeed, bankruptcy proceeds on equitable principles so broad that it will order a repayment when such principles require it, notwithstanding the court or the trustee may have received the fund without such compulsion or protest as is ordinarily required for recovery in the courts either of common law or chancery."

And from *Thompson v. Fairbanks*, supra, as follows:

"Under the present Bankruptcy Act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act."

In the instant case the full carload of steel arrived at Schenectady April 2d, the same day Mr. Smith had his talk with the treasurer of the Construction Company, but it was not unloaded or placed on Vrooman's premises until April 3d or 4th. It was on a siding probably. It may have been near the freight house. Probably the treasurer knew of its arrival, as he said it was there, but Smith did not. In any event this carload of steel had not passed from the possession of the railroad company into that of the Construction Company. There was time and opportunity to stop its delivery, if Smith had been correctly informed as to the financial condition of the company. Smith had learned facts, or a fact, which put him on inquiry, and he made inquiry. He was misinformed by the Construction Company. He was thereby deprived of his opportunity to stop the delivery of the steel to an insolvent concern. Title had not then passed, as delivery had not been made.

[3, 4] As to the other steel, which arrived on the 7th or 9th, the

title never passed to the Construction Company. It did not pay the charges or take it away from the railroad company. It never passed to its possession. The Construction Company was not entitled to the possession thereof until it did pay the charges. See *In re N. Y. H. F. G. Co.*, 169 Fed. 612, 95 C. C. A. 140; *In re M. Burke & Co. (D. C.)* 140 Fed. 971. As to this steel there was an anticipatory breach of the contract by the Construction Company on the 16th day of April, 1917, which in any event entitled the Steel Company to rescind and take that property. *Central Trust Co. v. Chicago Auditorium*, 240 U. S. 581, 591, 592, 36 Sup. Ct. 412, 415 (60 L. Ed. 811, L. R. A. 1917B, 580). Says the court:

"Proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement."

And when one party to a contract breaches it the other may rescind. [5] As to the fraudulent representations, the special master was of the opinion that, because the information was given the commercial agencies back in 1915, the Steel Company could not rely on them, but should have made further inquiries. We come, then, to the untrue and fraudulent statements of April 2d, made to Mr. Smith, and are led to inquire what effect these statements had. If the information derived from the commercial agencies did not constitute a fraud, what right did the Steel Company have on April 2d? Was it the right to stop the steel in transit? On what ground did the Steel Company have the right to stop delivery of the steel then on the cars and at Schenectady? On the morning of April 2d the contract of sale was valid and binding, says the special master. There had been no false representations on which the Steel Company could rely to avoid the sale or contract, is the holding. The steel was sold by the Steel Company and purchased by the Construction Company and shipped on a 30 days' credit. This time had not expired. But in fact the Construction Company was insolvent all this time, and was insolvent when the steel was shipped, and at all times thereafter. Of this the Steel Company had no notice or knowledge until just prior to April 2d, when it received some information indicating possible insolvency. Had the Steel Company been correctly informed on the subject, it would have been justified in refusing to ship the steel, except on payment in advance. As the facts were, the Steel Company had a right to stop the steel at any time while in transit, as the Construction Company was in fact insolvent. *Willis v. Glenwood Cotton Mills (D. C.)* 200 Fed. 301, 305; 35 Cyc. 493, 494, and cases there cited.

The law is correctly stated in *Willis v. Glenwood Cotton Mills (D. C.)* 200 Fed. 301, 305, 306, thus:

"The seller's lien on a sale of chattels exists at common law without any express agreement, and is impliedly a part of every contract of sale of personal property. It may be defined as the right on the part of the seller to retain possession of the chattels sold until the price is paid. This right continues until delivery of the goods to the purchaser, unless it is divested by any agreement express or implied. It is divested or waived where the sale, although absolute, is on credit to be paid at a fixed future date. Even in this case, however, if the goods have not been actually delivered to the

purchaser, and the purchaser becomes insolvent before payment, the lien or right is revived. It exists or revives, as between seller and purchaser, unless actual or constructive delivery has been made to the purchaser. Although the goods have been delivered to a carrier for transportation, consigned to the purchaser, yet if the purchaser becomes insolvent prior to the delivery to him by the carrier, the right or lien of the seller revives, and can be exercised under the rule of law known as stoppage in transitu; the right of stoppage in transitu being an equitable extension of the principle of the seller's lien for unpaid purchase money.

"Upon a sale of chattels, the seller has the right to retain possession until the purchase price has been paid. If he has parted with the possession, so far as to deliver the chattels to a carrier, consigned to the purchaser, he has still the right to withhold or reacquire possession upon the purchaser's insolvency prior to the carrier's delivery to him. This right is waived by an absolute sale, coupled with an extension of the time of payment for a definite fixed period, but although waived, revives upon the purchaser's insolvency prior to delivery to him, provided the right of innocent bona fide third purchasers may not have intervened."

Says 35 Cyc. 494, 495:

"The right of stoppage in transitu arises only on the buyer's insolvency; but if such insolvency exists, and the whole price has not been paid, the right of stoppage arises, whether the sale is on credit or not. It is immaterial whether the insolvency arose after, or existed at the time of, the sale, provided it was at that time unknown to the seller; but if the insolvency is known to the seller at the time of the sale he cannot exercise the right. Direct proof of insolvency, such as an adjudication of bankruptcy or insolvency, is not essential; but the insolvency may be shown by circumstances, insolvency with respect to stoppage in transitu meaning a general inability to pay, as shown by stoppage of payment, and it has even been held that it is sufficient to show that the buyer is embarrassed and probably not able to pay his debts."

The Steel Company, informed of the attachment levied on the property of the Construction Company, which was in fact insolvent, and thus put on inquiry and seeking to inform itself, to the end that it might assert and exercise its rights and stop the steel in transit, and none of it had then been delivered, went to the treasurer of the Construction Company and sought the facts, but was denied correct information, and instead given false and misleading information, and induced to believe the company solvent, and hence it did not then exercise its right of stoppage in transit and notify the carrier to retain possession.

[6] This steel was in transit until actually delivered and turned over to the Construction Company. Mere arrival at or on the premises of the carrier did not terminate the transportation and right of stoppage in transit. "Transit includes, not only carriage of goods to destination, but delivery there according to the terms of the contract." 35 Cyc. 499, and cases cited. So the seizure of the steel on an attachment by a creditor of the Construction Company did not end transit. 35 Cyc. 500, and cases cited. These materially false representations injured the Steel Company, induced it to forego its rights, and enabled the Construction Company to obtain possession of the carload of steel placed on Vrooman's premises. These representations furnish ample ground for rescission and reclamation of the steel, so far as the bankrupt and its receiver and trustee are concerned.

[7] What right did Vrooman gain by the unloading of the carload

of steel on his premises as against the Steel Company? He does not occupy the position of a purchaser in good faith and for value. He had not made any advances on this steel. It or its value had not been included in any estimate. Vrooman's contract had not been filed as a chattel mortgage. This steel was not in existence when the contract was made between Vrooman and the Construction Company. It was of a peculiar type, and was to be made to fit this particular job.

I discover no ground on which it can be held that Vrooman had or has an equitable lien or claim on this steel, or any of it, as against the Steel Company, induced as it was to part with possession and permit unloading under the circumstances described. The following cases are decisive on this point: *Titusville Iron Co. v. City of New York*, 207 N. Y. 203, 100 N. E. 806; *In re P. J. Sullivan Co., Inc.*, 254 Fed. 660, — C. C. A. — (C. C. A. 2d Circuit), affirming same case (D. C.) 247 Fed. 139. In the *Titusville Case* the city of New York occupied the same position with reference to the property in question that Vrooman does here. In the *Sullivan Case* the city of Syracuse occupied the same position Vrooman does here. In both cases the contract between the owner of the premises and the contractor was substantially the same as here.

In the *Sullivan Case* the city of Syracuse was the owner of the premises on which the building was being erected and on which the contractor had placed the property in question for use in erecting the building. There, as here, such property had not been incorporated in the building. In that case it was the trustee or receiver of the contractor who claimed the property had not passed to the city or owner of the premises. In that case, as here, the contractor had made default in performing his contract, and the city claimed the property, and in fact took it and used it in completing its building after the contractor's default, by consent and direction of the bonding company. There a bonding company for the contractor had entered into the agreement as to the property for its own protection as surety for the contractor, and it was liable to the city for the contractor's default. It was held neither the city nor the bonding company could hold the property as against the trustee in bankruptcy of the contractor. The contractor had not surrendered possession, but such possession was taken by the city by direction of the bonding company, which claimed under its agreement that it could do so in case of the contractor's default.

Here Vrooman's contract was with the contractor, and in case of its default was permitted and authorized by the agreement to take possession of any property placed on the premises by such contractor. Here the trustee in bankruptcy of the contractor claims the property. He is entitled to it as against Vrooman, as is the Steel Company. Here Vrooman claims the steel actually placed on his premises under his agreement with the contractor. The Steel Company is a creditor, and claims such property as against the trustee in bankruptcy because of the frauds committed and the insolvency, and as against Vrooman on the ground he never got title, as he is not a purchaser in good faith for value, and his agreement was not recorded or filed, so as to become effective as a chattel mortgage. There was no present consideration

between Vrooman and the Construction Company, and no present sale, and there was no delivery by the Construction Company to him. Having taken possession of the premises and all property thereon, on the 14th of April, before the actual filing of the petition in bankruptcy, if the question were simply between Vrooman and the Construction Company, and it had no creditors, it may be that Vrooman could hold it. It is not necessary to decide that question. The Construction Company is in bankruptcy and insolvent, and the Steel Company is a creditor, and the trustee claims the steel as against Vrooman, and also against the Steel Company. Vrooman claims it against both. The Steel Company claims it against both the trustee—that is, the Construction Company—and Vrooman, who gains his right, if any, from the Construction Company. All the equities are with the Steel Company, and I think *In re Chase*, 124 Fed. 753, 59 C. C. A. 629, 631, quoted and approved in *Hurley*, as trustee, v. *Atchison*, etc., 213 U. S. 126, 133, 29 Sup. Ct. 466, 53 L. Ed. 729, and hereinbefore cited and quoted, peculiarly applicable to this case. A court of bankruptcy is a court of equity, and may apply and enforce equitable remedies.

I think the conclusions of the special master are correct and that his decision as to title should be confirmed and affirmed, and that the Steel Company should be awarded the steel in question, which means that Vrooman, claimant of the larger shipment, which was placed on his premises, must pay therefor. The case is complex in many of its aspects, and the payment of the fees of the special master, already paid by the Steel Company, will be divided between that company and the bankrupt estate, each paying one-half, and the Steel Company will recover of the trustee one-half thereof, who will pay same as an expense of administration.

There will be a proper decree accordingly.

In re MARDENFELD.

(District Court, N. D. New York. March 26, 1919.)

BANKRUPTCY Ⓒ136(1)—**CONTEMPT OF BANKRUPT—USE OF PROPERTY AFTER PETITION FILED.**

Bankrupt, who, knowing he was bankrupt, after petition was filed against him, amounting to an attachment and injunction, and after custodian of his property was appointed, to his knowledge and with his consent, used money, which he did not disclose, for living expenses of himself and family and in paying claims against himself, before the delayed adjudication, and appointment of a trustee, and then shows his inability to return it or restore the amount, his whole conduct showing a purpose to defraud his creditors and impose on the officers of the court, may be punished for contempt.

In Bankruptcy. In the matter of Louis Mardenfeld, an individual, trading as Mardenfeld & Grossman, bankrupt. Findings and recommendations of referee approved and confirmed.

Motion to confirm the report of Hon. James A. Van Voast, as special master, and return of order to show cause why the above-named bankrupt, Louis

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

Mardenfeld, should not be punished for contempt for neglecting and failing on demand to pay over to Thomas R. Tillott, trustee in the above-entitled matter, the sum of \$1,328.13, money of the bankrupt in his hands on the day the petition in bankruptcy was filed, and which sum he proceeded to spend in paying certain claims, paying his attorney and in the support of himself and his family. The question now before the court is whether or not such report should be approved and confirmed, and an order made punishing the bankrupt.

Del B. Salmon, of Schenectady, N. Y., for trustee.
Harry G. Coplon, of Schenectady, N. Y., for bankrupt.

RAY, District Judge (after stating the facts as above). The facts in this case are not involved. A short time before the involuntary petition in bankruptcy was filed the now bankrupt had a fire in his store at Gloversville, N. Y., and there came due him from the insurance company for loss on account thereof over \$3,600. He was also running a store in Schenectady, N. Y., in which he had a small stock of goods, worth \$1,400. It would seem he was having some talk with certain of his creditors as to a composition, as he had had communication with a lawyer in New York City named David Geiger, who represented some of his creditors. On the 20th day of December, 1918, a draft payable to said now bankrupt came into his possession for the sum of \$1,328.13 in part payment for such fire loss. The now bankrupt had employed one Harry G. Coplon of Schenectady, N. Y., as his attorney in said matter, and all three knew that bankruptcy proceedings were contemplated and threatened.

On the morning of December 21, 1918, Geiger in person appeared at Utica, about 250 miles from New York City, and filed with the clerk of this court an involuntary petition in bankruptcy against Mardenfeld, and then on the same day went to Schenectady and saw Coplon and informed him of the filing of such petition. Although Coplon, attorney for said Mardenfeld, saw him the same day or the next day, he insists in open court that he did not inform Mardenfeld of the filing of such petition. If he did not, he failed in his duty to his client and to the court. The statement is not credible. Geiger did nothing further after seeing Coplon, and service of the subpoena was not made on the alleged bankrupt until December 23, 1918, although his whereabouts were well known.

On the motion to confirm, and on the return of the order to show cause, the bankrupt, later adjudicated such, files an answer, in which he admits the receipt of the draft for \$1,328.13 on the 20th day of December, 1918, and says:

"The respondent herein, at the time said draft was received by him, did not know that an involuntary petition in bankruptcy was to be filed against him on the 21st day of December, 1918."

He does not say when he heard one had been filed. He also says in his answer he was not requested by any one, or notified, that he should turn over the draft or its proceeds until February 3, 1919. He also states that from December 21, 1918, until February 3, 1919, he was endeavoring to secure a composition settlement with his creditors, and that he believed such a settlement would go through, and that for

that reason he used the said moneys, proceeds of such draft, in the manner stated, including the necessary support of himself and family. He says he expended the money as follows:

Paid Harry G. Coplon, attorney.....	\$ 500 00
Paid his wife \$240, that is, \$40 per week for six weeks; back rent \$74, and rent \$48, for January and February, 1919.....	362 00
Paid two creditors on account.....	125 00
Paid insurance company to prevent lapse of policy.....	43 28
Paid expenses to New York City with Coplon, his attorney, December 24, 1918, \$75, and January 2, 1919, \$50, and expenses, board, etc., at hotel in New York \$120.....	245 00
Paid for overcoat \$30, and for suit of clothes \$20.....	50 00
Making in all.....	\$1,325 28

He says his wife and child were sick a portion of the time during which he was paying the wife \$40 per week from this money. There is no pretense the bankrupt and his attorney, or either of them, went to the referee or to the court and suggested a composition, or proceedings to secure one, or that any such proceeding was instituted.

Coplon makes affidavit that December 17, 1918, he was called on the telephone by the now bankrupt from New York City to go there on important business, and that he did go, and that he and the now bankrupt saw David Geiger the next day, and that Geiger then insisted on involuntary petition in bankruptcy would be filed; that he interviewed certain creditors to induce them to grant Mardenfeld an extension of time, and spent the days from December 18th to December 20th in such efforts; that he could not secure a meeting of creditors, and that he paid his own expenses, which were \$54. Coplon then says the involuntary petition was filed, and that thereafter he wrote letters calling a meeting of creditors, and went to New York December 23, 1918, and met creditors and offered a composition of 10 per cent. cash and 15 per cent. indorsed notes, and the creditors present expressed a willingness to accept, but no papers were signed. He says he left the bankrupt in New York to secure consents; that January 3, 1919, he went again to New York for the same purpose; also that he went again on January 30, 1919, and returned "to Schenectady on the 3d day of February, 1919, in time to attend the sale of the bankrupt stock of the bankrupt Mardenfeld," and that an examination of the bankrupt was held February 3, 1919.

In point of fact, Geiger and Coplon voluntarily appeared before the referee December 21, 1918, at Schenectady, N. Y., and asked that a custodian of the property of Mardenfeld be appointed, and one was appointed by the referee on Monday, December 23, 1918, when the bankrupt, Mardenfeld, was also present and was examined by the referee on the question of a custodian, and at which time he testified as follows:

"Q. Are you one of the partners of the firm of Mardenfeld & Grossman?
A. Yes, sir.

"Q. It is a copartnership, and not a corporation, is it not? A. Copartnership. Mr. Grossman's first name is Max; he is in the United States service, and not in actual charge of the business.

"Q. You have two stores, have you not? A. Yes, sir.

"Q. Where is the one in Schenectady? A. 203 State street.

"Q. Where is the other store? A. 10 South Main street, Gloversville.

"Q. What is the nature of the business? A. Ladies' and children's ready-made clothing. * * *

"Q. As you understand, a petition in bankruptcy was filed against you last Saturday morning? A. I do.

"Q. It was an involuntary petition; have the papers been served upon you yet? A. No."

After having heard Geiger and Coplon on Saturday, December 21st, and Coplon and the bankrupt on Monday December 23d, the referee made the following order:

"Ordered, that until the further order of the court William M. Miller be, and he hereby is, appointed as a person to take possession and charge of the merchandise, stock, and fixtures contained in the two above-mentioned stores of the alleged bankrupts, and to continue the business now being carried on by them in said stores, not, however, to purchase any new stock of goods or merchandise, nor to incur any expense beyond the necessary expense for the continuation of the business, including clerk hire, lighting, and rent."

No mention was made to the referee of any money or drafts in hand or coming to the bankrupt. The referee was in ignorance of this money received and coming to the estate. He acted with reference to the property in the two stores, and supposed this was all the property the bankrupt firm had. He was not advised that Grossman was out of the firm, but, on the other hand, was given to understand that he was still a member of the firm and in Europe. Neither Coplon nor the bankrupt disclosed the fact of the receipt by Mardenfeld of such draft, or of the money thereon, or that such money had been received, or was coming to the alleged bankrupt. This was a concealment from the referee and creditors of an important fact. It was only on the examination of the bankrupt February 3, 1919, that creditors, except one or two, or the referee, obtained knowledge that Mardenfeld had received this money, or that any such sum was due him. Neither Coplon nor Geiger did anything to prosecute or aid and expedite the bankruptcy proceedings, or in the interest of creditors, after the filing of the petition. At the date of this hearing March 18th the bankrupt had not made or filed his schedules. It is evident from all the papers and proceedings that the creditors and referee would have remained in ignorance to this day of the existence of such money received by the bankrupt as stated, had not other creditors come in and procured an examination of the bankrupt.

Coplon has not earned the \$500 by any services rendered the bankrupt for which an allowance can be made, or ought to be made, out of the estate, and it is the duty of the trustee to recover same, less such sum as ought to be allowed as a reasonable attorney's fee under section 64 of the Bankruptcy Act.

Demand has been made on the bankrupt for this money. He has neglected and refused to pay it over. In answer to these proceedings he boldly and defiantly alleges its receipt, and asserts its expenditure for the purposes stated, under the circumstances stated, all after the petition was filed. That while he was spending this money the bankrupt knew proceedings in bankruptcy were pending against him is beyond all question.

Is there any remedy? Can this bankrupt be punished for contempt in not paying over this money, or for dissipating it and depriving the estate of same? It may be true that he has spent the most of it, if not all. When an alleged bankrupt, who is in fact bankrupt, and he is conscious of the fact, after a petition has been filed against him, deliberately appropriates the money belonging to the bankrupt estate to his own use, spends it in living expenses for himself and family, and in the purchase of clothing for himself, and in payments on claims against himself, debts owing by him, and then shows his financial inability to return it, or restore the amount, can anything be done by way of punishment for contempt? If not, what remedy do creditors have? If not, how can the court protect the estate and save the rights of creditors? Is the court in such a case impotent and helpless?

This is a peculiarly aggravated case, as it is apparent that Coplon and Geiger were allied and acting in concert to delay action, if not to defeat the Bankruptcy Act. Geiger and Coplon were in close communication prior to the filing of the petition. Geiger filed the petition the day after the bankrupt received this money, and went immediately and saw Coplon, and they had a custodian appointed, but took no further action. He, as attorney for the petitioning creditors, did nothing further. He neither saw nor voluntarily thereafter communicated with the referee or the court. Coplon gets \$500 of the money, three creditors a part thereof, and the bankrupt, he says, proceeded to spend the remainder as stated. Coplon and Geiger, both lawyers, knew that under section 70 of the Bankruptcy Act the title would vest in the trustee as of the date Mardenfeld was adjudged a bankrupt, and hence it was important to the bankrupt to delay adjudication, and hence nothing further was done. Mardenfeld's attorney places perfect reliance on the decisions that contempt orders cannot be made and enforced against a bankrupt for nonpayment of money when he shows he is unable to comply with the order, and cites them to the court as a complete answer to this application. By delaying the adjudication, both Coplon and Geiger knew the bankrupt would be enabled to spend the money before that event, and either knew, or supposed they knew, the trustee would be powerless to obtain restitution.

In this case the matter was so cunningly managed that the bankrupt had actually spent all the money, accepting his statement, before a trustee was appointed, and hence there has been no concealment of property from his trustee while a bankrupt in violation of section 29 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 554 [Comp. St. § 9613]). But the bankrupt, knowing that a petition had been filed against himself, and having this money belonging to his estate in bankruptcy in his possession, and knowing it was his duty to keep it and turn it over to his trustee in bankruptcy, when appointed, for the benefit of his creditors, paid \$500 to his lawyer, \$240 to his wife to pay living expenses, \$74 on a debt he owed for rent, \$48 for rent for January and February, 1919, \$125 to two of his creditors on account of their claims, \$50 for clothing for himself, and \$245 for his own living and hotel expenses in New York and perhaps other places, and when he did this he knew he was unable to make it good.

There is a line of decisions which makes these acts a criminal contempt and punishable, regardless of the present ability of the bankrupt to pay over the money. *Matter of Adam Ferris et al.*, trading as the Paris Mfg. Co., 33 Am. Bankr. Rep. 565, 566, 567; *Clay v. Waters*, 178 Fed. 385, 101 C. C. A. 645, 21 Ann. Cas. 897 (C. C. A., 8th Circuit); *In re Potteiger* (D. C.) 181 Fed. 640, 24 Am. Bankr. Rep. 648; *Merrimack River Sav. Bank v. City of Clay Center*, 219 U. S. 527, 535, 31 Sup. Ct. 295, 55 L. Ed. 320; *Wartman v. Wartman*, 29 Fed. Cas. 303; *Ex parte Calvin W. Kellogg*, 64 Cal. 343, 30 Pac. 1030, cited and approved 219 U. S. page 536, 31 Sup. Ct. 295, 55 L. Ed. 320; *Matter of Lutfy* (D. C.) 156 Fed. 873, 19 Am. Bankr. Rep. 614; *United States v. Shipp*, 203 U. S. 563, 574, 27 Sup. Ct. 165, 51 L. Ed. 319, 8 Ann. Cas. 265; *Collier on Bankruptcy* (11th Ed.) page 63. In this case, as the bankrupt knew of the proceedings, it is immaterial that the subpoena was not served on him until December 23d. His attorney in the matter was notified of the filing of the petition almost immediately by the lawyer who filed it, and almost immediately the bankrupt's attorney obtained \$500 of the money, and the attorney who filed the petition remained quiescent.

In *Matter of Paris Mfg. Co.*, supra, the court held:

"A member of a bankrupt partnership, who, after the filing of the petition in bankruptcy and the service of process upon the bankrupts, paid money belonging to the firm to his brothers-in-law in satisfaction of alleged personal debts, is guilty of criminal contempt and properly imprisoned therefor."

And the court said:

"The referee has carefully considered the facts of this case, and he can find in it no extenuating circumstances as regards the respondent Harry Siegel. It is contended that the debts alleged to be due to the respondents Hyman Weissner and Alter Weissner were valid ones, and that the respondent Harry Siegel ought not to be punished as for a contempt in paying such debts; but it is manifest that, even if it be assumed that these debts were valid, the respondent Harry Siegel could not, under the circumstances, pay the debts without violating the mandate of the court, and that, if a court of bankruptcy should give its sanction to the course here followed, it would open the way to an easy method by which in all cases bankrupts could withdraw their property from the jurisdiction of the court of bankruptcy and thereby defeat its decree. It is further urged that the petitioning creditors should have protected themselves from the wrongful transfer of the bankrupt's property by securing a seizure of the property through the marshal or a receiver. But certainly it is not open to the bankrupts to urge such a defense, and, furthermore, the mere possession of property by a bankrupt presents no grounds for seizure, as the law casts upon the bankrupt the duty of preserving the property for administration in bankruptcy, and creditors are entitled to assume that he will obey the law and the mandate of the court, and not disregard both, as was done in this case. It is also urged in extenuation that the respondent Harry Siegel is an ignorant man, and did not know that his acts were contrary to law; but the testimony given by this respondent, together with the facts in evidence, show very plainly that he is a shrewd, cunning, and resourceful man, and there is no doubt in the mind of the referee that he deliberately planned and executed a scheme to circumvent the creditors of the bankrupt firm and to defeat and render ineffective the process of this court. To give countenance or sanction to the acts of this respondent would be to invite cunning and unscrupulous persons to disregard the law and to treat with contempt the process of the court, and would be fraught with most disastrous consequences. As the gravamen of the offense here committed consists of unlawfully disposing of the bankrupts' property

after notice of the pendency of the bankruptcy proceeding, and as the evidence does not indubitably establish that the respondents Hyman Weisser and Alter Weisser knew that the petition had been filed, the referee is of the opinion that no action should be taken as against the respondents Hyman Weisser and Alter Weisser. But the referee is of the opinion that the facts clearly show that the respondent Harry Siegel has been guilty of a contempt of this court, and should be punished therefor in such manner as the court, in its discretion, deems appropriate."

In *Clay v. Waters*, supra, the court said:

"Any willful interference with any of this trust estate, any willful attempt to injure it, to withdraw it from the custody of the court, or to conceal it from the court, or any of its officers whose duty it is to administer it, is a defiance of the power and an affront to the dignity of the court, which may be punished by a judgment for contempt. In re Walsh Bros. (D. C.) 159 Fed. 560, 562; In re Lutfy (D. C.) 156 Fed. 873, 875; *Wartman v. Wartman*, 29 Fed. Cas. No. 17,210, pp. 303, 304, 305, 306. * * *

"A party to a suit, who knowingly and intentionally disposes of its subject-matter with intent to withdraw it from the jurisdiction of the court, and to render futile any future decree concerning it, unavoidably defies the power and affronts the dignity of the court, and thereby renders himself liable to punishment for contempt. *Wartman v. Wartman*, 29 Fed. Cas. No. 17,210, pp. 303, 304, 305, 306; *Ex parte Kellogg*, 64 Cal. 343, 344, 30 Pac. 1030; *Greite v. Henricks*, 71 Hun, 11, 24 N. Y. Supp. 546; In re Grant, 26 Wash. 412, 67 Pac. 73, 74; *American Construction Co. v. Jacksonville, T. & K. W. Ry. Co.* (C. C.) 52 Fed. 937, 941; *Devlin v. Hinman*, 161 N. Y. 115, 117, 55 N. E. 386; 9 Cyc. par. D, and note 22."

In *Merrimack Riv. S. Bank v. Clay Center*, supra, the Supreme Court held:

"Irrespective of an actual injunction order, the willful destruction or removal beyond the reach of this court of the subject-matter of litigation pending an appeal to this court is a contempt of the appellate jurisdiction of this court; and this is so, even though it may also be a violation of the injunction below."

The court cited with approval *Wartman v. Wartman*, supra, and said:

"In *Wartman v. Wartman*, cited above, a case heard by Chief Justice Taney on the circuit, the question was whether a defendant who had parted with an alleged trust fund in his custody pending an application for an order requiring him to pay the money into court was thereby in contempt. His act was held to be in contempt of the authority of the court, as a final decree would be idle and nugatory, if pending the litigation he should be held at liberty to put the fund beyond the reach of the process of the court."

In speaking of absence of an injunction the court said (219 U. S. 535, 536, 31 Sup. Ct. 296, 55 L. Ed. 320):

"This we need not decide, since irrespective of any such injunction actually issued the willful removal beyond the reach of the court of the subject-matter of the litigation or its destruction pending an appeal from a decree praying, among other things, an injunction to prevent such removal or destruction until the right shall be determined, is, in and of itself, a contempt of the appellate jurisdiction of this court. That such conduct may be a violation of the injunction below affords no reason why it is not also a contempt of this court."

In *United States v. Shipp*, supra, one Johnson had been convicted and sentenced to death, and was confined in jail awaiting the execution of the sentence. The Supreme Court of the United States allowed an

appeal, and ordered that all proceedings against the appellant be stayed, and that the custody of the said appellant be retained pending the appeal. It was the duty of Shipp, the sheriff, to keep the prisoner, Johnson, pending the appeal. Conniving with the sheriff, a mob broke into the jail, took Johnson out, and hung him. This, of course, made any decision the Supreme Court might make fruitless, and made it impossible to proceed with the case. It was sought to punish the sheriff for contempt. The court said:

"The question was touched, in argument, whether the acts charged constitute a contempt. We are of opinion that they do, and that their character does not depend upon a nice inquiry whether, after the order made by this court, the sheriff was to be regarded as bailee of the United States, or still held the prisoner in the name of the state alone. Either way, the order suspended further proceedings by the state against the prisoner, and required that he should be forthcoming to abide the further order of this court. It may be found that what created the mob and led to the crime was the unwillingness of its members to submit to the delay required for the trial of the appeal. From that to the intent to prevent that delay and the hearing of the appeal is a short step. If that step is taken, the contempt is proved."

There the defendants claimed and made oath that they had nothing to do with the murder of Johnson, and assumed and consented that this ended the proceedings to punish for contempt. The court said:

"Another general question is to be answered at this time. The defendants severally have denied under oath in their answer that they had anything to do with the murder. It is urged that the sworn answers are conclusive, that if they are false the parties may be prosecuted for perjury, but that in this proceeding they are to be tried, if they so elect, simply by their oaths. It has been suggested that the court is a party and therefore leaves the fact to be decided by the defendant. But this is a mere afterthought, to explain something not understood. The court is not a party. There is nothing that affects the judges in their own persons. Their concern is only that the law should be obeyed and enforced, and their interest is no other than that they represent in every case."

In this case the bankrupt makes oath that he has paid out and spent the money and is unable to return it. Here, instead of removing a human being, the subject-matter of the litigation, from the jurisdiction of the court, and preventing the judicial action of the court respecting same, the bankrupt and his attorney removed a substantial part of the bankrupt estate from the jurisdiction of the court and placed it beyond its reach and that of trustee and creditors. There is no difference in principle. It was the duty of this bankrupt to safely keep the money and turn it over to the receiver or trustee when appointed.

The Bankruptcy Act provides for making offers of composition to creditors after the filing of a petition and before adjudication, as well as after adjudication. There is to be a meeting of creditors to consider such offers, and the bankrupt is to be examined. The court is a participant, and the bankrupt, after a petition is filed against himself, cannot dissipate the estate in personal efforts, out of court and without its knowledge, to effect a compromise with creditors, or employ an attorney for such purpose, and pay him from the money of the estate in his hands, or expect the court to pay him from the estate. In in-

voluntary proceedings, a reasonable allowance can be made the attorney for the petitioning creditors, and, as the bankrupt is required to do certain specified things, the law provides that he may have a reasonable allowance in proper cases.

The evidence taken before the referee shows that Geiger and Coplon visited the referee on December 21st, and that the next day, Sunday, Coplon got \$500 of this money from Mardenfeld. The evidence shows that Coplon and Geiger, in what they did, actually misled the referee, who had no specific authority to act in the matter, as the case had not been referred to him, and quieted creditors in the vicinity of Schenectady. The referee was led to suppose that the stock of goods was all the property the alleged bankrupt possessed. He was kept in ignorance of the money due for insurance loss. Coplon knew of it, for he obtained \$500 of it the same or the next day.

On his examination before the referee, February 3, 1919, the bankrupt testified that he did not know he was insolvent, and believed he was solvent all this time, even when he was negotiating with creditors for a settlement at 10 per cent. cash and 15 per cent. notes. Still he was owing over \$14,000, and his only estate consisted of a stock of goods worth \$1,400 and this insurance money, in hand and coming, in all not to exceed \$5,000. He was offering a compromise of 10 per cent. cash and 15 per cent. notes, and believed himself solvent! His testimony is not credible, and does not appeal to this court. Taken in connection with his conduct, the court does not credit the stories told by him. The evidence shows that Mardenfeld assigned all the moneys coming on the fire loss to secure a loan (he claims) or two loans of less than \$1,000, and that he spent time and money to secure the third draft coming for the balance of the insurance money out of the regular course. In short, his whole conduct shows a purpose to cheat and defraud his creditors, and impose upon the officers of this court, and place this money beyond the reach and control of the court.

It is a mistake to assume there was no injunction in this case. The filing of the petition was "a caveat to all the world, and in effect an attachment and injunction." *Mueller v. Nugent*, 184 U. S. 1, 14, 22 Sup. Ct. 269, 275, 46 L. Ed. 405; *Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 866. This is the language and holding of the Supreme Court under the present Bankruptcy Law (*Mueller v. Nugent*, supra), as it was under the act of 1867. It has been followed and approved many times. On Monday, December 23, 1918, the bankrupt was before the referee, and testified that the petition had been filed on the 21st, and consented to a custodian of the stock of goods, but remained silent as to the money, thereby concealing it from the referee and the court, and then he proceeded to spend the remainder in defiance of the injunction created by the filing of the petition and service of the subpoena.

It should also be noted that when Mardenfeld, with his attorney, went voluntarily before the referee on Monday, December 23d, and consented to a custodian, it was represented and stated that there was a firm or copartnership which owned this property, consisting of Mardenfeld and one Grossman. In truth, this firm or copartnership had ceased to exist. Mardenfeld had bought out Grossman, and given

his note for his interest, and Mardenfeld was continuing the business and trading under the old firm name.

The trustee will take proper proceedings to have the amount of the allowance to the attorney for the bankrupt fixed by this court and to recover the balance from Coplon. There will also be an order requiring the bankrupt to pay over to the trustee this money belonging to the estate, and which the bankrupt says he has used up as stated, and giving him 10 days in which to comply, in order to purge himself of the contempt committed. If not paid over, so as to purge him of the contempt committed by placing such money beyond the reach and jurisdiction of the court, for the purpose of defeating such jurisdiction, he will be committed to the county jail of the county of Schenectady, N. Y., for the term of six months, or the further order of this court.

The findings and recommendation of the referee are approved and confirmed.

MUSCATINE LIGHTING CO. v. CITY OF MUSCATINE.

(District Court, S. D. Iowa. March 24, 1919.)

1. CORPORATIONS ⚡394—PUBLIC UTILITIES—REGULATION OF CHARGES.

Code Iowa, § 725, empowering municipalities to "regulate and fix" public utility rates, authorizes the rate to be fixed by contract with the utility company, subject to revision by the municipality.

2. STATUTES ⚡238—CONSTRUCTION—FRANCHISES—LEGISLATIVE GRANTS.

Public utility franchises, granted under legislative authority, are construed most strongly against the grantee.

3. ELECTRICITY ⚡11—GAS ⚡14(2)—CHARGES—CONTRACTS—REVISION BY COURTS.

Franchise contracts, fixing rates to be charged for lighting, cannot be revised by the courts because the rates have become noncompensatory, although the municipality reserved the right to revise the rates.

4. CONSTITUTIONAL LAW ⚡43(1)—WAIVING RIGHTS.

Individual constitutional rights may be waived.

5. CONSTITUTIONAL LAW ⚡242, 298(7)—ELECTRICITY ⚡11—GAS ⚡14(2)—FOURTEENTH AMENDMENT—CONFISCATORY RATES.

The fact that lighting rates fixed by franchise contracts later became confiscatory because of changed industrial conditions does not deprive the utility of its property without due process or deny it equal protection of laws, in violation of the Fourteenth Amendment.

In Equity. Suits by the Muscatine Lighting Company against the City of Muscatine, by the Ft. Madison Gaslight Company against the City of Ft. Madison and others, by the Iowa Gas & Electric Company against the City of Mt. Pleasant and others, by the Southern Iowa Electric Company against the City of Chariton, and by the Iowa Electric Company against the City of Fairfield. Recommendation that confiscatory character of rates be stipulated before entry of order.

Lane & Waterman, of Davenport, Iowa, and E. M. Warner, of Muscatine, Iowa, for plaintiff.

Ralph U. Thompson, of Muscatine, Iowa, for defendant.

WADE, District Judge. [1] 1. I cannot do more at this time than to briefly record the conclusions which I have reached after the extensive and helpful arguments presented in these cases. Any attempt to review the wilderness of authorities cited, or to distinguish between apparently conflicting opinions of the courts, would be fruitless, even if I had the time.

Most of the cases at bar involve the question as to whether a specific provision in a franchise ordinance, fixing the price which shall be charged by the grantee of the franchise, is binding upon such grantee. It is not disputed that such provision is subject to modification by the city under its general power to "regulate and fix" rates.

It is earnestly contended that the power to "regulate and fix," excludes the power of the city to contract. This may be granted, so far as a contract binding on a city is concerned; but I cannot agree that there is any limitation upon the power of the city to "regulate and fix" by contract, as well as by ordinance or resolution.

It is a general rule, with relation to the exercise of power by a city, that—

"If the mode of exercise is not prescribed in the act or charter conferring the power, or in some other statute, the corporation may exercise the power in any usual and appropriate manner, according to its own discretion." 28 Cyc. 275, and authorities cited.

"This statute expressly confers on cities and towns the power to provide for the measuring or weighing of hay, coal, or any other article. The manner in which the power conferred shall be exercised is left to the discretion of the corporation, subject, however, to the general rule that the ordinance must be reasonable. The power given, in substance, is to regulate, and this implies that the corporation is empowered to do all things essential to the proper exercise of the power expressly conferred." *Davis v. Town of Anita*, 73 Iowa, 325, 35 N. W. 244.

In the state of Iowa a city is given the power to grant franchises without any limitation, except that such franchise shall not extend more than 25 years and that no exclusive franchise shall be granted. When this law was passed, it was, and still is, the well-settled rule that—

"When a municipal corporation has the power to grant or refuse, in its discretion, permission to a public service company to occupy the streets with its structures, whether such permission be called a franchise, a license, a permit, or a mere designation of the streets to be occupied, it may grant such permission, subject to such conditions as it sees fit to impose." 19 R. C. L. p. 1153, par. 427.

Of course, such conditions must not be against law or public policy. The city having the power to grant a franchise, the right to impose conditions is limited only by the terms of the grant of the power. Therefore it is self-evident that unless other legislation, and especially section 725 of the Code of Iowa, limits the power with reference to conditions to be imposed in granting franchise, a provision as to maximum rates would be binding.

Section 725 confers the power to "regulate and fix," but it does not specify how such power shall be exercised, and under the rule above stated it has the power to use its own discretion as to how such power shall be exercised. In *Miller v. City of Webster City*, 94 Iowa, 162, 62 N. W. 648, Judge Deemer says:

"As the statute expressly confers upon the city the authority to establish markets and to provide for the weighing of commodities, and contains no limitations upon the powers granted, the time, manner, and expediency of its exercise are left to the discretion of the corporation; and the judgment of its officers upon such matters cannot be controlled by the courts, so long as they act within the scope of their authority. The discretion of a municipal corporation, within the sphere of its powers, is as wide as that possessed by the government of the state, subject, however, to the general rule that the ordinances must be reasonable. The action of the city council in the exercise of expressly delegated powers cannot be questioned upon the ground that it is in conflict with public interests."

The term "regulation" is very broad. It is said that an ordinance "is not so comprehensive as a 'regulation,' and is more solemn and formal than a 'resolution.'" 28 Cyc. 348. Judge Shiras, in *Kimball v. City of Cedar Rapids* (C. C.) 100 Fed. 802, uses the words: "A contract regulating the rates to be charged by the company."

It ought to be a fair inference that, if the Legislature intended to limit the exercise of the power to "regulate and fix" to conditions expressed by ordinance, it would have so stated. We must always bear in mind, in dealing with municipal problems, that the powers of a municipality are not always exercised with formality, and I feel that this fact is kept in mind in the enactment of legislation for cities and towns.

Of course, any contract regulating rates must be in the nature of things "one-sided," so far as the rate is concerned. This is true because the city reserves to itself the power to change the rate at any time, subject only to the general rule that the new rate fixed must be reasonable. But I see no objections to a contract understandingly made which provides that the city shall charge a maximum rate, which shall continue until such period as the same becomes unreasonable, and that at such time the city reserves the right to modify the same.

Opposed to the foregoing views, counsel present strong reasons in public policy why the law should not be so construed. Of course, the matter of public policy can only be considered here, in an effort to construe the legislation. There are sound reasons in public policy why the city should not be allowed to bind the corporation by a contract for a rate which does not bind itself; but there are other opposing reasons in public policy, which to my mind overcome every suggestion in support of the contention of the utilities companies. It is a matter of common knowledge that franchises are frequently granted—sometimes after spirited competition, and often after bitter controversy, which franchises contain a definite provision that, during the term of the franchise, no more than a certain sum named shall be charged for public service. There can be no question that heretofore the people, voting upon franchises, have believed such conditions to be valid, and I must assume that utility companies, acquiring franchises containing such conditions, also assumed that such conditions were valid.

[2, 3] It is of the highest importance that the confidence of the people in the law, and especially in the sacredness of contracts, shall not be weakened. Every franchise and every power, under legislation, is construed most strongly against the grantee of a franchise. It is self-evident that to now hold that conditions relating to rates solemnly agreed to are without force would have a strong tendency to undermine

the confidence of the public in the law, and would have a tendency to put utility companies under suspicion of repudiating their obligations.

There is much force in the suggestion that regulation by contract should be permitted, especially with reference to smaller towns, which cannot well afford the investigation and the trial of the question of the reasonableness of rates from time to time, and I believe it would be in the interest of said communities to have a law permitting a contract binding both sides as to rates for reasonable periods of time, say three or five years. This would stabilize conditions for the utility company and the city or town, and avoid expensive and unpleasant controversies.

It is, of course, important that utility companies shall receive reasonable compensation for what is furnished. Upon the showing before the court (which for the trial of this issue I assume to be true) it is apparent that some of these companies cannot continue under the contract rates, because they have no source of income, except the money received for the commodity furnished, and war conditions have radically increased the cost of production, so that a rate fixed at the time a franchise was granted a few years ago may be utterly inadequate at the present time to pay even current expenses; but these are conditions which the court cannot relieve, as has been recently held in *Columbus Co. v. City of Columbus* (D. C.) 253 Fed. 499, and other cases.

[4, 5] 2. But there are other considerations. These cases are brought upon the claim that because the rates are confiscatory, the utility companies are deprived by the state of property without due process of law, and that they are denied the equal protection of the law. The Fourteenth Amendment to the Constitution of the United States provides:

"Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The state (and the municipality, which is an arm of the state) shall not "deprive any person," etc. At the foundation of these cases is the problem as to whether, upon the facts, the state or the municipality has deprived the utility companies of property without due process, or whether the state or municipality is denying the "equal protection of its laws."

The courts are ever ready to enforce the provisions of the Constitution of the United States; but, in order to interfere with state or municipal legislation, it must appear that there is some affirmative act which constitutes the "deprivation," or the "denial," specified in article 14. When an ordinance is passed by a city council, under authority of the state, it is an act of the state, and if it deprives one of his property without due process, or denies equal protection, the act will be enjoined, for the Constitution is sacred, and must under all circumstances be upheld.

But has the state, or the municipality, in these cases, done any act which violates the Constitution, except in so far as such act has been consented to by the companies? It is fundamental that every individual constitutional right may be waived.

"A person may, by his acts or omission to act, waive a right which he may otherwise have under the provisions of a Constitution; and where such acts or omissions have intervened, a law will be sustained which otherwise might have been held invalid, if the party making the objection had not by prior acts precluded himself from being heard in opposition. Thus a person who has participated in proceedings under a statute, or who has acted under the statute and in pursuance of the authority conferred by it, or who has claimed the benefit of the statute to the detriment of others, or who asserts rights under it, may not question its constitutionality." 12 Corpus Juris, p. 769, § 190 et seq., and cases cited.

Even in criminal cases :

"Those constitutional guaranties, which are in the nature of personal privileges of the accused, may be waived by him, and therefore he may not question the constitutionality of a statute under which he has made such a waiver." 12 Corpus Juris, 774, § 203.

It must be apparent that if the confiscatory rate is fixed, not by the municipality, but by the utility company, the state has done no act "depriving" the company of its constitutional rights. It must likewise be apparent that if the rate is the joint act of the utility company and the city, if the utility company has consented to the rate, that it has waived the constitutional right which it might otherwise assert, and I am convinced that if a rate is fixed by agreement of the utility company, which at the time is a reasonable rate, but which thereafter becomes confiscatory, without any act of the state, but simply as a result of industrial conditions, that the prohibition of the Fourteenth Amendment upon the state is not violated by the state.

This is serious business, restraining the sovereign act of a state. There is no constitutional guaranty of compensatory rates. So far as income and profits are concerned, the utility corporation stands exactly in the same position as the building corporation, or the street improvement company. It may make money—it may lose money; but only when the state has acted affirmatively, to the deprivation of reasonable income upon actual investment, can constitutional guaranty be invoked; and where the utility company consents to the act of the state, there is not that "deprivation" or "denial" which the Constitution forbids. So that I am satisfied that the utility companies are bound by these contracts.

I realize, of course, the hardship which this construction imposes. I realize that it is inequitable to expect a utility company to furnish service which cannot be paid for out of the income. It may not be here inappropriate to quote from the opinion in the Columbus Railway Case, supra :

"It cannot be denied, on the showing made, that the present war has greatly increased the cost of street railway operation. The award of the National War Labor Board in the wage controversy cannot be regarded otherwise than binding on the company, and the increase of wages granted by the company pursuant thereto cannot, in any fair sense, be considered as its voluntary act. It is also undoubtedly true, on the showing made, that complainant cannot, under existing conditions finance any improvements required to meet new demands for heat, light, and power, or for increased street railway facilities, and its failure so to do must injure the interests of the defendant and its inhabitants as much as it injures the complainant.

"Prolonged operation under these conditions would seem to be a manifest impossibility, and must result in impairing the street railway service

and grievously harming the people and business of the city. These considerations do not, for the reasons already stated, present any ground upon which a court can grant relief, for it has power only to declare the law and apply it. A sound public policy forbids usurpation by the courts of governmental power lodged in other departments of the government. No power inheres in a court, either to make contracts for parties, or to absolve them from the effect of their contracts, provided the parties are competent in law to contract, and no fraud intervenes in the making thereof. In view of these well-recognized limitations of the court's power, I can only suggest that the present emergency, likely as it is to become much graver in the near future, calls urgently for some kind of accommodation or temporary compromise between the parties."

Much of the controversy in these cases arises out of a misunderstanding between the utility companies and the people of the communities which they serve. There ought not to be any misunderstanding. The public should interest themselves sufficiently to understand definitely the viewpoint of the company, and it is not too much to hope that in these cases, where existing contracts, by virtue of war conditions, imposed grave hardships, that temporary arrangements may be made, by which the situation may be solved for the time being.

The Record in These Cases.

These cases have been set down for trial by order of the court, upon the issue as to the validity of the contracts. I am not sure that the record is in shape to present this issue appropriate for review in the higher court. Of course, I have assumed, and counsel have assumed, for the sake of this question, that the contract rates are confiscatory; but I am not sure that the record justifies this assumption.

To save any possible question, in the interest of all parties, it ought to be admitted of record, for the purpose of this hearing, that the contract rates in each individual case are confiscatory. So important is this in my present view that I feel that it would be necessary to take testimony upon this point, unless it is handled by a stipulation.

I therefore suggest that counsel for the plaintiffs in these cases prepare a stipulation which they feel will make the record, and submit it to counsel for the company, and by mutual co-operation I am satisfied that, without waiving anybody else's rights, the record can be completed. In this way the matter can be presented to a higher court without much expense, and with more satisfaction in the consideration of the question involved.

After this is done, the court will enter an order of record, and will at that time hear counsel for the plaintiffs upon their request for a continuance of the restraining order pending appeal. Application for such continuance to be prepared and served upon counsel, as the rules of this court provide.

A. G. MORSE CO. v. WALTER M. LOWNEY CO.

(District Court, N. D. Illinois. January 29, 1919.)

No. 30231.

TRADE-MARKS AND TRADE-NAMES ⇔70(4)—UNFAIR COMPETITION—COLOR OF BOXES.

Use by defendant, for putting up milk chocolates, of a box and ribbon of the same shade of red as that first used by complainant for that purpose, may not be complained of as unfair competition, even if there was an unlawful intent; there being no other similarity, and defendant's box being distinguished by its registered name and trade-name, long advertised and older in use than those of any competitor.

In Equity. Suit by the A. G. Morse Company against the Walter M. Lowney Company. Bill dismissed.

William J. Ammen, E. P. Vail, and Albert B. Joyner, all of Chicago, Ill., for complainant.

George O. G. Coale and John E. R. Hayes, both of Boston, Mass., and George T. May, Jr., of Chicago, Ill., for defendant.

CARPENTER, District Judge. This is a bill in equity filed October 8, 1910, in the circuit court of Cook county, Ill., by A. G. Morse Company, complainant, a corporation of Illinois, against the Walter M. Lowney Company, defendant, a corporation of Massachusetts, seeking relief from unfair competition in the dressing of a candy box to hold milk chocolate creams. In due time the suit was transferred to the then Circuit Court of the United States for the Northern District of Illinois, Eastern Division, and the pleadings were completed; the answer denying liability. Most of the evidence was taken by deposition and the record is large. The material facts are substantially as follows:

The complainant, for many years, was engaged in the manufacture of a variety of candies, and in 1905 began making milk chocolate creams, putting them on the market in one-half and one pound boxes of four different colors and of a shape usual in the trade. Three of the colors were eliminated from that line of merchandise in a few months, and in 1906 the red package was the only one retained. The lettering and design on the box, or package, was varied from time to time, and about 1907 a box in its present color and design was determined upon, and since then milk chocolate creams have been sold by the complainant only in boxes of that character, in one-half pound, pound, and two and five pound sizes. The box is red in color, with a yellow design located at its left end, comprising a group of three women, one holding a trumpet extending more than halfway across the box, another supporting a shield on which is the letter "M," and the third holding a crown, the figures filling the left end of the cover; the right half of the cover having the words "Morse's Milk Chocolate Creams" (each word being on a separate line), the design and cut being mainly in yellow, the box being tied with a narrow red ribbon,

with a bow somewhat to the left of the center, where the ribbon is crossed. There are no other markings on the box.

The largest part of the business of the complainant was in the vending of milk chocolate creams, and, at the time of the filing of the bill, the territory of its activity covered approximately 15 states, with branch houses at Kansas City, Minneapolis, Denver, Buffalo, Cleveland, and Detroit. The main office and factory was in Chicago.

The complainant's merchandise appears to have been popular, and its sale was well established prior to January 1, 1910. The box in question was referred to generally between the complainant and its customers—that is, the retailers—as “the Red Box.” This may have been, however, because it was the only red box that complainant sold. The other candies handled by it and its retailers were sold in boxes of various colors and shapes, and, while the testimony shows that some of the public who bought across the counter in drug stores and candy stores would refer to the milk chocolate cream box as “the Red Box,” still it falls short of establishing the fact that the public at large bought from the retailers by the appellation “Red Box.” It appears that the name “Morse” had been extensively advertised and shown throughout the trade, in periodicals, window displays, posters, and signboards, and that the name, rather than the shape or style of the box, weighed with the consumer.

Practically all the advertisements of complainant's milk chocolate creams contained a picture of its particular box, showing the design and lettering in full, so that its characteristics may be assumed to have been well known to the public. There appears to have been no attempt to advertise the words “Red Box” as a catch phrase, or as descriptive of the merchandise, and apparently complainant always was putting forward the name “Morse” or “Morse's” as indicating its goods.

The design and lettering on the box was copyrighted by the complainant in April, 1906, and the name “Morse's” is there prominently displayed, being of somewhat larger type and the lettering being different from that of the balance of the wording on the box.

The defendant and its predecessors, all of whom bore the name Lowney, have been in the candy business in Boston, Mass., since 1877, and began the manufacture of chocolate bonbons in 1883, in which year they made not more than 20 varieties. Advertising began in 1887 or 1888, and the goods were fairly well distributed east of the Missouri river in 1890, but were sold in bulk. In 1893, the defendant erected a building at the World's Fair in Chicago patterned after the Temple of Vesta and there sold the first package goods of candy that were placed on sale. These goods were put up in ornamental boxes which the retailer displayed on his counter to engage the attention of the purchaser, and the attractiveness of the package has since become an important factor in the business. This increased the trade of the defendant materially, and the fancy box served as an advertisement to both manufacturer and dealer.

This plan was adopted by others, and at the present time all candy manufacturers sell package goods put up in fancy boxes; each manufacturer producing a variety of packages of different colors carrying

his own name or some appropriate design, which distinguishes his output from that of his competitors.

In February, 1911, the defendant had over 150 varieties of packages and annually made many changes in design. This was to promote the salability of the packages, by appealing to the desire of the customer for something new, and it gave the salesman or retailer something fresh and attractive to offer. This practice is now general in the trade.

Since the World's Fair in Chicago, the name "Lowney" in peculiar lettering has been stamped or printed on every package made by defendant, and has been impressed upon the bottom of each piece of chocolate candy put out by it, and often is cut in the lace paper which forms the interior ornamentation of the boxes.

In 1896, the picture of the so-called "Lowney girl" was adopted by the defendant as a trade-mark and duly registered. The name "Lowney" was also registered, and the name and the "Lowney girl" have been advertised all over this country and in foreign countries, and used continuously since that time. During the 10 years ending December 31, 1911, the defendant spent over \$2,400,000 in advertising in the United States alone, and during the 8 years preceding that perhaps another \$1,000,000 to make the public familiar with the word "Lowney" and the Lowney product; the advertisements being in magazines, street cars, periodicals, cook books, window displays, etc.

In 1908, the defendant added to its line of manufacture and sale the milk chocolate creams, which were distributed first in a maroon box, and then in a bluish tile box of standard size and shape, differing very little in its measurements from the box of the complainant and other manufacturers. In January, 1910, the color of this last box was changed so that it was, and is now, substantially the same shade of red as that used by the complainant. On the cover are the two registered trade-marks of the defendant; the "Lowney girl" appearing on the left half of the cover and the words "Lowney's Milk Chocolate Creams" to the right, on the remaining part of the cover. The figure of the girl is on a greenish yellow background of slightly different shade from the yellow figures appearing on the Morse box, and the design is surrounded by a gilt medallion on a shaded background. The words "Assorted Flavors" are added below in black and in smaller type than the other lettering. The box is tied with a red ribbon about the same width and color as that used on the Morse box, and complaint is made that the ribbon was so tied that it obscured part of the "Lowney girl" and was so placed that it concealed, in whole or in part, the name "Lowney's"; but an examination of the exhibits shows that the ribbon was too narrow to cover entirely the name "Lowney's", even if it were placed directly across the middle of the name, and that at best the bow would obscure only a part of the "Lowney girl."

It also appears that the ribbon would slip sometimes from out of its position on the box; but the boxes in evidence show that the ribbon in its natural place, across the center of the box, would obscure only the lower part of the letters in the name, and that the name "Lowney's" could be easily read by any one looking at the box, even in the most casual manner.

One of complainant's witnesses testified:

"Lowney's name is a very large factor in the sale of his candies; I think he is more widely known than any other candy man in the United States; he has a high reputation in the sale of chocolates and candies; he has been before the public for all these years and well established. The mere fact that Lowney's name was on the package would have a tendency to help sell the goods."

If the name of the Lowney Company sold the goods, or helped to sell the goods, it is inconceivable that the defendant should attempt to conceal that name, and, if the desire were to conceal the name, certainly a ribbon sufficiently wide for that purpose would have been used, and so attached to the package that it could not slip.

In the fall of 1909 there had been some talk among those in authority in the offices of the defendant of changing the color of the blue tile box, which had been found not successful in selling the cream chocolates of the defendant. While this change was under consideration, a letter was received from one Cunningham, who was a stockholder in the defendant company and manager of its branch house at Kansas City. The letter was as follows:

"Kansas City, Mo., Nov. 1, 1909.

"The Walter M. Lowney Co., Boston, Mass.—Gentlemen: Our Mr. Cunningham talked with you while in Boston about putting out a large red one-pound box for the Old-Fashioned Chocolates. We wish you could see your way clear to do this as quickly as possible, making this box appear as large as you can, but making it a bright red box, and we would suggest that they use yellow largely on the print.

"The only box that Morse seems to be selling is a large red box of Milk Chocolates, and we think that a package of this kind would put them out of business to a certain extent. We don't consider them much competition, but "every little bit helps." Also we would like to have you send us as early as you can the Milk Chocolate and Nut Milk dummy packages, a sufficient amount to make a number of window displays in the city. We believe with the dummy packages we could increase the sale of the item considerably.

"Very respectfully, [Signed] Cunningham Brokerage Company,

"By George W. Cunningham."

At this time the defendant was selling "Old-Fashioned Chocolates," as referred to in the first paragraph of the letter, and these chocolates are very different from milk chocolate creams. The receipt of this letter was acknowledged on November 4, 1909, and on the same date the defendant wrote to its Chicago branch, asking for a box of Morse's Milk Chocolate Creams. A package was received in due course and given to the box maker of the defendant company, and the defendant's present box was then produced and used in the distribution of its product.

The complainant claims that the two boxes are so confusing in appearance that the ordinary buyer is deceived in purchasing the goods of the Lowney Company, instead of the goods of the Morse Company; that Lowney's goods are sold to the dealer or retailer for \$2 per dozen for the half-pound boxes and \$4 per dozen for the pound boxes, whereas Morse's goods are sold to the retailer at \$2.75 per dozen for the half-pound boxes and \$5 per dozen for the pound boxes; that the dealer is therefore in a position to make a bigger profit on a sale of Low-

ney's goods to a prospective customer than on a sale of Morse's; that the quality of Lowney's goods is poorer than that of Morse's; that it is being injured, in that its trade is thus reduced; that the buying public is confused and misled; that the reputation of its goods suffers because of the alleged low quality of the Lowney goods, which the public may buy believing them to be Morse's goods; that there is shown a deliberate intent to simulate or copy the color and the design of complainant's package; and that this resulted in unfair competition.

The record shows that red boxes of different shades and shapes were used in the candy business many years before complainant began to distribute its product, and that other candy makers sold milk chocolate creams in red boxes before Lowney commenced the distribution of its milk chocolate creams in the box in question, and defendant had used red boxes for candies other than milk chocolates; but the complainant alleges that it did not feel the competition from the other red boxes, and that they were not of the same shade of red as the complainant's box. The complainant does not claim an exclusive right to red as a color; and the evidence shows that it was not the first manufacturer to sell milk chocolate creams in packages; but it claims that under the facts in the case there is shown a deliberate intent to steal its trade and to dispose of the defendant's wares on the reputation which the complainant had established, and that, so far as the sale of milk chocolate creams is concerned, it has an exclusive right to manufacture and vend them in a red box of the design, shade of red, and character that it is now using, it being the first to use this particular red box for milk chocolate creams, and that the defendant should be compelled to use some other color for its box.

The defendant denies that the quality of its product is lower than that of the complainant, and alleges that no manufacturer has an exclusive right to the box top of any specific color; that colored papers are open to general use, providing only that the vendor marks his box plainly with his own name and trade-mark; and that by unmistakably placing its own name and trade-mark or marks upon its milk chocolate cream package it has taken every precaution required by the law to enable the purchaser who uses ordinary care to distinguish its goods from those of its competitor. It alleges that, if the contrary is true, then in the candy business the supply of colors would have been exhausted long ago, and the sale of package goods, whether milk chocolate creams or otherwise, would be practically a monopoly shared by a very few manufacturers, who could prevent all others from entering the package goods field, solely because they were the first to make a box of a certain color.

The evidence shows that the arrangement of the design and the lettering on the package as used on both these boxes "is an almost uniform arrangement in the candy business. It seems that would be the only way." The evidence offered both by the defendant and the complainant shows that the Lowney name is a very large factor in the sale of the candies manufactured by the defendant, and officers of the complainant company also admitted that the fact that the Lowney name appeared upon the package would have a tendency to help the sale of the goods.

The record shows that there are two descriptive terms now used on package goods, "assorted chocolates," which have cream, nut and jelly centers, and "assorted flavors," which indicates that the chocolate creams have centers of different flavors. The manufacturing cost of chocolate creams of assorted flavors is less than that of assorted chocolates. Chemists on both sides testified that there was no adulteration in either goods; that they were pure in their elements, although made from different recipes, so that from the point of purity they were of equal quality.

Many witnesses testified as to the methods of doing business of both the complainant and the defendant, and the record discloses a considerable amount of trouble which clerks had in distinguishing one box from the other; but, so far as I can discover, only five purchasers were deceived as to what they bought, and these five all discovered the mistake before the candy was consumed, and four of them returned it. It seems that the dealers, as to these five, when Morse's chocolates were asked for, took a Lowney box, wrapped it up in paper, and gave it to the customer. The moment, however, the wrapping paper was removed the mistake was discovered. No instance is shown of a purchaser handling a box in the retailer's store being deceived as between Morse and Lowney.

The bill seeks for relief only as against unfair competition. No claim is made that the defendant is infringing, or purposes to infringe, upon any technical trade-mark of the complainant.

In this circuit no one has a monopoly of form, of color, of the shape of letters, or of geographical names. *Charles E. Hires Co. v. Consumers' Co.*, 100 Fed. 809, 41 C. C. A. 71. Such nonexclusive trade-names and devices are public property in their primary sense. See, also, *Coats v. Merrick*, 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847; *Diamond Match Co. v. Saginaw Match Co.*, 142 Fed. 727, 74 C. C. A. 59; *Continental Co. v. Larus Co.*, 133 Fed. 727, 66 C. C. A. 557; *Regensburg & Sons v. Portuondo Cigar Mfg. Co.* (C. C.) 136 Fed. 866.

The rule governing cases involving charges of unfair competition is:

"One may not legally use means, whether marks or other indicia, or even his own name, with the purpose and to the end of selling his goods as the goods of another. If such means tend to attract to himself the trade that would have flowed to the person previously accustomed to use them, their use will be restrained by the law." *Pillsbury v. Flour Mills Co.*, 64 Fed. 841, 12 C. C. A. 432.

As was said in *Postum Cereal Co. v. American Health Food Co.*, 119 Fed. 848, 56 C. C. A. 360, after quoting the above:

"In other words, no one may lawfully so dress his goods that he can palm them off as the goods of another manufacturer."

When, however, a manufacturer places conspicuously on the packages or cartons in which his goods are sold registered trade-marks which have been issued to him, he has distinguished his goods from those of other manufacturers, especially in cases where shapes of boxes and colors of wrappers are common to the trade and his marks are older in point of use and better known than those of his competitor. *Sterling Remedy Co. v. Eureka Co.* (C. C.) 70 Fed. 704; *Lorillard v.*

Peper, 86 Fed. 956, 30 C. C. A. 496; Postum Cereal Co. v. American Co., 119 Fed. 848, 56 C. C. A. 360.

There is no proof that the defendant has attempted to palm its goods off as the goods of the complainant. Defendant at all times endeavored to distinguish its goods from the goods of the complainant.

This controversy becomes serious only by reason of the Cunningham letter. It is true that Cunningham asked for a red box for Old-Fashioned Chocolates, and stated that he could put Morse out of business "to a certain extent" if he had it. It is also true that the defendant got one of Morse's red boxes, adopted substantially the same color for its boxes, but placed thereon its own registered trade-marks, so that the purchasing public under no circumstances could be deceived into thinking that it contained Morse's goods. It may be that the enthusiastic Cunningham believed he was doing something sharp in suggesting the use of the red box, and it may be that the defendant had the same idea, but an unlawful intent is immaterial so long as the one inspired by it remains within the law. While I do not think the record here discloses any unlawful intent on the part of the defendant, nevertheless, if it did, and the defendant made use of none other than lawful means to make its unlawful intent effective, the complainant has no redress. Centaur Co. v. Marshall, 97 Fed. 785, 38 C. C. A. 413; Postum Cereal Co. v. American Co., 109 Fed. 848, 56 C. C. A. 360.

An examination of the record discloses no similarity between the two boxes, save the solid color, red. Were this a question of trade-mark, clearly there is no such likeness between the two designs as to give either party any rights against the other. As was said in *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828:

"The defendant is not an imposter; he has openly and plainly represented his [goods] to be exactly what they are."

All that complainant can claim in this case is that it was the first to put milk chocolates in a red box of this shade. That fact does not prevent anybody else from using a red box, provided proper distinctive marks are placed thereon, so as to distinguish the product from that of the pioneer.

"The complainant has no exclusive right to the red color, nor to the size and shape of the packages, nor to the use of gilt letters on them. These things are undeniably open to the trade." *American Tobacco Co. v. Globe Tobacco Co.* (C. C.) 193 Fed. 1015, at page 1017; *Diamond Match Co. v. Saginaw Match Co.*, 142 Fed. 727, 74 C. C. A. 59.

Every candy dealer having the right to put up his product in red boxes, the casual purchaser of intelligence could not be misled into believing that the defendant's goods were those of the complainant. Of course, an unscrupulous dealer could show a red box to a purchaser and say that it was Morse's, wrap it up in a piece of paper, take the money, and send the purchaser home; but the moment the wrapping paper was removed the purchaser must discover the mistake and the dealer suffer for the deception.

"The defendant is not responsible for the fact that tricky retailers represent its manufacture as that of complainant, knowing better, provided defendant has done its legal duty in distinguishing its own product from that

of complainant." *Rathbone v. Champion Co.*, 189 Fed. 26, 110 C. C. A. 596, 37 L. R. A. (N. S.) 258; *Schlitz Brewing Co. v. Houston Co.*, 241 Fed. 817, 154 C. C. A. 519.

The law will not permit a manufacturer to put in the hands of an unscrupulous dealer goods that may be palmed off upon the purchaser as having been made by a competitor; but this presupposes that the similarity of the packages, cartons, cans, or boxes is such that the casual purchaser would be easily confused. Wherever the markings are such that the manufacturer must be known, there is no unfair competition. As was said in *Kann v. Diamond Steel Co.*, 89 Fed. 706, 32 C. C. A. 324:

"Every suit of this character is founded on the fact that the action, or the proposed action, of the defendant has deceived, or is calculated to deceive, ordinary purchasers buying with usual care, so that they have purchased, or will probably purchase, the goods of the defendant under the mistaken belief that they are those of the complainant, to the serious damage of the latter. The deceit, or probable deceit, of the ordinary purchaser to such an extent that he buys, or will probably buy, the property of one manufacturer or vendor, in the belief that they are those of another, is a *sine qua non* of the maintenance of such a suit, because every one has the undoubted right to sell his own goods, or goods of his own manufacture, as such, however much such sales may diminish or injure the business of his competitors."

Whatever confusion exists between the packages of the complainant and those of the defendant arises from features common to everybody in the trade, and to which nobody has an exclusive right, namely, the size and shape of the package, its color, and its ribbon. The features to which the parties have individual rights, those features which were put upon the packages to distinguish them—that is, the trade-marks or designs, and the names of the makers—are radically different, and it is upon these distinguishing features that the public relies, and not upon features common to the trade.

I find that the defendant has placed conspicuously, on a box of shape and color which he as well as the world had a right to use in the candy trade, two registered trade-marks to distinguish his goods from those of other manufacturers, and that those trade-marks were older in point of use than those of the complainant and defendant's other competitors. In other words, considering the things that were common to the trade, the differences between the complainant's box and the defendant's box are more conspicuous than the likenesses. Complainant has not shown "deception arising from some features of its own not common to the public."

The bill will be dismissed for want of equity; and it is so ordered.

GARRETT & CO., Inc., v. A. SCHMIDT, JR., & BROS. WINE CO.

(District Court, N. D. Ohio, W. D. January 4, 1919.)

No. 197.

1. TRADE-MARKS AND TRADE-NAMES ⇨57, 70(1)—INFRINGEMENT—TEST.

Whether there is infringement of trade-mark or unfair competition is to be determined by taking the trade-mark, labels, and dress as a whole, and determining whether the resemblances so far dominate the differences in appearance, sound, and dress as to be likely to deceive the average, ordinary, and unwary customer.

2. TRADE-MARKS AND TRADE-NAMES ⇨59(5)—INFRINGEMENT—SIMILARITY OF NAME AND DRESS.

The name "Virginia Dare," as a trade-mark for a wine, *held* infringed by the name "Virginette," used for wine of similar color and taste, in connection with bottles, caps, and labels all purposely made similar in appearance.

3. TRADE-MARKS AND TRADE-NAMES ⇨93(1)—INFRINGEMENT—UNFAIR COMPETITION.

The burden rests on a later comer in an established field to show that it exercised a proper degree of care to so differentiate its product as to avoid deception of purchasers by retail dealers.

4. TRADE-MARKS AND TRADE-NAMES ⇨86—SUIT FOR INFRINGEMENT—LACHES.

Complainant in a suit for infringement of trade-mark and unfair competition *held* not barred by limitation or laches of the right to relief by injunction and accounting.

In Equity. Suit by Garrett & Co., Incorporated, against the A. Schmidt, Jr., & Bros. Wine Company. Decree for complainant.

Smith, Beckwith & Ohlinger, of Toledo, Ohio, and Shattuck, Glenn, Huse & Ganter, of New York City (Garrard Glenn, of New York City, George H. Beckwith, of Toledo, Ohio, and William B. Walsh, of New York City, of counsel), for plaintiff.

George C. Beis, of Sandusky, Ohio, and Thomas E. Lannen, of Chicago, Ill., for defendant.

WESTENHAVER, District Judge. Complainant files its bill to restrain infringement of a registered trade-mark, consisting of the words "Virginia Dare," as applied to a light-colored sweet wine. Its bill also contains allegations tending to show a common-law trade-mark in the same words, and charges generally unfair competition. Allegations of diversity of citizenship and amount in dispute are also made, which give this court jurisdiction independently of the registration of the trade-mark. Defendant's answer denies infringement and unfair competition, and makes a defense of laches and the statute of limitations. Upon these issues the case has been fully heard and submitted for a decision.

The testimony satisfactorily shows that complainant's predecessors in title began the manufacture as early at least as 1901 of a light-colored sweet wine, the base of which is the juice of the Scuppernong grapes, grown chiefly in North Carolina. This wine has ever since been continuously advertised and sold to the trade under the trade-

mark "Virginia Dare," and in bottles with labels of the appearance and dress such as is now being used.

On this hearing no question is made touching the validity of the trade-mark, nor of complainant's title thereto, nor of its succession by valid transfer to all the rights of its predecessor's good will and business. The validity of the words "Virginia Dare" as a trade-mark could not well be questioned, in view of *Hamilton Brown Shoe Co. v. Wolf Bros.*, 240 U. S. 251, 26 Sup. Ct. 269, 60 L. Ed. 629, commonly known as the "American Girl" Trade-Mark Case. Moreover, in *Garrett & Co. v. Sweet Valley Wine Co.* (D. C.) 251 Fed. 371, decided May 11, 1918, Hon. John M. Killits, of this district, upheld its validity.

Complainant and its predecessors have uniformly marketed this wine, never in bulk, but always in bottles of various sizes, but of similar shape, and have sold only to jobbers, and never direct to the consumer or retail trade. These bottles are of white glass, evenly tapered from the middle to the mouth end. They contain at the base a rectangular label on white paper with the trade-mark "Virginia Dare" printed in gilt letters diagonally curved from the lower left to the upper right corner. In the upper left corner is a picture of a lady's head, supposed to represent the legendary personage known as Virginia Dare, and in the lower right corner is a crest or shield, surmounted with an eagle, supposed to be the crest or shield of complainant or its predecessors. Another label appears approximately midway of the tapered part of the bottle, bow-shaped in form, with ends depending diagonally from the center, and with this crest or shield appearing at the middle or apex thereof. The bottle is closed with a metal cap. On the side opposite the labels are blown in the glass the words, "Garrett & Company" and "Virginia Dare," the crest or shield above described, similar to that on the labels, and a warning against refilling the bottle. In 1912 this trade-mark, with an accompanying drawing, showing the lady's head and the shield or crest in the approximate position and form of the printed label, was duly registered. In 1917 the trade-mark "Virginia Dare," without any accompanying drawing or part of the label, was again registered.

The testimony also shows that complainant has advertised extensively its product under the trade-mark "Virginia Dare" in magazines, newspapers, and trade papers, and has, by practically every method known to the advertising trade, brought it to the attention of the retail trade or a consuming public. In addition, it has employed traveling salesmen whose duties were to call upon the retail and saloon trade to stimulate a demand for the Virginia Dare wine, to be supplied through some jobber or wholesaler. It has distributed various forms of advertising matter, consisting in part of placards, calendars, fans, booklets, and other display advertising, all to be used in advertising and bringing to the attention of the consuming public its Virginia Dare wine. As a part of this advertising, it has distributed to the retail trade triangular metal racks to be used in building up in the form of a pyramid a display of bottles of Virginia Dare. On the margin of these racks is conspicuously displayed the following:

"This display of racks is loaned, and remains the property of Garrett & Company. Other goods must not be displayed on it."

The testimony shows that for many years complainant's advertising expense has been not less than \$100,000 a year. As a result, in 1913 and prior thereto, a large and profitable trade in Virginia Dare, and a wide popularity with certain parts of the retail trade and consuming public, had been obtained.

The testimony also shows that defendant is a producer of wines, with its place of business at Sandusky, Ohio. Prior to 1913 most of the wine produced by it was sold in bulk, and very little, if any, in bottles. During 1913 defendant's manager, a Mr. Royer, after experimentation, produced a light-colored sweet wine of the same general color and quality as Virginia Dare. The experimentation was indulged in with a view to getting this result. The base of this wine is the juice of the Delaware and Catawba grapes, with some juice of the California grapes added to increase the alcoholic content, also adding some sweetening material. Defendant began immediately to market this wine in bottles of precisely the same shape and color as those used by complainant for marketing its product. It also sells it in bulk. Defendant's prices are and have been uniformly lower than complainant's prices. Defendant does not advertise its product, and has never done so, except only to a negligible extent, when this wine was first placed on the market.

Defendant, at the time it began to introduce this wine to the trade, adopted therefor, as a trade-mark, the word "Virginette." This trade-mark was registered by defendant February 24, 1914. Defendant also registered a label bearing this trade-mark and other matter February 25, 1914. This label is in size, shape, color, and position on the bottle precisely the same as complainant's. The word "Virginette" is printed thereon in substantially the same type and color, although in somewhat larger sized letters, extending from the lower left to the upper right corner in the same general form and curve, as complainant's Virginia Dare label. In the upper left corner, in place of the lady's head, is a bunch of grapes of substantially the same size; in the lower right corner, in the place of the crest or shield of complainant, is an eagle of substantially the same size as the crest. There is also a bow label, of the same size and form as complainant's, placed on the neck of the bottle in the same position, containing, however, a bunch of grapes, instead of the crest or shield. The cap closing the bottle is also of the same form and appearance. These bottles do not have blown therein on the reverse side any words or descriptive matter.

The evidence further tends to show that complainant's wine has become known to the retail trade or consuming public as Virginia wine, that it has acquired a wide popularity with people of Polish nationality or descent, and that these purchasers, either of a bottle or of a glass of wine over the counter, receive and accept Virginette wine, when offered in response to requests for Virginia or Virginia Dare wine, without detecting this substitution.

The evidence also further shows that retail dealers make use of

complainant's advertising matter, particularly the triangular racks, above described, to display and sell Virginette wine in bottles containing the Virginette trade-mark and dress; also that some retailers have advertised Virginette wine as being like Virginia Dare, and have refilled complainant's bottles with Virginette purchased in bulk, and sold it as Virginia Dare to the retail trade. Defendant disclaims all knowledge of these practices, and denies that it has ever authorized, directed, or suggested them.

[1] Upon this general state of facts, complainant contends that its trade-mark is infringed and that its charge of unfair competition is sustained. The law applicable in this situation is well settled, and does not require an extended citation or review of the authorities. The difficulty is, as usual, in the application of well-settled rules of law to the facts of the case. In this circuit we have a number of well-considered cases, a reference to which will be sufficient for present purposes, namely, *Ohio Baking Co. v. National Biscuit Co.*, 127 Fed. 116, 62 C. C. A. 116, known as the "In-er-Seal" Case; *De Voe Snuff Co. v. Wolff*, 206 Fed. 420, 124 C. C. A. 302, known as the "Eagle Snuff" Case; and *O. & W. Thum Co. v. Dickinson*, 245 Fed. 609, 158 C. C. A. 37, known as the "Sticky Fly Paper" Case.

From these opinions it appears that the test of whether or not there is infringement or unfair competition is to be determined by taking the trade-mark, labels, and dress as a whole, and determining therefrom whether the resemblances so far dominate the differences in appearance, sound, and dress as to be likely to deceive, not the cautious, experienced, or discriminating purchaser, but the average, ordinary, and unwary customer; in this case, that purchaser is the retail or consuming purchaser buying a bottle or glass of wine at retail and exercising in so doing only that degree of care or attention which a purchaser in that situation is accustomed to exercise. In other words, the test of infringement of a trade-mark is similarity, not identity.

[2] Applying these tests, is the charge of infringement and of unfair competition established? This inquiry is not to be answered by an examination of the words "Virginia Dare" and "Virginette" alone. The law of trade-marks is only a specialized branch of the general law of unfair competition, and in determining whether or not a charge of infringement is sustained, it is usual to take into consideration all of the other similarities contributing, with the general similarity of the words in the trade-mark, to mislead the public.

In a number of trade-mark cases in which the sustaining or differentiating collateral considerations were no greater than in the present case, the charge of infringement has been held to have been sustained, and, while each case must stand on its own particular circumstances, a reference to the holding of the courts in analogous cases will be helpful. In *Celluloid Co. v. Cellonite Co.* (C. C.) 32 Fed. 94, "Celluloid" was held infringed by "Cellonite"; in *Little v. Kellam* (C. C.) 100 Fed. 353, "Serosis" by "Sortoris"; in *Enoch Morgan v. Whittier-Coburn Co.* (C. C.) 118 Fed. 657, "Sapolio" by "Sapho"; in *Ohio Baking Co. v. National Biscuit Co.*, 127 Fed. 116, 62 C. C. A. 116 (C. C. A. 6), "In-er Seal" by "Factory Seal," because

of similarity of display matter; in *Florence Mfg. Co. v. Dowd* (C. C.) 171 Fed. 122, and 178 Fed. 73, 101 C. C. A. 565, "Keepclean" by "Sta-Kleen"; in *American Lead Pencil Co. v. Gottlieb* (C. C.) 181 Fed. 178, "Knox-all" by "Beats-all"; in *De Voe Snuff Co. v. Wolff*, 206 Fed. 420, 124 C. C. A. 302 (C. C. A. 6), "Eagle Snuff" by "White Eagle Snuff," notwithstanding the picture of the eagle and name on the conflicting trade-marks were materially different; in *Lambert Pharmacal Co. v. Kalish* (C. C.) 219 Fed. 323, "Listerine" by "Lister-septine"; in *Fairbanks v. Ogden Co.* (D. C.) 220 Fed. 1002, "Cot-tolene" by "Chefolene"; in *United Lace Co. v. Barthels Mfg. Co.* (D. C.) 221 Fed. 456, "Beaded" by "Imbeaded"; in *Stephano Bros. v. Stamatopoulos*, 238 Fed. 89, 151 C. C. A. 165 (C. C. A. 2), "Rameses" by "Radames"; in *Actien, etc., v. Somborn*, 14 Blatchf. 380, Fed. Cas. No. 496, "Appolinaris" by "Appolinus"; in *Hostetter v. Vowinkle*, 1 Dill. 329, Fed. Cas. No. 6,714, "Hostetter" by "Hostetler." The foregoing summary is in part appropriated from the opinion in (C. C. A.) 238 Fed. 89, 94. See, also, *O. & W. Thum Co. v. Dickinson*, 245 Fed. 609, 158 C. C. A. 37 (C. C. A. 6), in which a charge of infringement and unfair competition was sustained, notwithstanding numerous marked differences.

I am clearly of opinion that the charge of infringement and of unfair competition are both established. It is difficult to resist the impression that the defendant's object and purpose was to obtain some part of complainant's good will due to the consuming public's wide acquaintance with Virginia Dare. Defendant's manager began his experimentations, obviously for the purpose of producing a wine similar in character and appearance to complainant's, and likely to appeal to the same class of consumers. This defendant had a lawful right to do. It adopted, however, the trade-mark of "Virgnette," the same style, shape, and color of bottle, the same general form and dressing of label, for the purpose, it seems to me, of appropriating to itself some part of that business and good will thus built up through many years of effort and advertising. This defendant has no lawful right to do. It had, of course, a lawful right to compete in good faith for this trade and sell its wine. It had also the right to use that type, shape, and form of bottle; but, being a later comer into the same field of trade, it did not have the right to adopt a trade-mark or trade-name, or to assemble similarities of size, shape, and form of the bottle, label, dress, and cap in such a way as would naturally tend to produce confusion in the minds of the retail or consuming trade as to the origin of its product—certainly not to produce such confusion as to its origin as to result in its sale to purchasers under a belief that it was the product of complainant.

[3] The burden is on the later comer in an established field to exercise a proper degree of care and caution in these respects, so as to avoid such deception or confusion. If defendant had performed its full duty in these respects, it would not be responsible for wrongful acts of retailers in substituting one wine for the other; but this the defendant has not done. It has adopted a trade-mark of such similarity that, taken with other similarities in bottle, label, and dress, the natural and probable result is that purchasers are confused or

deceived. It must therefore be held responsible for all the consequences of its neglect or default; that is, in the present case, held responsible for the substitution practiced by retailers of *Virginette* or *Virginia Dare*, and the appropriation in consequence thereof of some part of complainant's good will and established trade.

The wrongful consequences of defendant's conduct is intensified by its business policy of refraining from advertising, and of selling this wine in bulk and at lower prices, thereby enabling it to appropriate in larger measure the results of complainant's efforts and advertising, and tempting retail distributors to indulge in substitution and unfair competition.

[4] Defendant's defense of laches and statute of limitations may be briefly disposed of. Complainant's president, learning in 1913, or early in 1914, that defendant was marketing a similar wine in the manner already described, sought an interview with defendant's manager and called his attention to the alleged infringement, and to the alleged unfair competition resulting from similarity in dress and appearance. Defendant insisted upon its right to continue the methods of which complaint was thus made. Immediately thereafter a bill like the present one was filed in this district, to which defendant appeared and answered, setting up, in addition to its present defenses, that complainant had violated the Pure Food and Drugs Act in various respects. This case was placed on the calendar for hearing in 1915, but for some reason had not yet been heard in the early part of February, 1918. Complainant therein, being a Virginia corporation, had, in the meantime, sold and transferred its business and good will to the complainant in this suit, a New York corporation, and later the present complainant moved for a substitution on the record and for leave to file a supplemental bill setting up this change of title. Defendant responded with a motion to dismiss under equity rule No. 57 (198 Fed. xxxiv, 115 C. C. A. xxxiv) and early in February, 1918, an order was made, dismissing that case without prejudice. The present complainant within two weeks thereafter filed this bill.

If the question were one arising under the Ohio statute of limitations, and the action one that would be barred, if not brought earlier than the date of the filing of this bill, complainant's right would still be protected by section 11233, General Code, and not barred by any statute of Ohio. See *Bates v. Railroad*, 12 Ohio St. 620; *Penfield v. Mason*, 17 Ohio Cir. Ct. R. (old) 165. The applicable rule is that of the equitable doctrine of laches in trade-mark or unfair competition cases. Upon the facts stated, it is clear that complainant is not barred of its right to relief by injunction. See *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828; *Menendez v. Holt*, 126 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526; *Saxlehner v. Eisner*, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60.

Nor is complainant barred by laches from its right to an accounting. Defendant in the early stages of its conduct was promptly notified and warned. A suit was brought in due time, and, while it did not proceed to a final hearing, was none the less a pending action, giving ample notice of complainant's rights and of its intention to insist upon them. The dismissal later for want of prosecution does

not diminish the force of these considerations; hence it appears that all defendant's acts were indulged in after full warning, and with full knowledge of complainant's rights and of its intentions. Nothing appears herein to indicate that the defendant has at any time altered its situation, modified its course of conduct, indulged in expenditures, or did anything in reliance upon a belief induced by any act of complainant or its predecessor that complainant or its predecessor was acquiescing in defendant's conduct, course of business, or waiving any of its legal or equitable rights to redress. Defendant began and persisted in its methods of doing business upon its own responsibility, without being misled by any act of complainant or its predecessor, and must now be held to full responsibility for the consequences.

A decree awarding an injunction and for an accounting will be entered in conformity herewith.

GREGORY et al. v. KEENAN.

(District Court, D. Oregon. March 10, 1919.)

No. 7334.

1. VENDOR AND PURCHASER ⇨76, 130(1)—CONSTRUCTION OF CONTRACT.
Contract for the sale and purchase of land *held* to entitle the purchaser to a marketable title, and to make the acts of final payment and conveyance concurrent.
2. PUBLIC LANDS ⇨114(5)—OREGON DONATION LANDS—PERFECTING OF TITLE AFTER DEATH OF SETTLER.
A settler on public land in Oregon *held*, on the evidence, to have completed his residence to entitle him to patent prior to his death in 1855, so that under the statute the land was subject to sale by his administrator for payment of his debts, in proper proceedings, although patent was subsequently issued to his heirs at law.
3. EXECUTORS AND ADMINISTRATORS ⇨337—SALE OF LANDS—NOTICE TO HEIRS.
Where the statute required notice to the heirs at law of an intestate decedent of proceedings to subject his real estate to payment of his debts, a proceeding and sale on published notice "to whom it may concern," although the heirs were named in the petition, *held* void, and the defect not curable by retroactive legislation.
4. PARTNERSHIP ⇨252—PARTNERSHIP ADMINISTRATION—PARTNERSHIP LANDS.
Under L. O. L. § 1168, the administrator of a partnership estate has power to sell lands owned by the partnership for the payment of partnership debts, although the title is in the names of the individual members.
5. EXECUTORS AND ADMINISTRATORS ⇨378—SALE OF LAND—IRREGULARITIES IN PROCEEDINGS—CURATIVE STATUTE.
Mere irregularities in proceedings by an administrator for the sale of land, which do not affect substantial rights of the heirs, may be remedied by curative legislation.
6. VENDOR AND PURCHASER ⇨117, 122—RESCISSION OF CONTRACT BY PURCHASER—CONDITION PRECEDENT.
A party is not permitted to rescind a contract for the purchase of realty, and at the same time keep possession of all or any part of the land bargained for, but must proffer its return, so as to put the vendor *in statu quo*.

7. VENDOR AND PURCHASER ⇨117—RESCISSION OF CONTRACT BY PURCHASER—TENDER OF POSSESSION.

A tender of a deed by a purchaser to the vendor of land is not equivalent to a tender of possession for the purpose of a rescission.

8. QUIETING TITLE ⇨12(1)—VENDOR AND PURCHASER ⇨144(1)—CONTRACT OF SALE—TITLE OF VENDOR.

Decree, in a suit by a vendor of land under contract to convey on full payment of the price, brought while the purchaser was in possession, and quieting the title in plaintiff, *held* sufficient to render the title marketable within the terms of his contract.

9. VENDOR AND PURCHASER ⇨144(2)—SUIT TO FORECLOSE CONTRACT—DEFECTIVE TITLE.

Where the vendor brings suit to foreclose a contract for the sale of land, in which defendant pleads defective title, when time is not of the essence of the contract, or delay has been the fault of the defendant, complainant may clear up defects in the title at any time before final decree.

In Equity. Suit by W. J. Gregory and others against S. A. Keenan. Decree for complainants.

F. J. Newman and A. E. Reames, both of Medford, Or., for plaintiffs.

Jenkins & Crawford, of Portland, Or., for defendant.

WOLVERTON, District Judge. On May 6, 1911, the defendant, S. A. Keenan, advanced \$250 earnest money for the purchase of 140 acres of land situated in Jackson county, Or.; Huntley-Kremer Company representing the vendors. It was a condition of the contract then entered into respecting the purchase of the land by Keenan that, as soon as the title was found to be good by the purchaser and the soil satisfactory, Keenan should pay the balance of the purchase price in manner stipulated. The title was to be retained by the vendors, and Keenan agreed to accept a bond for a deed, which was to operate between the parties as security for deferred payments, the title to be conveyed when payment was fully met. The agreement contained a further provision to the effect that the purchaser should have 10 days after receipt of abstract of title to pay the balance of the first installment agreed to be paid for the land.

Prior to this time, namely, on February 25, 1909, the plaintiff W. J. Gregory, who held the title to the land, and his wife, Elizabeth Gregory, gave to the plaintiffs W. W. Glasgow, Charles M. English, and J. A. Bothwell a bond for a deed, whereby Gregory agreed to sell the property to them, in pursuance of which he let them into possession.

On May 20, 1911, a further agreement was entered into with reference to the sale of the land to Keenan, wherein Gregory and wife are styled the parties of the first part, Glasgow, English, and Bothwell and their wives parties of the second part, and Keenan party of the third part. By the terms of the agreement, the second parties waive their right of purchase under the bond for a deed from Gregory, and the first parties agree to sell and convey the premises to Keenan for the sum and price of \$20,000, to be paid in manner following: \$5,000 down, \$3,000 on or before May 20, 1912, and the balance of \$12,000

on or before May 20, 1916, with interest at 6 per cent. per annum. The agreement, among others, contains this clause:

"Now, if the sums of money herein promised to be paid by the party of the third part herein shall, time being strictly the essence thereof, be by him well and truly paid, strictly at the time and in the manner herein promised by him, then upon the full and complete performance of each, every, and all of said payments, together with the annual interest thereon, then the parties of the first part herein and the parties of the second part herein do hereby undertake, agree, and promise that the parties of the first part herein will forthwith make, execute, and deliver to the party of the third part herein a good and sufficient deed of general warranty, conveying all of said property to said party of the third part herein, free from either lien or incumbrance of any kind or nature."

In default of prompt payment, foreclosure is provided for. Until date of default, it is stipulated that Keenan shall have possession of the property, and it is further agreed between the parties that Keenan should cause the land to be subdivided into 5-acre tracts, and these it was his right to sell as he might find purchasers. When sold, the tracts were to be deeded, either to Keenan or to the purchasers, upon condition that Keenan should pay upon the purchase price of the land at the rate of \$150 per acre of the tracts so sold. In this relation the first parties covenanted to convey the tract or tracts so sold by "good and sufficient deed," and to "do and perform each and every act and thing that may be either necessary or requisite to be done in the premises, so that full and complete title to said 5-acre subdivision shall be transferred * * * free from either lien or incumbrance of every kind and nature and especially free from the operation of this contract." Then follows the stipulation:

"And as between all of the parties hereto it is further expressly agreed and understood that the title to all of the property herein described is at this time in the parties of the first part herein, and that their general warranty deed shall have the effect of conveying and passing full and complete title to any of said subdivisions of land so paid for by the party of the third part herein."

The defendant, Keenan, having failed to pay the last installment of \$12,000, and certain taxes, as provided for in the agreement, the plaintiffs, on December 2, 1916, instituted this suit to foreclose the contract.

On December 16, 1916, Keenan wrote Glasgow, indicating a wish to take up the balance due on the contract, and asked for a statement of the amount necessary to discharge the obligation. The amount claimed, namely, \$14,316, was, on December 20th, communicated to Keenan by letter, and he was informed that the suit would be stayed until January 2, 1917, until which time he could avail himself of the offer made to accept payment. On December 22d Keenan wrote as follows:

"I have your letter of the 20th inst. concerning the land contract. I note that you and your associates are willing to carry out the terms of the contract and to execute the necessary conveyances which, with the abstract of title continued down to date, will disclose a perfect title to be transferred to me. I also note that you will procure a deed from all the parties to the contract and that you fixed January 2, 1917, as the expiration of your offer.

In order that there may be no mistake or misunderstanding, I am mailing the inclosed formal notice to all the parties to this contract.

"I expect to be in Medford at the time designated myself, and will want the transaction closed up at that time without any further delay or misunderstanding, so please have your deeds and the abstract of title all ready."

The meeting took place, at the place and on the day indicated, which resulted in Keenan's disapproval of the title offered by Gregory and his co-complainants, and an attempted rescission on his part of the contract to convey, and a demand for the repayment of the amount of the purchase price and some taxes previously paid.

Thereafter Keenan answered, setting up that Gregory was without good and sufficient title to the land, and was unable to convey the same in fee simple, free and clear of incumbrances, as called for by the agreement, and prayed a decree for rescission of the agreement and recovery of the amount of the purchase price and taxes theretofore paid in pursuance of the contractual relations of the parties.

The chief grounds of defense relied upon by the defendant for defeating the suit to foreclose are:

First, that the plaintiffs have not proffered a marketable title to 43.9 acres included in the tract of 140 acres agreed to be conveyed. The acreage alluded to is a part of the donation land claim No. 37 of James A. Lupton.

Second. Nor have they proffered a marketable title to 36.1 acres, being all of lot 2, derived from the Angle and Plymale estate.

Third, that the deed from A. Childers et al. to William Angle and F. M. Plymale was insufficient to carry title; and—

Fourth, that certain quitclaim deeds found in the chain of title are insufficient, because of the simple fact that they are quitclaim deeds, to convey a marketable title such as was contracted for by the defendant under the agreement to convey.

[1] Previous to a discussion of these objections to the plaintiffs' title, it is essential that we dispose of a contention urged by plaintiffs, which, if sustained, is preclusive of any defense that the defendant might make on account of the condition of the title in plaintiffs. The point is that, by the condition in the agreement to the effect that the title to all the property was at the time of entering into the agreement in the parties of the first part, that is, W. J. Gregory and wife, and that a general warranty deed from them should have the effect of conveying and passing full and complete title to any of the subdivisions into which the land was to be divided, precludes the defendant from now asserting that the title proffered was not a good or marketable one. The solution of the controversy depends upon a proper construction of the agreement.

Elsewhere in the agreement, as is shown above, the parties of the first and second parts undertake and agree, upon the payments being made as stipulated, that the parties of the first part shall forthwith make, execute, and deliver to Keenan a good and sufficient deed of general warranty, conveying all the property, free from either lien or incumbrance of any kind or nature. And later, speaking with relation to the 5-acre subdivisions, it is further stipulated that the parties

of the first part shall make, execute, and deliver to the vendee a good and sufficient deed conveying the specific subdivision of land, and shall do and perform each and every act and thing that may be either necessary or requisite to be done in the premises, so that a full and complete title shall be transferred. These are stipulations that occur in the agreement previous to the one upon which plaintiffs rely for precluding the defendant from questioning the title.

It is a canon of interpretation that all clauses in a contract shall stand and subserve their obvious purpose, unless in palpable conflict with or incongruous to some other clause that renders them nugatory. In other words, the agreement must be so construed, if possible, as to give meaning and effect to all its provisions. Applying the rule, we find no difficulty in construing these several stipulations of the agreement.

When dealing with the subject of sale and conveyance to Keenan, or of the subdivisions, a warranty deed is stipulated for conveying a fee-simple title, free and clear of incumbrances, and thus it was intended that the vendee should have a marketable title. Were it not for the clause relied upon by plaintiffs, there could be no question as to the correctness of this construction, and yet, when the true purpose of the clause is considered, there is left no incongruity. The second parties previously held a bond for a deed to the property, and therefore had some interest in it. This interest they were waiving, so that the title might be conveyed to Keenan. Gregory held the legal title. Therefore, in order that the second parties might not still insist upon holding their interest, it was stipulated by and between all the parties to the agreement that Gregory and wife held the legal title, and that a warranty deed from them would convey whatever title the parties of the first and second parts had in any of the subdivisions to which it was applied.

I am impressed that it was not intended thereby to mutually covenant that Gregory held the absolute fee-simple title, free from incumbrances, or that his title was the marketable title elsewhere covenanted to be conveyed to Keenan. This construction renders the agreement entirely harmonious, and is obviously the one that was in the minds of the parties when the agreement was executed. The previous contract with Keenan was altogether merged into this agreement. Although Keenan may have had the abstract of title in his hands at the time of entering into the later agreement, he had probably never examined it and it is fair to assume that he depended upon the covenants of the agreement for conveyance of a marketable title.

Another suggestion of construction is tendered relative to whether the act of final payment on the part of Keenan and the act of conveyance on the part of the other parties to the agreement were independent or concurrent covenants. I construe the agreement as rendering them concurrent. The time of payment is made of the essence of the agreement, but upon payment, as stipulated, the first and second parties covenant to forthwith make, execute, and deliver the deed of general warranty. This renders the acts concurrent, which was no doubt the purpose of the parties, and the agreement must be so interpreted.

We now return to defendant's objections to the title, and first as it pertains to the Lupton land. This land is, as has been indicated, a part of the James A. Lupton donation land claim. The patent bears date August 8, 1866. It recites the fact of the issuance by the register and receiver at Roseburg, Or., of certificate No. 984, from which it appears that under the provisions of the act of Congress approved September 27, 1850 (9 Stat. 496, c. 76), and legislation supplementary thereto, the claim of the heirs at law of James A. Lupton, deceased, notification No. 7, has been established as a donation land claim of one-half section, or 320 acres, of land, and that the same has been surveyed and designated as claim No. 37, whereon is predicated a grant to the heirs. The land is described by metes and bounds, from which it appears that the survey was made upon lines running east and west and north and south.

[2] This claim was sold at administrator's sale by the administrator of the estate of James A. Lupton, deceased, and the strong contention of counsel is that the land was then not the property of Lupton's estate, but the property of his heirs at law, and that his administrator was without power or authority to sell it to satisfy his debts, or for any purpose.

From the abstract of title, the record shows that Lupton died October 8, 1855, and that he left as his heirs at law two sisters, namely, Elizabeth McLaughlin, of Pennsylvania, and Margaret Holmes, of St. Louis. The sale of the real estate was consummated on November 12, 1859, and was confirmed December 5th following. This, it will be perceived, was all accomplished prior to the issuance of the patent. Gregory claims title through the administrator's sale, and the crucial question is whether the land was subject to sale to satisfy Lupton's debts. This depends, in my opinion, upon whether Lupton died prior to having resided upon the donation for the full period of four years after settlement, or subsequent to the expiration of that period. The evidence bearing upon the subject is meager, and much is left to inference and presumption.

The Donation Act, approved September 27, 1850 (9 Stat. 496, c. 76), granted to every white settler or occupant of the public lands then residing in the territory of Oregon, or having become a resident thereof before the 1st day of December, 1850, "and who shall have resided upon and cultivated the same for four consecutive years," one-half section, or 320 acres, of land, if single, and if married, or having become married within one year from December 1, 1850, one section, or 640 acres, one half to himself and the other half to his wife, to be held in her own right, the surveyor general to designate the part inuring to the husband and the part to the wife.

By section 5 of the same act, there was granted to every white male citizen of the United States, above the age of 21 years, settling in said territory between the dates of December 1, 1850, and December 1, 1853, and having complied with the section of the act next preceding, one-quarter section, or 160 acres, of land, if a single man, and if married, or having become married within one year after reaching the

age of 21 years, one half section, or 320 acres, one half to the husband and the other half to the wife.

By the sixth section of the act, the settler was required, within three months after survey was made, or, if survey had been made before settlement commenced, then within three months after settlement, to notify the surveyor general of the precise tract claimed, the same to be in a compact form; also to be, as nearly as practicable, according to legal subdivisions, but, where that could not be done, the surveyor general was to survey and mark the claim with boundaries. It was provided, however, that after December 1, 1850, all claims should be bounded by lines running east and west and north and south.

By section 7 the settler was required, within 12 months after survey, or, when survey had been made, within 12 months from time of settlement, to prove to the satisfaction of the surveyor general settlement and cultivation as required by the act, specifying the time when commenced, and at any time after the expiration of four years from date of settlement, upon proper proofs, he was entitled to a certificate from the surveyor general, which likewise entitled him to a patent from the government to the land, upon surrender of the certificate.

By section 8, upon the death of a settler before the expiration of four years' continued possession, all the rights of the deceased descended to his heirs at law, including the widow, where one was left, in equal parts, and proof of compliance with the conditions of the act to the time of death entitled the heirs to the patent.

The certificate, as appears from the patent, was issued by the register and receiver at Roseburg, Or. These officers were authorized to be appointed by the President by act of Congress of July 17, 1854 (10 Stat. 306, c. 84), which was supplementary to the Donation Act, and not before it. The certificate is not in evidence, and we only know of its contents by such reference as is made to it in the patent. Lupton, in all probability, was not a married man at the time he made settlement, and so notified the surveyor general. Otherwise we must assume that some note of the fact would have been made in the certificate, and consequently in the patent. None such appears in the latter document. Not being a married man, he must have made settlement in pursuance of section 4 of the act of September 27, 1850; for otherwise he would have been entitled to one quarter section only, and not to a half section, as the certificate of the register and receiver shows was his right. So we must conclude that Lupton was either a settler and occupant of his donation at the time of the passage of the act, and made declaration thereof prior to December 1, 1850, or that he became a resident of the territory and a settler upon the land some time prior to December 1, 1850.

This result seems logically to follow from a proper interpretation and application of the provisions of the act, and we must assume that the officers of the land office acted in discharge of their functions of office. Such being the case, Lupton's four years' settlement and cultivation must have expired some time prior to December 1, 1854. Having died October 8, 1855, he had therefore completed such resi-

dence and occupation prior to his decease. It must be true, however, that the heirs at law made the final proofs, and that they did this after his death, as otherwise the certificate would have shown that Lupton was entitled to the patent, and not the heirs. The only item of evidence that would seem to indicate that Lupton's settlement was made subsequent to December 1, 1850, and not prior thereto, is the manner in which the survey of his claim was made by lines running east and west and north and south, and this may have been a mere coincidence.

We may now determine what was the effect of the issuance of such certificate and patent to the heirs, rather than to Lupton.

Section 4 of the act contains a provision rendering void all further contracts for the sale of the land to which the donor is entitled before receipt of his patent. This provision was repealed by the act of July 17, 1854, and it was declared that no sale should be deemed valid unless the vendor had resided four years upon the land. The Supreme Court has construed the legislation to mean that:

"After this prohibition was taken away, the system was radically changed, and a perfected right to a patent was made as good as the patent itself for all purposes, except the mere convenience of proving title." *Barney v. Dolph*, 97 U. S. 652, 658 (24 L. Ed. 1063).

And the court goes on further to say of the amendment:

"A grant by Congress, under these circumstances, of the right to sell the land, must have been intended to authorize those entitled to patents to convey in the same manner they could if the patent had been actually delivered. Any provision in the act transferring the title of the settler, in case of his death before receiving the patent, to his child, heir, or devisee, is palpably inconsistent with an unlimited power to sell and convey the land."

Some time previous to this decision by the Supreme Court, it was distinctly held by the Supreme Court of Oregon that, after four years of residence, the settler possessed an estate in fee in his land claim, which he could sell and convey to another before obtaining his patent, and that his heirs, on receiving the patent after his death, would be bound by his deed, and that they took the patent subject to such sale by the settler. *Ramsey v. Loomis*, 6 Or. 367, 377-8.

It follows, quite naturally and logically, that if, after four years' settlement and cultivation, the settler took a fee-simple estate in his donation land claim, he possessed such an estate as could be subjected to the payment of his debts and obligations, at least such as may have accrued subsequent to the expiration of the period of four years' settlement and cultivation. His administrator would therefore be authorized to sell his fee-simple estate, with a view to discharging such debts and obligations. We must assume, on this collateral proceeding, without else being shown, that the debts were such that the land could be properly subjected to their payment.

Lupton's administrator being so authorized to sell his donation, the next question presented is as to the sufficiency of the sale.

The petition for the sale is amply sufficient. But it is objected that there was no sufficient publication of notice to the heirs. It appears that the heirs were nonresidents of the state; hence it was nec-

essary that they be served with the citation by publication. At the time the transactions took place, the law required that, upon filing the petition for order of sale of the real property, a citation issue to the devisees and heirs mentioned in the petition to appear at a term of court specified, not less than ten days after service of the same upon them, to show cause, if any exist, why the order of sale should not be made as prayed for. Upon an heir or devisee resident within the state the citation was required to be served and returned as a summons; but upon a nonresident it was provided that service should be made by publication thereof of not less than four weeks, and such further time as the court might direct, the published citation to contain a brief description of the property described in the petition. Sections 1115 and 1116, General Laws of Oregon 1845-1864.

The petition for sale appears, from an abstract of title which has been submitted in evidence, to have been filed on October 7, 1859. Proof of the publication of the order of sale was filed, and the order of sale itself was entered, all on the same date. The proof shows four weeks' publication, beginning with the 10th of September, 1859. The publication consisted of an order of the county court, addressed "To Whom It may Concern," which order reads as follows:

"It is ordered by the county court of Jackson county, Oregon, that all persons interested in the sale of the real estate of James Lupton, deceased, late of said county, appear before the said court, on the first Monday of October, 1859, at the courthouse in Jacksonville, to show cause why an order shall not be granted to O. D. Hoxie, administrator of the estate of said James Lupton, deceased, to sell so much of the real property of the said decedent as shall be requisite to pay all debts, charges, and allowances remaining unpaid.

"Sept. 8, 1859."

It will be noted that the order to show cause was made practically one month before the petition for sale of the real property was filed; whereas, such an order, or a citation directing the heirs to show cause why sale should not be made, should have been predicated upon the petition, and not anticipated it, as it appears to have done. Further than this, the statute required that the citation should be to the devisees or heirs. This order, or citation, if such it be called, was directed "To Whom It may Concern," and not to the heirs that the petition shows were the heirs of deceased. So that in no way in which the document may be construed does it conform to the direction of the statute that it be issued to the devisees or heirs, and the proceeding for the sale was, on this account, a nullity, and the sale is inoperative and of no effect, unless it is aided and rendered valid by some one of the curative statutes of the state.

[3] It is the contention of counsel for plaintiffs that the title is rendered valid by the curative legislation of 1907 (section 7156, Lord's Oregon Laws) and of 1913 (Session Laws 1913, pp. 752, 753). Such legislation is regarded as constitutionally valid and operative so long as it does not attempt to infuse life into a proceeding utterly void for want of jurisdiction. It was so declared by the Supreme Court of the state in *Fuller v. Hager*, 47 Or. 242, 83 Pac. 782, 114 Am. St. Rep. 916.

The principle involved has quite recently received very careful and able consideration at the hands of the same court in *Stadelman v. Miner*, 83 Or. 348, 155 Pac. 708, 163 Pac. 585, 983. It was there held, in effect, that because real property under the laws of the state descends directly to the heirs at law, notwithstanding it is incumbered by the debts of the decedent, the heirs at law could not be deprived of their property right without notice and a chance to be heard; in other words, that a sale by an administrator of decedent's real property to pay the debts of the estate, without notice to the heirs, would be tantamount to taking the heirs' property without due process of law. To the suggestion that the Legislature has the power to adapt sales of decedent's real property to proceedings in rem, and thus dispense with notice to the heirs, actual or constructive, other than is necessary and requisite to a legal and sufficient sale in rem, and therefore that it has the power to do subsequently by curative legislation what it could lawfully have done primarily, it was answered, and quite sufficiently to my mind, that it had not dispensed with notice to the heirs, and hence that any sale of decedent's property without such notice was nugatory and void.

While on a subsequent hearing it was decided that the conclusion reached, as applied to the facts in that case, the heirs having had the required notice, but that the order of sale had been prematurely entered, could not be maintained, I do not understand that the principle announced was at all departed from, or even criticized. So I am impressed that a sale, without notice to the heirs substantially as prescribed by statute, is not such an irregularity as may be cured by retroactive legislation. If such were the case, the heirs could derive but little protection from the statute enacted especially for their benefit.

To apply the principle here, we find that the Lupton heirs had practically no notice at all, to say nothing of the palpable irregularities attending the making of the show-cause order, the serving of the same, and the entry of the order of sale. The notice or citation, or whatever it may be called, was directed "To Whom It may Concern," and not to the heirs named in the petition for sale. Such a lack of notice the Legislature was without power to cure by retroactive legislation, and the heirs could not be deprived of their day in court by such a legislative fulmination.

Plaintiffs were therefore, according to the abstract of title, without marketable title to the 43.9 acres of the Lupton donation.

[4] A different aspect is presented as it respects the 36.1 acres, or the Angle and Plymale tract. The objection to the title to this tract is that the administrator of the estate of the copartnership of Angle and Plymale was without power to sell the real estate, because the title stood in the names of the individual members of the firm, and that the Plymale heirs were not sufficiently served with citation.

Under the statute, the powers and duties of the administrator of the partnership estate extended to its settlement generally. Section 1168, Lord's Oregon Laws. The petition for sale shows that the partnership estate was the owner of this land; and, it being the owner, the land was subject to sale for payment of the partnership debts.

There exists no good reason why the administrator of such estate may not sell the real property of the estate for the payment of the debts, although the real property stood in the name of the individual members of the partnership. It was the property of the partnership estate, nevertheless.

[5] It is further objected that the order to show cause was served, and not a citation. This order contained all the elements of a citation, however. It directed the heirs to show cause why the order of sale should not be made, and the service had was for the requisite time prescribed by the statute. This included the Plymale as well as the Angle heirs, and indeed all persons to be affected by the proposed sale, as shown by the petition.

It is hardly conceivable how the heirs, or any of them, could have been affected injuriously by reason of the service of the order to show cause upon them, instead of a technical citation. The warning to them was the same as it would have been, had a citation been regularly served upon them, and they had ample notice as to how they would be affected by failure to answer the petition.

Another objection goes to the regularity of the service. The sheriff's return shows service on the adults "personally and in person," and on the minors by leaving a true copy of the order with Cassie Nicholson, she being over the age of 14 years and a resident of the same house with them, in person. Neither service is good, and if the return had been properly brought to the attention of the court in that proceeding, the court would undoubtedly have required an amendment of the return, if the facts warranted, but, if not, then a reservice. But the service was not so elementarily bad as that it may be said there was no service. There was, in fact, a service of the order, and that service was for the length of time required by the statute. So the heirs did have notice, and reasonable notice at that. The irregularity is simply one respecting the manner of service, and one I am firmly impressed the Legislature was authorized to remedy by curative legislation, and has remedied by the legislation herein before noted. So, also, has it remedied the irregularity touching the service of the show-cause order, instead of a technical citation, and other irregularities respecting the administrator's sale of the Plymale interest in the Plymale and Angle tract.

The abstract, therefore, shows a good, merchantable title to this tract of 36.1 acres.

As to the A. Childers conveyance, it appears that James S. Howard and wife, the original patentees of lot 2, being the 36-acre tract, deeded to A. Childers and son. Later A. Childers and Sarah Childers, his wife, and Spencer Childers and Mary Childers, his wife, executed a deed to Wm. Angle and F. M. Plymale. This is the deed that defendant objects to as insufficient to convey a good title, on the ground that it is not shown that Spencer Childers is the person to whom the Howard deed was made as the son of A. Childers. Spencer Childers, however, has executed an affidavit which shows that he is such person, and, although it was executed out of court, it is prima facie sufficient proof of the fact. The deed from A. Childers and Spencer

Childers and their wives was therefore ample to convey the title to Angle and Plymale, and the objection thereto is without merit.

The objection made that quitclaim deeds are insufficient to convey a fee-simple title is also without merit. They pass all the estate which the grantor could lawfully convey by deed of bargain and sale. Section 7102, Lord's Oregon Laws. Nor is the term "heirs," or other words of inheritance, necessary to create or convey an estate in fee simple. Section 7103, L. O. L.

The next phase of the controversy relates to the attempt on the part of Keenan to rescind the agreement, so as to put him in a position to demand back the money theretofore paid in pursuance of the agreement. Unless Keenan made proper tender of the money due plaintiffs under the agreement, and also due tender of the return of the possession of the land, so as to put plaintiffs in statu quo thereto, he was not in a position to insist upon a rescission.

It may be questionable whether there was a legal tender of the money in the form in which it was made. There was no handing out of the money, or any offer of a check representing it. Keenan simply declares that he had the money on his person at the time, and was able, ready, and willing to perform. But, this aside, I will pass to the tender as it pertains to the possession of the land.

[6] A party is not permitted to rescind a contract for the purchase of realty, and at the same time keep possession of the whole or part of that which was bargained for. He must proffer a return of what he has received, so as to place the vendor in statu quo, before he will be entitled to a return of his purchase money, or any part of it. This is equitable, and, as a rule, it is settled by adequate authority. *Vaughn v. Smith*, 34 Or. 54, 57, 55 Pac. 99; *Sievers v. Brown*, 36 Or. 218, 56 Pac. 170; *Livesley v. Muckle*, 46 Or. 420, 80 Pac. 901.

That Keenan went into possession of this land is not disputed; and that he platted it into 5-acre subdivisions, with avenues running between them dedicated to the public for road purposes, is also conceded. But Keenan claims that he settled with his tenants, obtained a release from them, and turned the property back to the plaintiffs, or, to use his language in his testimony, "offered to turn it back." On cross-examination he says, in effect, that plaintiffs demanded possession of the property, but not from him; that he was not present when possession was demanded, and knew nothing about it personally.

H. L. Gregory, who was a lessee from Keenan, testified, in substance, that some time in the fall of 1916 Newman, one of the attorneys for plaintiffs, came out to his place and demanded possession of the land, and that after such demand was made he gave up possession, which was about the same time demand was made. On cross-examination by Mr. Newman, he was asked:

"So I did not demand that you give up possession; I simply asked you whether I should make you a defendant in order to litigate your rights under the lease?"

To which he answered, "Yes, sir."

Note that this transaction of which Gregory speaks was some time in the fall of 1916. He probably did not surrender possession to plain-

tiffs in the fall of that year, as possession was eventually surrendered by him to Keenan, by formal written release of date December 18, 1916. From that time on possession was in Keenan. This disposes of the claim that Gregory surrendered possession to plaintiffs.

Keenan says, as previously stated, that he "offered to turn it [the land] back." He does not say when. It must have been, if at all, after December 18, 1916, and before January 2, 1917, or upon the latter date. There is no pretense that he made the offer prior to January 2, 1917. Did he make such an offer at that time? There were five persons present on that date, namely, Newman, Glasgow, W. W. Gregory, Keenan, and Conner. Keenan testifies that, after Newman had presented him the abstract and tendered deeds to the land:

"I told him I could not accept them, and I tendered to him the deed to this property back to the plaintiffs, and demanded the return of the money which I had paid, and I rescinded the contract and would insist upon the money being refunded to me, and I also tendered him back the possession—absolute possession of the property and demanded the return of my money."

Later the defendant says:

"I still think the plaintiffs will have a hard time getting possession unless they pay me back the money they got."

So it appears that Keenan's tender of possession of the land, if he made any, was, according to his own testimony, conditional upon his being paid back the money he had advanced.

Mr. Conner was asked:

"What was said—what did Mr. Keenan say—about delivering back the possession of the property, if anything, after he refused to accept the title that they offered?"

To which he answered:

"As I remember it, he stated that the property was theirs, and that he would give them the deed whenever the money was repaid to him."

On cross-examination he was further asked:

"Well, you did not understand, from anything that occurred there at the bank, that he was going to give up possession unless they gave him his money back, and interest, and took his deed, did you?"

To which he answered:

"I understood, from what transpired there, that he claimed that they were the owners of the property, and that he would simply keep charging up interest against them on all moneys that he had paid out previously."

According to witness, this was all that was stated on the subject at that conversation at the bank on January 2d.

W. W. Gregory, after relating what was said at the bank, says positively that nothing was said in that conversation about tendering back the possession of the property.

Mr. Newman was the principal participant with Keenan in the conversation at the bank. After relating the conversation as he understood and remembered it, he was asked:

"Was there anything said in the conversation at the bank, on either side, about the possession of the property?"

To which he answered :

"Not to my knowledge; no, sir. * * * To the best of my knowledge, there was nothing said about possession, either by one or the other, excepting with reference to what I have said about his being in possession of the property."

Glasgow asserts that there was nothing said during the conversation about possession of the land.

[7] From a careful survey of the testimony of these witnesses, the clear weight would seem to be in favor of the plaintiffs, and that Keenan did not tender the possession of the land at that time, or at all, to plaintiffs, or to any one for them. A tender of the deed can hardly be recognized as a tender of possession for the purpose of rescission. It does not operate to place the parties in statu quo, which signifies that the vendor must be reinstated in his original possession. In addition to this, the land had been subdivided, and certain avenues were dedicated to the public. A statu quo basis involves a vacation of the plat and restoration of the land to the original condition in which it was at the time the agreement was entered into: This was not done, nor was there any effort to vacate the plat and thus get rid of the dedicated avenues through it. Thus considered, Keenan was not in a position to rescind, even had he tendered back possession, because he could not place the plaintiffs in possession of that which he bargained for in the condition in which it was at the time. Keenan is therefore not entitled to recover back the purchase money paid in pursuance of the agreement.

[8] Now we come to the question whether complainants are entitled to their foreclosure. Subsequent to the institution of this suit, the complainant W. J. Gregory began a suit against all parties interested in the title to this land, to quiet title thereto. Decree was obtained in due course, and a supplemental bill was filed herein, prior to a hearing on the merits, setting up the facts showing that the title to all the land in controversy had been quieted by that proceeding.

The defendant insists that the court was without jurisdiction to quiet this title, because the plaintiff was not at the time in possession of the land. The complaint in that proceeding shows that, since the execution of the contract here in question, which is referred to and made a part thereof, Keenan has been in possession of the premises by virtue of such contract. Thus it is shown that Gregory had and has a potential interest in the premises, and a right to have the title quieted. The court unquestionably had jurisdiction of the subject-matter, and the record shows that it obtained jurisdiction of the persons of defendants therein in pursuance of the act of the legislative assembly of the state of Oregon, filed in the office of the secretary of state February 23, 1911 (page 439, Sess. Laws 1911), relating to suits pertaining to real estate, and providing for service on unknown defendants. The decree was therefore not wholly void for want of jurisdiction in the court to render it, and hence was not subject to collateral attack such as is here made upon it, and must be held to have quieted the title to the premises against the objection of the defendant. This suit was effective to clear up the title to all the lands

the title to which is challenged by the defendant, and renders it merchantable or marketable, within the covenant of the vendors.

[9] Now it is a rule of law, well settled by ample authority, that when time is not of the essence of the agreement, or the delay has been the fault of the defendant, and there has been no element of fraud in the bargain, the complainant may, if he can, clear away difficulties in the title before the final decree. The rule was so announced in the case of *Kentucky Distilleries & Warehouse Co. v. Blanton*, 149 Fed. 31, 41, 80 C. C. A. 343, decided by the Circuit Court of Appeals for the Sixth Circuit; Lurton, Circuit Judge, delivering the opinion. The case was one for specific performance of a contract. The point was specifically made that at the time of filing the bill the complainant was not able to comply with all of the terms of the contract, and that the tender then and thereby made was not sufficient. But the learned jurist disposed of the objection by declaring that it was not necessarily fatal, and that if the vendor "was able to correct defects in the title, and clear away incumbrances without unreasonable delay, he should be allowed to do so before final decree." It was following this determination that the rule aforesaid was announced.

In further support of the principle, reference may be had to the following authorities: *Hepburn et al. v. Dunlop & Co.*, 1 Wheat. 179, 4 L. Ed. 65; *Kimball v. West*, 15 Wall. 377, 21 L. Ed. 95; *Dresel v. Jordan*, 104 Mass. 407; *Chrisman v. Partee*, 38 Ark. 31; *McKinney v. Jones*, 55 Wis. 50, 11 N. W. 606, 12 N. W. 381; *Logan v. Bull*, 78 Ky. 607; *Collins v. Park*, 93 Ky. 6, 18 S. W. 1013; and 36 Cyc. 627.

It is clear the delay in closing up the purchase is attributable to the defendant, for he had long defaulted in his payments. He attempted to put the plaintiffs in default by making a tender of payment and of the restoration of the possession of the property, but in this he failed, especially as respects a tender of the restoration of the possession of the land, as has been herein previously determined, so that he is still in default within the purview of the rule.

If the rule is applicable in a suit to have the defendant specifically perform, he being the vendee, there seems to be no good reason why it should not apply with like force and consequence in a suit to foreclose the contract by the vendors, such as this is.

Plaintiffs are entitled to their foreclosure, and a decree will be entered accordingly for the amount demanded, and for \$1,000 additional as reasonable attorney fee.

COHEN et al. v. EDWARDS, Internal Revenue Collector.

(District Court, S. D. New York. February 7, 1919.)

INTERNAL REVENUE ⇨25—**ADULTERATED BUTTER—FINDING OF FACTS BY DEPARTMENT—REVIEW.**

Under Act May 9, 1902, § 4 (Comp. St. 1916, § 5978), imposing a special tax on manufacturers of adulterated butter, the decision of the Commissioner of Internal Revenue, pursuant to Act Aug. 2, 1886, § 14 (Comp. St. 1916, § 6226), that a substance is adulterated butter, where no unfairness or irregularity is charged, is conclusive, and not reviewable by the courts.

At Law. Action by Samuel K. Cohen and Jacob K. Cohen, copartners as the New York Butter Packing Company, against William H. Edwards, Collector of Internal Revenue. On demurrer to complaint. Demurrer sustained.

Joseph R. Truesdale, of New York City, for plaintiffs.

Francis G. Caffey, U. S. Atty., of New York City (Vincent H. Rothwell, Asst. U. S. Atty., of New York City, of counsel), for defendant.

MAYER, District Judge. Defendant has demurred upon the ground that upon the face thereof, the complaint does not state facts sufficient to constitute a cause of action.

The complaint alleges that plaintiffs were and now are partners, doing business under the name of New York Butter Packing Company; that on February 10, 1916, the collector of internal revenue demanded of plaintiffs \$750 as a special tax as manufacturers of adulterated butter; \$500 of this sum representing the amount of the tax and \$250 penalty.

Plaintiffs allege that the collector was without authority to exact or collect the \$750, and that neither during the period for which the tax was assessed nor at any other time were they engaged in the business of manufacturing adulterated butter.

The complaint then alleges that in March, 1916, they filed with the collector a claim in writing for the abatement of the tax and penalty, addressed to the Commissioner of Internal Revenue at Washington, D. C.; that on or about February 7, 1917, they received notice that the claim of abatement had been rejected, and on the same date they received another demand for the payment of the tax and penalty; that about May 23, 1917, they received notice that additional affidavits furnished them had been considered and rejected; that about the same date there was served upon plaintiffs a warrant of distraint averring nonpayment of the tax and penalty, and authorizing the deputy collector to distraint upon and sell the property of the plaintiffs; that on May 25, 1917, and pending the return of the warrant, the plaintiffs were served with another notice and demand, requiring them to pay the \$750 above referred to. The complaint then sets forth that the \$750 with interest, making in the aggregate \$862.50, was paid under protest on May 25, 1917, and that on June 6, 1917, plaintiffs took an appeal to the Commissioner of Internal Revenue.

There is no allegation in the complaint as to any lack of hearing, nor that any of the administrative decisions complained of were arbitrary. The complaint on its face clearly shows that plaintiffs and the officials (that is, the collector and the Commissioner of Internal Revenue) proceeded in due course along regular and orderly procedure. This action is in purpose and effect nothing more nor less than an attempt to review the finding of fact by the Commissioner of Internal Revenue that plaintiffs were engaged in the manufacture of adulterated butter under circumstances which subjected them to the tax and to the penalty for nonpayment thereof. The single point involved is whether the decision of the Commissioner upon the finding of fact may be attacked in an action such as this.

Section 4 of the Act of May 9, 1902 (32 Stat. 194, c. 784 [Comp. St. §§ 5968, 5978, 6233-6238]), defines adulterated butter and sets forth the requirements laid upon manufacturers thereof. Under this section of the act a tax is assessed. Section 14 of the Act of Congress approved August 2, 1886 (24 Stat. 212, c. 840 [Comp. St. § 6226]), provides as follows:

"That there shall be in the office of the Commissioner of Internal Revenue an analytical chemist and a microscopist, who shall each be appointed by the Secretary of the Treasury, and shall each receive a salary of two thousand five hundred dollars per annum; and the Commissioner of Internal Revenue may, whenever in his judgment the necessities of the service so require, employ chemists and microscopists, to be paid such compensation as he may deem proper, not exceeding in the aggregate any appropriation made for that purpose.

"And such Commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases are to be taxed under this act; and his decision in matters of taxation under this act shall be final.

"The Commissioner may also decide whether any substance made in imitation or semblance of butter, and intended for human consumption, contains ingredients deleterious to the public health; but in case of doubt or contest his decision in this class of cases may be appealed from to a board hereby constituted for the purpose, and composed of the Surgeon General of the Army, the Surgeon General of the Navy, and the Commissioner [now Secretary] of Agriculture; and the decisions of this board shall be final in the premises."

Section 4 of the Act of May 9, 1902, makes the provisions of section 14 of the Act of August 2, 1886, applicable to manufacturers of adulterated butter—

"to an extent necessary to enforce the marking, branding, identification, and regulation of the exportation and the importation of adulterated butter." Comp. St. § 6238.

It can be seen that the object of inserting the provision in section 7 of the Act of May 9, 1902, was to make applicable to the so-called "Adulterated Butter Act" the remedial provisions of the Act of August 2, 1886, the Oleomargarine Act, contained in the fourteenth section (inter alia) of that act.

Section 14 of the Act of August 2, 1886, *supra*, provides a careful and complete administrative machinery for determining what substances, extracts, mixtures, or compounds, which may be submitted to the appropriate officials, are to be taxed under the act. Obviously it

was realized that the large number of cases of this kind should not be passed upon by the courts in so far as such court action was invoked to determine the facts. Congress, of course, could have made its own definition in respect of numerous details, but it preferred the wiser procedure which the statute sets forth. Whatever review may be had by direct suit or action, or by any other method, in those cases where the constitutionality of such a statute is attacked, or where it is claimed that no hearing was accorded, or where the conduct of the administrative officer was such that it can be characterized as arbitrary as matter of law, it is at least certain that where there has been a hearing on contested facts, and arbitrary conduct in the legal sense is not complained of, the decision of the Commissioner is final.

The cases to the foregoing effect are so numerous, when dealing with various statutes in which the same question has arisen, that it is unnecessary to cite them at length. It is sufficient, for the purposes of this case, to refer to *Cooperville Co-operative Creamery Co. v. Lemon*, 163 Fed. 145, 89 C. C. A. 595.

Holding that the administrative decision complained of is not reviewable, the demurrer must be sustained, and the complaint dismissed.

In re WILSON-NOBLES-BARR CO. .

(District Court, W. D. Washington, N. D. October, 1918.)

1. BANKRUPTCY ⇨228—FINDINGS OF REFEREE—CONCLUSIVENESS.

The findings of a bankruptcy referee, who heard the evidence, observed the conduct of witnesses, etc., will not be disturbed, where the record presents nothing to challenge his conclusions.

2. CONTRACTS ⇨94(1)—FRAUD.

A contract cannot be rescinded because of fraud, except for a misrepresentation regarding a past or existing fact, which was relied upon.

3. CONTRACTS ⇨99(3)—FRAUD—EVIDENCE.

A party charging fraud has the burden of proving it by clear and convincing evidence.

4. BANKRUPTCY ⇨212—RECLAMATION PROCEEDING—EVIDENCE.

In proceeding to reclaim goods sold a bankrupt, evidence held to show the sales were induced by satisfactory business relations existing between the parties, and not, as the referee found, by false statements made by the bankrupt to mercantile rating agencies six months and a year before the sales.

5. CONTRACTS ⇨143—CONSTRUCTION—POWER OF COURTS.

Courts cannot make contracts; they can only construe and adjudicate with relation to them.

In Bankruptcy. In the matter of the Wilson-Nobles-Barr Company, a corporation, bankrupt. On petition to reclaim property alleged to have been sold to bankrupts through fraudulent representations. From an order of the referee requiring return of the goods or payment therefor, the trustees petition for review. Referee's order reversed, and order denying petition to reclaim.

Will J. Griswold, of Bellingham, Wash., for trustee.

Walter B. Whitcomb, of Bellingham, Wash., and Grinstead & Laube, of Seattle, Wash., for claimants.

NETERER, District Judge. The issue before the court is the right of the Wenatchee Flouring Mills, Armour & Co., and Swift & Co., to reclaim goods sold to the bankrupts, respectively through fraudulent representations it is charged. The matter was tried before the referee, who entered an order for the return of the goods to the respective claimants or payment of the value thereof. The trustees have petitioned a review.

The false statements charged were made, one to Bradstreet, February 1, 1916, and one to R. G. Dun & Co., September 17, 1916. The goods were sold by the Wenatchee Flouring Mills, March, 1917, and delivered the 16th day of April, 1917. This sale was made upon the statement of February 1, 1916. The Armour & Co. and Swift & Co. sales were made about the same time, relying upon the Dun statement of September 17, 1916. It is also contended by the trustees that the creditors named waived any preference and assumed the status of general creditors by filing their claims and participating in the election of trustees; while the creditors admit participating at the election of the trustees, state that in filing their claim they reserved the right to proceed against the specific property, if it developed that the property was obtained by fraud, and that the trustee for whom they voted was not elected, hence their activity in the election was without effect, and they are not estopped from prosecuting this proceeding, since the fraud was not discovered until after the election; and that, the referee having found in their favor upon the facts upon the general issue, the court would be bound thereby.

[1-5] This court said, in the Matter of Lester W. Davis, Bankrupt, filed December 24, 1915:

"The referee heard the evidence, observed the conduct and demeanor of the witnesses, and was therefore in a position to weigh the evidence, and where the record presents nothing to challenge the conclusion, the findings will not be disturbed."

I think this is the rule. An examination of the evidence in this case shows that the bankrupts have been engaged in business for many years; that the petitioning creditors had been trading with this concern for a number of years, and, with relation to the Wenatchee Flouring Mills claim, the sale was made by a traveling salesman, who called and took the order in the usual way. No statement was made with relation to the financial status, and in response to the question:

"What conversation did you have with Mr. Wilson if anything, pertaining to credits and payments?"

—he said:

"I don't remember whether that conversation came up there at that time, but I think it was about that time they had sold some mill property, and he simply said they would be in pretty good shape from now on and in condition to pick up their discounts on flour."

The witness also said:

"Yes sir. However, I would have taken the order, whether this conversation had come up or not, for in the years we have sold them we have absolutely never questioned them."

Afterwards, in conversation with Wilson with relation to a car that had not been paid for, said:

"He said: 'I will see to it immediately that the remittance is made on that car.'"

The manager of the Milling Company stated that credit was extended on "our past experience with the account and the Bradstreet's Commercial report," and further said to questions propounded:

"Q. They had always paid their bills? A. Yes, sir.

"Q. And you had no reason to believe this would be any different from any other car they had ordered? A. No, sir.

"Q. And when the order came in from Mr. Conner you just put it down in the ordinary course of business to be shipped according to his direction? A. Yes, sir.

"Q. You don't know whether this report came from Bradstreet or whether it came from Wilson, Nobles & Barr, do you? * * * A. No; I don't know."

On recross-examination the witness stated:

"* * * We always took into consideration the statements we had received, and our past experience, in figuring whether or not we were going to fill that order when it came in."

Mr. Anderson, the agent for Armour & Co., said in substance:

"Nobles did not say they were not making any money. I implied from what they said they were in better condition than they had been. He made no statement about paying any bills."

And the statement of the credit man is in substance the same as of the Wenatchee Flouring Mills, as is also the testimony of Swift & Co.

There is a further uncertainty with relation to the goods of Armour & Co., sought to be reclaimed, as to being the goods that were actually sold upon the date alleged. The witness says he inferred that the goods were purchased within a given time, and further said credit was based "to some extent" on promptness of payment of monthly accounts and also "moral risk." Some conversations were had with some member of the firm as to the financial status after the goods were sold, but these can have no bearing. The face of the record challenges the conclusions.

This court has frequently held, and I think it is the universal rule, that a representation as a basis for the rescission of a contract on the ground of fraud must be a statement which represents a past or existing condition or fact and must be relied upon. Fraud is never presumed, and the burden is upon the party charging it, and the proof must be clear and convincing. I have no hesitancy in saying that the statements referred to, one more than a year old and the other six months, under the circumstances shown, were not the basis of credit, but that the sales were induced because of the former and existing business relations between these parties. Courts cannot make

contracts; they can only construe and adjudicate with relation to them.

With this disposition, it is unnecessary to express any view as to the effect of participation in the election of trustees.

The order of the referee is reversed, and an order denying the petitioners to reclaim may be presented.

GRIFFITH v. ALOIS AUFRICHTIG COPPER & SHEET IRON MFG. CO.

(District Court, N. D. New York. March 25, 1919.)

1. ATTACHMENT ⇨250—VACATION—DISPOSITION OF MOTION.

The term at which the case can be tried being but a few days distant, motion to vacate the attachment, on the ground that plaintiff's papers fail to show how he has sustained damages, will be denied for the time; the affidavit for the attachment giving information of the nature of the damages.

2. ATTACHMENT ⇨137—BOND—INCREASE—MOTION.

Defendant's motion papers for increase of security given by plaintiff, on obtaining attachment, show no facts indicating that the property has or will sustain damages while in sheriff's hands; they merely alleging on information and belief its value, and that it is liable to depreciation in his hands, but giving no information as to its nature and character.

Action by Webster E. Griffith against the Alois Aufrechtig Copper & Sheet Iron Manufacturing Company. On motion to vacate attachment and increase security given by plaintiff on obtaining same. Motion denied.

Wm. D. Ingram, of Ogdensburg, for plaintiff.

Leo Oppenheimer, of New York City, for defendant.

RAY, District Judge. The plaintiff is a citizen of the state of New York and the defendant is a citizen of the state of Missouri. The action was brought in the state court, and removed by the defendant to the United States District Court.

At the time of bringing the action the plaintiff, on the sworn complaint and affidavits, obtained a warrant of attachment and attached certain goods of the defendant in the state of New York, alleged to be of the value of \$5,000 or more. On obtaining such attachment the plaintiff gave a bond or undertaking in the sum of \$250, conditioned that if the defendant recovers judgment, or if the warrant is vacated, the plaintiff will pay all costs which may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum of \$250.

[1, 2] The defendant claims that the security is insufficient, as the property attached is liable to depreciate in value and suffer damage in the hands of the sheriff. The defendant also claims that the plaintiff's papers are insufficient, in that they fail to show wherein or how the plaintiff has sustained damage, and contain no allegations from which the damages of the plaintiff may be ascertained.

The plaintiff claims that he has been damaged in the sum of upwards of \$10,000 by reason of the failure of the defendant to perform contract to sell and deliver to the plaintiff on or before March 1, 1918, a vacuum condensed milk pan which plaintiff agreed to purchase and for which he agreed to pay some sum, but the purchase price is not mentioned in the complaint. The complaint alleges that the plaintiff performed the contract on his part and paid to apply on the same the sum of \$1,670, and was ready at all times to complete the contract on his part, but that Charles Aufrichtig, the person with whom he made the contract, failed to perform same on his part, and failed to deliver the said pan to the plaintiff March 1, 1918, or sooner, and has never delivered the same, although plaintiff frequently requested delivery. The complaint then alleges that said Charles Aufrichtig caused the defendant corporation to be organized under the laws of the state of Missouri in July, 1918, and that the defendant above named—

“has assumed the contract entered into between the plaintiff and Charles Aufrichtig, and is liable for the breach of the said contract and for the damages sustained by the plaintiff.”

The plaintiff then alleges that—

“By reason of the failure of the said Charles Aufrichtig to perform the contract on his part the plaintiff has been damaged in the sum of \$9,107.78, besides the sum of \$1,670 paid to apply on the contract.”

The complaint itself does not state how or wherein the plaintiff sustained any damage by reason of the failure to deliver the pan, except the statement as to the amount paid to apply on the purchase price of the pan.

In the affidavit on which the attachment was granted it is stated that the plaintiff was to pay for the pan the sum of \$5,000, viz. \$1,670 at the time of signing the contract, \$1,670 on presentation of the bill of lading, and the balance 30 days after delivery, and that he did pay the sum to be paid on the signing of the contract. He also states that the said Charles Aufrichtig failed to perform, and failed to deliver the said pan, although he repeatedly called for delivery, and informed Aufrichtig that the failure to deliver had caused the plaintiff great damage financially, and that the plaintiff would hold him responsible for the damages. The assumption of the contract by the defendant is also set forth in the moving affidavit. It is also set forth in the moving affidavit that the pan has been sent to North Lawrence, N. Y., and is now in the possession of the carrier at that place, and the plaintiff states:

“That the plaintiff never ordered a pan from the Alois Aufrichtig Copper & Sheet Iron Manufacturing Company, and has never had any dealings with the said company, and the pan ordered from the said Charles Aufrichtig by the plaintiff is the only pan which plaintiff has ordered from any source which remains undelivered at this time.”

As to damages sustained by the plaintiff by reason of failure to ship the pan in time, the affidavit on which the attachment was granted states:

“That by reason of the failure of the said Charles Aufrichtig to make delivery of the vacuum condensed milk pan as agreed the plaintiff has suffered

damage in the said sum of \$10,177.78; that the said damage consists of the sum paid to apply on the purchase price, loss of business on account of the plaintiff being unable to commence business at the time planned, loss of patrons for the same reason, rental of a vacuum condensed milk pan which plaintiff installed in his factory, freight on the same, expense of installing the same, expense of plaintiff and his agents in going to St. Louis, etc., making in all the amount of damage as hereinbefore stated."

There is no allegation that the plaintiff was engaged in any business, and there is no allegation that he had planned to commence business at any particular time, and we are at a loss to know what patrons he refers to. In effect it is stated that, inasmuch as the plaintiff did not receive the pan contracted for, he rented one to take its place and paid freight and expenses of installing same. I think the defendant is informed by the affidavit, not by the complaint, the nature of the damages alleged to have been sustained and which will be claimed on the trial.

The April term of this court commences April 1, 1919, at Syracuse, N. Y., and this case can be tried at that term, when it will appear whether or not the plaintiff has stated a cause of action against the defendant, and when the plaintiff can present his proofs as to damage.

I will deny the motion at this time without prejudice to a renewal of same, and with leave to renew same in case the cause is not brought on for trial at the April term. The defendant in its motion papers does not show any facts which indicate that the attached property has sustained damage or will sustain damage when in the hands of the sheriff. In fact, the court is not informed as to the nature and character of the property attached by the plaintiff. The only allegation in this regard is:

"Upon information and belief that the property so levied upon by said sheriff under said warrant of attachment exceeds in value the sum of \$5,000; that said property is liable to depreciation in the hands of said sheriff."

There will be an order accordingly

THE JOHN J. HOWLETT.
THE ADMIRALEN.

(District Court, E. D. Pennsylvania. April 16, 1919.)

No. 2.

1. SALVAGE ⇨26—JUDICIAL MEASUREMENT—FACTORS TO BE CONSIDERED.

The compensation for salvage is influenced by many factors, the risk incurred, the imminence of the danger, and what is saved to the owners, as well as the labor involved and the presence or absence of other promise of assistance.

2. SALVAGE ⇨31—EXTINGUISHMENT OF FIRE—GOVERNING ELEMENTS.

Where a steamer laden with oil caught fire, and the crew of a steam tug promptly went to its assistance with a hose, and fought the fire without aid for 10 or 20 minutes, until other help came, and it was extinguished with little damage, the tug is entitled to salvage; the elements tending to augment the amount being the alertness of the crew of the tug

in discovering the fire, their promptness in responding, and the risk they faced, while the elements tending to lessen the amount are the comparative triviality of the fire and the little damage done.

In Admiralty. Libel by M. P. Howlett, owner of the steam tug John J. Howlett, against the Norwegian steamship *Admiralen* and cargo. Hearing on libel, answer, and proofs. Finding for libelant.

Otto Wolff, Jr., and John F. Lewis, both of Philadelphia, Pa., for libelant.

Howard H. Yocum, of Philadelphia, Pa., for respondent.

DICKINSON, District Judge. [1] The admiralty doctrine of salvage is regarded from the standpoint of the vessel owner, as a concession to the spirit of the time when a ship in distress was looked upon as the lawful prize of all who might plunder her. From the viewpoint of the advocates and supporters of the doctrine, it springs from the sense of justice, which would grant compensation to the salvors out of that which their efforts have saved from destruction, and from the policy of the law, which would second the impulse of humanity by rewarding prompt and successful efforts to rescue lives and property from threatened danger. Such a rescue evokes the gratitude of the one saved and a spirit of liberality in rewarding the rescuer. The measure of compensation, when it is to be judicially determined, is influenced by many factors, among which is the risk incurred by the salvors, the imminence of the danger which is averted, and what is saved to the owners, as well as the labor which is involved. The results in loss actually incurred may indicate little risk to the salvors, and the smallness of the danger averted, or it may be a tribute to the promptness and efficiency of the rescuers, and justify a liberal estimate of salvage.

Another feature of importance is the presence or absence of other promise of assistance than that rendered. Many of the elements which enter into an award of salvage compensation or allowance are difficult of admeasurement.

The services rendered in the present case were at a fire. In any fire, when uncontrolled, there is always danger, and, when beyond control, there is certain destruction of whatever there is to be destroyed. When it is on a vessel, and is near oil or other highly inflammable material, and the vessel is loaded with oil (as was the case here), the risk of rendering assistance and the threat of destruction is increased. When other and effective aid (as was again the case here) is close at hand, this threat is less menacing. Perhaps the most helpful guide to what might have happened is, not so much what did happen, as what was done by the salvors and others to do what was done to put out the fire and to avert the spread of the flames. This gives us something of the measure which the actors at the time applied to the situation.

[2] Applying this test, what the libelant did was to appreciate at once the need for assistance, to go promptly to the rescue, to supply a hose, which was carried aboard the respondent vessel, to pump water, which it is claimed by the libelant actually was, and which admittedly was, ready to be played upon the fire, and to stand by until the

fire was out. The whole time which elapsed from the discovery of the fire until the pump was stopped was upwards of half an hour. From the time the hose was on board the *Admiralen* to the coming of aid other than that afforded by this hose and the means of fighting the fire, which the crew commanded, was a matter of from 10 to 20 minutes. Just what part the hose played in the actual control of the fire and the extent of the damage thereby averted cannot, with any definiteness, be determined. The actual damage done was slight.

There is nothing in this recital to warrant a finding that there was much of a fire, much danger incurred in going to the rescue, much of a service rendered by the libelant, or much accomplished in results by the efforts made. On the other hand, however, the crew of the libelant is to be commended for their alertness in discovering the fire, for the promptness with which they responded to the at least probable need for assistance, and for facing the risk of incurring a more than possible danger.

We submit herewith, in compliance with the requirement of the statute, specific findings of fact, and an award of salvage by way of compensation for services rendered by which the whole story is disclosed. These findings make any extended discussion of the facts unnecessary.

The conclusion is (in which the respondent concurs) that there should be an award of salvage. This further comment we feel is invited. Had there been an earlier recognition of the claim of the libelant to something, the need of litigation would probably have been avoided by the parties agreeing upon a sum much less than that now awarded. This belongs to the class of cases to which the proverb which enforces the wisdom, as well as the duty, of agreement with the adversary, has application. The failure to invite such agreement (as compensation is allowed) justified, if it did not compel, the filing of the libel. The continued failure to agree after the libel was filed was due to each of the parties mistaking the attitude of the other. This misunderstanding has not yet been removed, and its presence was manifested at the trial and was reflected in the discussion of the merits of the case. The libel demanded a large sum of the respondents. The award now made carries the finding of the justification of the respondent in resisting this demand. The character of the answer, however, put the libelant to the expense and trouble of making formal proofs of averments of fact which were not in any real sense in controversy.

There is, on the other hand, some basis for the defense which is made of the sweeping denials of the answer. This is that the denials were directed, not to the averments of the libel, which founded a claim to salvage compensation, but to the averments which founded the claim made to the large sum of salvage which was demanded.

This feature of the libel, embodying, as it did, very sweeping demands, may have justified as to this feature denials equally sweeping, if the answer had been accompanied with an avowal of the attitude which was displayed at the close of the trial. The denial of all right in the libelant to compensation was not, however, justified, and the avowal of a willingness to make compensation came too late to enable the respondent to avail itself of any complaint of exaggerated demand

on the part of the libellant. The parties must in consequence stand or fall by the result of the finding made, and the finding that the libellant is entitled to something is reflected in the sum awarded, and in the disposition made of the costs.

UNITED STATES v. KRICHMAN.

(District Court, S. D. New York. April 7, 1919.)

BRIBERY ⇨1(2)—UNITED STATES OFFICER—PERSON ACTING IN "OFFICIAL FUNCTION."

The provision of Criminal Code, § 39 (Comp. St. § 10203), making it an offense to bribe any person acting for or on behalf of the United States "in any official function, under or by authority of any department or office of the government thereof," held to include within such definition a baggage porter employed in the baggage room of a railroad then being operated by the Director General of Railroads.

[Ed. Note.—For other definitions, see Words and Phrases, Official Function.]

Criminal prosecution by the United States against Harry Krichman. On motion by defendant for new trial. Denied.

This is a motion for a new trial upon conviction by the defendant upon three counts of an indictment, which alleged that he attempted to bribe a baggage porter employed by the Director General of Railways at the Pennsylvania Terminal, New York. It was proved upon the trial that the defendant had approached one Zwillinger, who was then engaged as a baggage porter in the baggage room at the Pennsylvania Terminal in the city of New York, and offered to bribe him to deliver to the defendant from time to time trunks containing furs, which were checked from the Pennsylvania station to points outside the state of New York. Zwillinger, after the first interview, reported to his superiors, who directed him not to alarm the defendant, and to let him proceed if he would. Afterwards the defendant paid Zwillinger a sum of money and obtained from him delivery of a trunk containing valuable furs, which he took with him to the Grand Central Terminal in the city of New York. Shortly after he was apprehended by the Pennsylvania detectives, who had kept him under observation from the time he entered the Pennsylvania Terminal.

The judge charged the jury that, if they found the facts to be as stated below, the defendant was guilty. The defendant took no exception to the charge, and although he moved for the direction of a verdict, both at the close of the government's case and at the close of his own case, he did not raise the point that Zwillinger was not acting in an official capacity on behalf of the United States under the authority of a department of the United States. Criminal Code (Act March 4, 1909, c. 321) § 39, 35 Stat. 1096 (Comp. St. § 10203). He now moved for a new trial upon the ground that a baggage porter in the employ of the Director of Railways is not such a person within the section in question.

Edward Schoen, of Newark, N. J., for the motion.

David V. Cahill, of New York City, for the United States.

LEARNED HAND, District Judge. A motion for a new trial is always in the discretion of the court. *Mattox v. U. S.*, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917. And as the point now raised was not suggested upon the trial, and there was therefore no exception

touching it, I might, without more, deny this motion. Nevertheless, the objection goes to the very essence of the charge, and could not have been corrected, had it been raised upon the trial, and, if it be good, the defendant has been illegally convicted. It seems to me, therefore, in the interests of justice to consider the matter upon its merits, rather than to subject the defendant to the possibility of suffering punishment for a crime which he could not commit.

The leading authority on section 39 is *U. S. v. Birdsall*, 233 U. S. 223, 34 Sup. Ct. 512, 58 L. Ed. 930, in which a conviction was sustained. In that case the Commissioner of Indian Affairs, with the authority of the Secretary of the Interior, had appointed Brents and Van Werts to be special officers for the suppression of liquor traffic among the Indians. In cases of convictions for violation of the law against selling liquor it had become the custom of the department to investigate through subordinates whether executive or judicial clemency should be exercised; this in the interests of the effective suppression of such traffic. The defendant Birdsall had bribed Brents and Van Werts to obtain their influence in procuring such clemency, and the Supreme Court, in upholding the conviction, decided that they were exercising official functions, although they were not expressly defined by any statute, or even by a regulation, but had arisen from a custom of the department. Similarly a member of the Board of Examining Surgeons appointed by the Commissioner of Pensions was held to be within the statute in *U. S. v. Van Leuven* (D. C.) 62 Fed. 62, although such officials were not themselves officers of the United States. See *U. S. v. Germaine*, 99 U. S. 508, 25 L. Ed. 482.

In *U. S. v. Ingham* (D. C.) 97 Fed. 935, the section was extended to a secret service operative employed by the Secretary of the Treasury, and in *Haas v. Henkel*, 216 U. S. 462, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112, to an associate statistician employed by the Department of Agriculture to prepare and publish official reports of the cotton crop. In *Re Yee Gee* (D. C.) 83 Fed. 145, an interpreter appointed by the Secretary of the Treasury was held not to be within the statute, but for the reason that only the court had any power to appoint interpreters, and that therefore he was not acting under the authority of a department or office of the government. In *Sharp v. U. S.*, 138 Fed. 878, 71 C. C. A. 258, an Indian agent appointed by the Commissioner of Indian Affairs was held to be within the statute.

These are the only cases which I have found having any important bearing upon the section, and none of them presents a very direct analogy to the facts at bar. So far as they go, they all look to a broad construction of the language of the section.

In principle it seems to me that this case is within the law. The Director General of Railways is an office or department of the government charged with the operation of the railways of the United States, and Zwillinger was acting under his authority. It is, of course, true that he was appointed and discharged by subordinates who were in turn not appointed by an "officer" of the United States, as defined in *U. S. v. Germaine*, supra. Nevertheless, although at

several removes, he was acting under the authority of the Director General. Moreover, in caring for and dispatching baggage intrusted to the railroad, he was acting on behalf of the United States, since the dispatch of baggage was a duty which the United States had assumed and which only baggage porters could discharge. So the sole question is whether he was acting in an "official function."

It must be conceded that the section would as well cover the case if the words "official function" were omitted, and that it is something of a strain upon the ordinary use of language to speak of a baggage porter's duties as "official." Yet the business of operating a railway is nothing more than that of moving persons and things from one place to another, and a baggage porter actually performs a part of that movement. It is quite impossible to establish any consistent line, based upon the importance of his duties, which will make them any the less "official." Nobody, I should think, would say that a traffic manager had no official functions, or indeed a freight dispatcher, or a ticket seller. At least about them I can see no plausible doubt. With deference there seems to be no basis for the limitation thrown out obiter by Judge McPherson in *U. S. v. Ingham*, supra. No doubt we ought not to press logic to its conclusions, for we are only dealing with common words, but we ought to execute the purposes which the words contain.

If we look at the purpose of the section, there seems to me every reason not to draw any line based upon the supposed inaptitude of the words "official function." The section is full of verbiage, no doubt, but its very presence shows its desire for comprehension. The draftsmen certainly wished to include all efforts by corruption to impede the success of the United States in any of its enterprises. All such enterprises are official as soon as the United States lawfully undertakes them, and any interference with them, by debauching those on whom any part of their execution is imposed, is a prejudice to the United States, whether the impediment be grave or trivial. This result is the evil against which the statute is clearly aimed, and it seems to be covered by the use of a phrase like "official function," without undue violence to common use. Indeed, if the importance of the duty delegated be a test, the custody and correct dispatch of valuable baggage is certainly not a trivial function.

I think the point is not well taken, and the motion is denied.

THE POWELL BARGES NOS. 5 AND 7.

(District Court, S. D. Alabama. April 1, 1919.)

No. 1711.

COLLISION Ⓒ117—PLEADING—SUFFICIENCY.

In a libel suit, claimant's allegations that the barges causing the damage were owned by it, but had been chartered to a lumber company, which had full control of them at the time of the collision, that the lumber company had employed a fuel company to tow the barges, and that claimants did not know whether the barges were properly loaded or tied, but, if not, the negligence was that of the lumber or fuel company, *held* sufficient to bring the lumber and fuel companies into court.

Libel by Sebastian Gonzales and others against the Powell Barges Nos. 5 and 7, to which an answer was filed seeking to make the Brannock Lumber Company and the Southern Fuel & Material Company parties to the case. On motion of the Southern Fuel & Material Company to quash process. Motion denied.

Howard & Pegues, of Mobile, Ala., for libelants.

Palmer Pillans, of Mobile, Ala., for claimant.

Harry T. Smith & Caffey, of Mobile, Ala., for movant.

ERVIN, District Judge. This matter has heretofore been argued on the motion of the Southern Fuel & Material Company to quash process against them; said motion being submitted and held for consideration.

The libel in this case was based on an alleged collision of the barges, Nos. 5 and 7, with a vessel owned by libelant, and it was averred that the barges were improperly loaded and broke away from their mooring, and were blown against the vessel of libelants, causing considerable damage to said vessel.

Claimants answered the libel, and further set up that the barges were chartered by them to the Brannock Lumber Company, who had the full custody and control of the barges at the time of the alleged injury, and that said barges were not then in the custody and control of claimants; that the Brannock Lumber Company employed the Southern Fuel & Material Company to tow said barges from the place of loading to the wharf of the Southern Fuel & Material Company, where the barges were tied; that claimants knew nothing of the fact as to whether the barges were properly loaded or properly tied, but that, if they were improperly loaded or improperly tied, the negligence in this respect was either that of the Brannock Lumber Company or the Southern Fuel & Material Company, and pray that these two companies might be made parties to the case. Process was issued against both companies, and this motion was then made by the Southern Fuel & Material Company.

The motion is based largely upon the idea that there are not sufficient allegations of fact showing or charging any wrongful act on the part of the Southern Fuel & Material Company contained in the petition of claimants, asking that the said Southern Fuel & Material Company be made a party defendant. The petition shows that claimants owned

the barges, but that these barges, Nos. 5 and 7, were chartered by claimants to the Brannock Lumber Company, who had complete custody and control over them at the time of the alleged collisions, and at the time the barges were turned over to the said Brannock Lumber Company they were properly equipped with new and approved mooring equipment, consisting of steel chains and manila hawsers, sufficient to properly tie them; that they are informed that the Southern Fuel & Material Company was employed by the Brannock Lumber Company to tow said barges from the place where they had been laden with lumber to Mobile; and that the Southern Fuel & Material Company had taken said barges in charge and towed them to Mobile, and tied them at the wharf of the said Southern Fuel & Material Company. Then follow allegations that, if there was any improper loading of same, it was done by the charterer or some one for it, and, if there was any improper mooring and securing of said barges, the same was done by either the Southern Fuel & Material Company or by the charterers, or some one representing them. The allegation is made in the petition that petitioner is not informed of the facts as to the improper loading and as to the improper mooring of the said barges, as the barges were not then in the custody of claimants.

It seems to me that, under these allegations, claimants have alleged all they could properly allege, because they show that they are not informed of the facts, and how could they allege specific acts of negligence on the part of the Southern Fuel & Material Company, in the absence of information by them of these acts?

The motion to make the Southern Fuel & Material Company and the Brannock Lumber Company party defendants is based upon the analogy to admiralty rule 59 (29 Sup. Ct. xlv). In *The Alert* (D. C.) 40 Fed. 836, all we know of the petition is contained in the opinion, where it is said:

"The *Alert* was a chartered ship, and, being sued * * * for negligent damage to cargo, by the breaking of her tackle while discharging, under the charterers, her owners in their answer say that the tackle was furnished either by the shipper or by the charterers, under a special agreement between them, and not by the ship, and they now move that the charterers be made codefendants."

The able opinion of Brown, J., on reargument of the exceptions, shows cogent reasons why the Southern Fuel & Material Company should be made parties defendant to this libel, because, if, as a matter of fact, they were guilty of negligence, either in loading or in mooring the barges, they should be brought into this suit, where they can have an opportunity to defend in one trial the charges of negligence in this respect, because, if the negligence was theirs, they are the ones who should respond to whatever judgment is rendered, and not the barges and their owners.

Judge Brown, quoting from the *Epsilon* Case, 6 Ben. 378, Fed. Cas. No. 4,506, further shows the broad equities of the admiralty court and its power and purpose to do justice by bringing in parties who may be necessary to effectuate justice and pursuing methods unknown to other courts, where necessary to effectuate justice in the cause, even though the rules as laid down do not strictly cover the matter, for in these

cases they can proceed by analogy to the rules, and where the ordinary equity rules and forms do not specifically cover cases, the admiralty courts have the power to make such rules and forms as may be necessary.

In the case of *The Barnstable*, 181 U. S. 464, 21 Sup. Ct. 684, 45 L. Ed. 954, the Supreme Court expressly recognizes the practice referred to in *The Alert* of extending rule 59 to cover analogous cases. In the statement of facts, the allegations wherein a third party was sought to be brought in were referred to as follows:

"Before the time to answer expired, the Turret Company presented a petition, setting forth that at the time of the collision the *Barnstable* was chartered to the Boston Fruit Company, a Massachusetts corporation; that the charterer supplied its own officers and crew, who were navigating the vessel at the time of the collision, and that, if there were any faults on the part of the *Barnstable*, they were the faults of the charterer and not those of the owner."

It seems to me that the petition in the instant case follows what is here recognized as a sufficient petition.

A decree will therefore be entered, denying the motion to quash the service.

OILFIELDS SYNDICATE v. AMERICAN IMPROVEMENT CO.

(District Court, S. D. California, S. D. February 27, 1919.)

No. D-117.

1. QUIETING TITLE ⇨7(4)—CLOUD ON TITLE.

The recording of a sheriff's certificate for sale of land under execution on a judgment against a third person would constitute a cloud upon title, and would authorize a suit to quiet title as against such cloud.

2. BANKRUPTCY ⇨387—DISCHARGE OF BANKRUPT—JUDGMENT LIEN.

A discharge of a bankrupt, after adjudication of bankruptcy by a composition, does not discharge a lien of a judgment rendered more than four months prior to the filing of the petition in bankruptcy.

3. BANKRUPTCY ⇨387—COMPOSITIONS WITH CREDITORS—JUDGMENT LIENS—“DISCHARGE.”

Under Bankruptcy Act, §§ 12a, 14c (Comp. St. §§ 9596, 9598), providing that the confirmation of a composition shall discharge the bankrupt from his debts other than those “not affected by a discharge,” the lien of a judgment obtained more than four months prior to the filing of a petition in bankruptcy was not discharged by a composition with creditors prior to adjudication of bankruptcy; the word “discharge,” in the phrase “not affected by a discharge,” in the last-named section, referring to a discharge of the bankrupt after adjudication.

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

In Equity. Suit to quiet title by the Oilfields Syndicate against the American Improvement Company. Decree for defendant.

Charles W. Slack, of San Francisco, Cal., and O'Melveny, Milliken & Tuller, of Los Angeles, Cal., for plaintiff.

Wm. P. Hubbard, of San Francisco, Cal., for defendant.

TRIPPET, District Judge. This is a suit to quiet the title of plaintiff to certain real estate within the jurisdiction of this court. In order to understand the controversy, it will probably be well to state the facts chronologically:

On November 29, 1915, the American Improvement Company commenced an action against one Hammon. On October 19, 1916, judgment was entered in this suit in favor of the American Improvement Company and against Hammon. On November 8, 1916, a transcript from the docket of said judgment was recorded in Santa Barbara county, of this state, where the land in controversy lies. On September 6, 1917, Hammon sold this property to the plaintiff, and the deed was recorded on September 24, 1917. On September 27, 1917, a petition of involuntary bankruptcy was filed against Hammon. On August 31, 1918, a composition was confirmed by an order of the court in which said bankruptcy proceeding was instituted. The said Hammon was not adjudged a bankrupt. On September 19, 1918, the American Improvement Company caused execution to be issued to the sheriff of Santa Barbara county on its said judgment. On October 16, 1918, a certified copy of the order confirming the composition was recorded in Santa Barbara county. On October 23, 1918, Hammon made a motion to recall the execution on the ground that the composition had discharged him from his indebtedness and that the judgment lien, therefore, was satisfied. The superior court of San Francisco denied this motion to recall the execution and an appeal has been taken from that ruling of the court. On October 25, 1918, the sheriff sold said real estate in controversy under said execution to the American Improvement Company, the defendant herein and the plaintiff in the superior court action, for the sum of \$6,735.92. The next day the sheriff's certificate was recorded in Santa Barbara county.

[1] Of course, the recording of this certificate would constitute a cloud upon the title and would authorize the plaintiff to institute a suit to quiet the title to the property as against such cloud. The defendant herein did not take any steps in said bankruptcy proceeding and declined to do so; but what bearing that may have upon the case is not apparent to the court.

[2, 3] The plaintiff claims that there having been no adjudication of bankruptcy, and the alleged bankrupt being discharged by a composition, the lien of the judgment was avoided, although obtained more than four months prior to the filing of the petition in bankruptcy. The plaintiff contends that there is no provision in the Bankruptcy Law by which a lien of a judgment obtained prior to four months shall be preserved to the judgment creditor as against a discharge by composition prior to the adjudication of bankruptcy. Section 12a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 549, as amended by Act June 29, 1910, c. 412, § 5, 36 Stat. 839 [Comp. St. § 9596]) provides:

"A bankrupt may offer, *either before or after adjudication*, terms of composition to his creditors," etc.

The phrase, "either before or after adjudication," was added to the act by amendment of 1910. But for this amendment this suit never would have been commenced.

Section 14c provides:

"The confirmation of a composition shall discharge the bankrupt from his debts, other than * * * *those not affected by a discharge.*" Comp. St. § 9598.

This sentence was in the original act as here quoted. A solution of the proposition is determined by the meaning and application of the last phrase in section 14c; that is to say, what debts are *not affected by a discharge*? The word "discharge," in this phrase, refers to a discharge of the bankrupt after adjudication. It could not possibly refer to a discharge by composition before adjudication, for, as we have seen, at the time section 14c became a part of the Bankruptcy Act, there was no provision in the Bankruptcy Act for the discharge of a bankrupt prior to adjudication. The amendment of 1910 to section 12a, providing for a composition before adjudication, could not possibly have changed the meaning of the word "discharge" in the last phrase of section 14c.

It is well settled, and the plaintiff concedes, that a discharge of a bankrupt, after adjudication of bankruptcy, by a composition, does not discharge a judgment lien rendered more than four months prior to the filing of a petition in bankruptcy. In such a case the judgment lien is not affected. The judgment creditor holds the lien upon the property as against the bankrupt's creditors and the bankrupt. This necessarily answers the proposition of the plaintiff. Such a judgment is "not affected by a discharge."

UNION WATER DEVELOPMENT CO. v. STEVENSON et al. (two cases).

(District Court, N. D. California, Second Division. April 7, 1919.)

No. 16174, at Law, and No. 411, in Equity.

PROCESS ⇄ 120—SERVICE—PRIVILEGE.

Service on the chief executive officer of a fraternal order resident in another state, while temporarily in the state of service to give testimony in an action against the order, *held* void, despite the officer's incidental attendance at a business conference between the secretary of the investment board of the order and a third person, which did not constitute other and independent business on the part of the officer than that of attending as a witness.

At Law and in Equity. Actions by the Union Water Development Company against Elliott G. Stevenson and the Independent Order of Foresters. On motions to quash service of process. Motions granted.

R. P. Henshall, of San Francisco, Cal., for plaintiff.

Corbet & Selby, of San Francisco, Cal., for defendants.

VAN FLEET, District Judge. These actions were filed in the state court on June 3, 1918, and on the same day summons in each was served on the defendant Stevenson under coincident circumstances. The cases were subsequently removed here, and Stevenson has inter-

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

posed the present motions to quash the service, on the ground that it was in both instances made in violation of his rights under the familiar and well-established doctrine that one from another state cannot competently be served with process in a civil action while temporarily within the state where service is had, in actual attendance upon a trial as party, witness, or counsel in a court of justice, and is present solely for such purpose.

The facts are substantially lacking in conflict. Stevenson is a resident of Detroit, Mich. For a number of years up to September, 1917, he had been chief executive officer of the Independent Order of Foresters, his codefendant, and as such had become familiar with and had to do with certain business transactions of the order in this state. One of these had resulted in an action against the order, which was set for trial in the superior court of the state at San Francisco for May 27, 1918. Stevenson's testimony in the case was required, and in due course he was requested by counsel for the defendant to appear as a witness at the trial, which he did. He had no other purpose in coming to the state than as such witness, and but for such request would not have been here. He arrived the day before the trial commenced, and remained throughout its progress, which covered several days, being required by order of the court, against his request to be excused after giving his evidence, to remain in attendance, upon the contingency of being required to take the stand again. The service was made in the court building in the midst of the trial and several days before it was finished.

These facts bring the case fully within the most restricted application of the doctrine invoked as applied in the federal court, in any modern case, and clearly render the service void (*Stewart v. Ramsay*, 242 U. S. 128, 37 Sup. Ct. 44, 61 L. Ed. 192, and numerous cases there cited), unless excepted from the operation of the rule by the circumstance to be stated.

During a recess in the trial, of two or three days, occasioned by the intervention of Decoration Day, Mr. Cottrelle, the secretary of the investment board of the defendant order, who was also attending the trial, requested one Haehl to come to San Francisco and discuss with him a matter of business between Haehl and the order which fell within the authority and supervision of Cottrelle. Stevenson, having familiarity with the transaction to be considered, by reason of his previous relations to the order, and not being otherwise engaged, attended the discussion, and being asked by Cottrelle while there to look over a proposed contract or agreement, made suggestion of a change in one particular therein, but, as he states, "with no authority or responsibility in connection with the negotiation," and that he "had no thought or expectation of taking any part in such conference at the time he went to San Francisco, and did not go for that purpose, or for any purpose than to attend the trial of said cause as a witness"; that he "only participated in the discussion because for the time being he was not otherwise occupied."

Based upon this incident it is contended by plaintiff that Stevenson is not within the protection of the rule invoked, because it thus ap-

pears that he engaged while here "in other and independent business" than that of attending as a witness. But I am unable to accord to the incident such effect. The doctrine relied on is one of substantial right, is founded on principles of justice and propriety, and is not beset by any such restricted limitation. *Burroughs v. Cocke et al.* (Okl.) 156 Pac. 196, L. R. A. 1916E, 1170; *Roschynialski v. Hale* (D. C.) 201 Fed. 1017. It would be sacrificing substance to form, and giving an untoward and incidental thing a controlling effect, which its character does not warrant. The attendance of Stevenson at the interview was a mere casual and unforeseen incident arising during his necessary detention on the trial, was not contemplated in the purpose bringing him to the state, and can in no proper sense be regarded as the engaging by him in "business" outside the original object of his visit. Had he voluntarily delayed his departure from the state, after his dismissal as a witness, to attend the discussion in question, it might well present a different aspect. But a denial of the protection of the rule in question should not be based upon a circumstance so trivial and unsubstantial. *Burroughs v. Cocke et al.*, supra.

In answer to the contention that the service in question would be held good under the state law, and as these cases were removed here from a state court after the service was made it should be held good here, it is sufficient to say that it is well settled that the question is one to be determined in accordance with the principles obtaining in the federal courts, and is not to be circumscribed by a statute or rule of decision of the state. *Railroad Co. v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699; *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517.

The motion to quash is granted in each case.

UNITED STATES v. LYNCH.

(District Court, S. D. New York. December 20, 1918.)

1. CRIMINAL LAW ☞37—DEFENSES—ENTRAPMENT.

A defendant cannot be convicted of a crime which was provoked or induced by a government officer or agent, and which otherwise would not have been committed.

2. CRIMINAL LAW ☞37—DEFENSES—ENTRAPMENT.

The government held estopped from prosecuting a defendant for offering a bribe to secure a government contract for his firm on the ground that the offer was induced by an army officer at the instance of the Military Intelligence Department for the purpose of entrapment.

Criminal prosecution by the United States against Oscar J. Lynch. Verdict of acquittal directed.

Wm. H. Daly and M. Michael Edelstein, both of New York City, for defendant.

HOUGH, Circuit Judge (charging jury). I have spent some considerable time in reflecting upon what is a novel situation to me, and am

now prepared to dispose of this trial; a motion having been made on the part of the defendant on the whole case, and in respect to the second and third counts of the indictment, to dismiss or advise the jury to acquit. I have reduced my views to writing, and I will read them:

[1] It is plain and very old law that, while detectives and decoys are not only necessary, but praiseworthy, instruments in ascertaining whether a given person is committing or has committed crime, it is equally plain and old that detection exceeds its limits when the detective or the decoy provokes or creates a crime that would not otherwise have occurred. It is not always easy to apply this rule. Border line cases are difficult, and doubtless it is usually best to leave the matter to the jury when and if, in view of the evidence, a reasonable man would be justified in holding that the accused had the intent or desire to do that for which he is indicted, and seized and swallowed the bait that was laid for him.

After reflection and argument yesterday afternoon, when the gentlemen of the jury had retired or been excused, it is to me plain that in this case there is no contradiction of any vital or really important point of fact. Whether there were meetings, not only on September 19th, or on that day, and also a few days before, whether one man, months or years before that September last, borrowed money of the other, or whether one man ever said that he sometimes became unconscious, meaning thereby intoxicated, are no more than the trivial trimmings of the following outstanding and dominating facts:

[2] A man who expected to be an officer in the United States army, and had a very good reason to believe that he would be soon commissioned, was asked what he would want out of a government contract over which he seemed—only seemed—to have some control. He replied most properly, most honorably, "Nothing," because he was about to become an officer; and there the matter dropped on that occasion.

Later, days later, weeks later, at the instigation or by the order—it does not appear which, and it makes no difference which—of the governmental officers, or some of them, comprising the Department of Military Intelligence, this same man, now Capt. Fancher, said over the telephone that he had reconsidered this question of commission, when he had not reconsidered it at all, in truth and in fact, and then by his own statement he demanded money which he never expected to get in a manner that plainly seemed to say to the person to whom he made the demand:

"If you don't promise to pay secretly money to me, you don't get this government contract."

That was the trap or decoy. This, gentlemen, in my judgment as a lawyer, was going beyond all bounds; it was provoking and creating a crime; it provoked and created it by in effect and substance threatening loss if crime was not committed, and promising profit if it was committed. Under such circumstances the government is estopped from prosecuting on the ground that it caused and created that of which complaint is made.

Now, underlying this whole miserable affair is the fact that it all grew out of what I think is a dishonorable sort of commission, or com-

mission seeking that is all too common in this and every other commercial community; the story which you heard yesterday does not in substance and effect differ from the common and commonly known custom that, if a woman intrusts to her cook the business of going to the stores and procuring the sustenance for the family, buying it from grocers and butchers, the gift by the grocers and butchers to the cook is politely called a commission, for which, of course, the consumer pays in the long run, as the consumer generally pays for everything.

Now, that is not a pleasant thing to contemplate; but it is not, so far as the criminal law is concerned, unlawful. It is out of that bad custom that this poor business grew. The next source of growth was obviously the misdirected zeal of the Military Intelligence Department, or some of the officers of that department, who put Capt. Fancher in the position of a provoking agent. All of this makes me regret the whole occurrence. I may be permitted to say that I am sorry for every one concerned, but that does not change the law, which is that this prosecution cannot proceed, because it is an endeavor to punish a crime which would never have been committed if it had not been for the request, and I may almost say the threat, of the governmental officer to inflict loss, not upon the defendant, Lynch, personally, but upon his employing company, the Otis Lithographing Company, if they did not do the very thing for which this indictment is laid.

Therefore, gentlemen, I peremptorily advise you to acquit this defendant, and the clerk will enter verdict accordingly.

In re NATIONAL ENGINEERING & EQUIPMENT CO.

(District Court, W. D. Washington, N. D. September, 1918.)

SALES ⇨456—"CONDITIONAL SALE"—WHAT CONSTITUTES.

An agreement that motors might be rented at a stipulated monthly sum for an indefinite period, and that, if purchased, the first three months' rent should be applied on their purchase price held not a "conditional sale," within Rem. & Bal. St. Wash. § 3670, making unrecorded conditional sales of personalty absolute as to subsequent creditors in good faith, etc.

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

In Bankruptcy. In the matter of the National Engineering & Equipment Company, a corporation, bankrupt. Petition by C. Kirk Hillman for reclamation of property in the trustee's possession. Order of referee, directing return of property or purchase at list price, less three months' rental, affirmed.

Cassius E. Gates, of Seattle, Wash., for trustee.

Ballinger & Hutson, of Seattle, Wash., for claimant.

NETERER, District Judge. C. Kirk Hillman, between April 19 and September 1, 1917, delivered to the bankrupt six motors, 15, 7½, 10, 10, 50, 10 horse power, respectively, on a six months' rental basis at

\$1 per horse power per month. Three months' rent on each motor was to apply on the purchase price, if the motors were purchased. The rental was paid, but no purchase was made.

On September 1, 1917, the following letter was written for the express purpose of reducing the understanding between the parties to a definite form, and it is contended by the trustee that it is a conditional sale or lease within the provisions of section 3670, Rem. & Bal. Statutes of Washington. After reciting the clause relative to rentals as stated, it continues:

"It is further agreed and understood that, at any time you wish to purchase these motors, you will receive a credit equal to the first three months' rent which you will have paid. It is further understood that you can continue to rent these motors as long as you desire, or to purchase them outright at any time. As stated above, this letter is simply a memorandum for your files and as a confirmation of our understanding. If this is not correct in every way, kindly advise us by return mail, so that everything may be correctly understood before the writer leaves for the East."

Nothing further was done with relation to purchase, and rental was paid until the adjudication, April 26, 1918.

The issue upon the petition of Hillman for reclamation of the property was tried before the referee, and an order made, directing the return of the property or the purchase at the list price, less three months' rental, which the claimant agreed might be done. The trustee brings this order here for review.

I think the referee was right in his conclusions. The lease agreement does not show, and the letter relied upon and quoted does not establish a contract of sale between the parties. There is no element of a conditional sale embodied; there is no agreement to buy; there is no agreement to pay any price; there are none of the elements of bargain and sale; there is no understanding by which the bankrupt could become possessed of the title to the property by the payment of any sum of money as rentals. The only right the bankrupt had was the use of the motors so long as the rent was paid, unless a subsequent purchase was made. The conditional sale statute of Washington, cited by the trustee, was discussed at some length. In *re Caldwell Machinery Co.* (D. C.) 215 Fed. 428.

An order confirming the order of the referee may be entered.

MEMORANDUM DECISIONS.

ALLANWILDE TRANSPORT CORPORATION v. PIDWELL. (Circuit Court of Appeals, Third Circuit. March 10, 1919.) No. 2387. Appeal from the District Court of the United States for the District of New Jersey; John Rellstab, Judge. Libel by A. W. Pidwell against the Allanwilde Transport Corporation. A decree for libelant (247 Fed. 236) was appealed to the Circuit Court of Appeals, which certified certain questions to the federal Supreme Court; the questions being answered in 248 U. S. 377, 39 Sup. Ct. 147, 63 L. Ed. —. Decree reversed, and bill dismissed. Duncan & Mount, of New York City, for appellant. Barry, Wainwright, Thacher & Symmers, of New York City, for appellee. Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. It is ordered that the decree below be reversed, and that the bill be dismissed, with all costs to the claimant.

ALLANWILDE TRANSPORT CORPORATION v. VACUUM OIL CO. (Circuit Court of Appeals, Third Circuit. March 10, 1919.) No. 2337. Appeal from the District Court of the United States for the District of New Jersey; John Rellstab, Judge. Libel by the Vacuum Oil Company against the Allanwilde Transport Corporation. A decree for libelant (247 Fed. 236) was appealed to the Circuit Court of Appeals, which certified certain questions to the federal Supreme Court, which were answered in 248 U. S. 377, 39 Sup. Ct. 147, 63 L. Ed. —. Decree reversed, and libel dismissed. Duncan & Mount, of New York City, for appellant. Barry, Wainwright, Thacher & Symmers, of New York City, for appellee. Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. The controversies in this case and in the companion case of *Allanwilde Transport Corporation v. A. W. Pidwell*, 256 Fed. 987, — C. C. A. —, grew out of an order of the government refusing clearance to any sailing vessel bound for the war zone, and involved questions of law, whether the said order frustrated the adventure, and in consequence relieved the carrier from further obligation (1) to carry the cargo and (2) to return the prepaid freight. As the government's order affected many carriers and shippers on the Atlantic seaboard, raising similar or kindred controversies, we certified the questions to the Supreme Court. As the Supreme Court has answered these questions in the affirmative (248 U. S. 377, 39 Sup. Ct. 147, 63 L. Ed. —), we now order that the decree below be reversed, and that the libel be dismissed, with all costs to the claimant.

BRADY v. SOUTH SHORE TRACTION CO. et al. (Circuit Court of Appeals, Second Circuit. January 15, 1919.) No. 140. Appeal from the District Court of the United States for the Eastern District of New York. Suit by Paul T. Brady against the South Shore Traction Company. From an order and decree of the District Court, A. H. Flint & Co. appeal. Affirmed. See, also, 233 Fed. 778. M. & S. Meyers, of New York City (Morse S. Hirsch and Samuel Meyers, both of New York City, of counsel), for appellant. A. C. Hume, of New York City, for complainant. Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

THE CHARLES F. MAYER, THE HOWARD. (Circuit Court of Appeals, Fourth Circuit. January 7, 1919.) Nos. 1603, 1604. Appeals from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge. Suits for collision by the Consolidation Coastwise Company, the Consolidation Coal Company, and James Ressler

against the Merchants' & Miners' Transportation Company, and by the Merchants' & Miners' Transportation Company against the Consolidation Coastwise Company. From a decree dividing the damages (253 Fed. 599), the Merchants' & Miners' Transportation Company in the first suit, and the Consolidation Coastwise Company in the second suit, appeal. Affirmed. J. Walter Lord, of Baltimore, Md., for appellant in No. 1603 and appellees in No. 1604. Clifton S. Brown, of Baltimore, Md. (Daniel H. Hayne, of Baltimore, Md., on the brief), for appellee in No. 1603 and appellant in No. 1604. Before KNAPP and WOODS, Circuit Judges, and McDOWELL, District Judge.

PER CURIAM. We find no error. The opinion of the trial court (253 Fed. 599) is adopted as the opinion of this court. The decree below is affirmed. The costs in this court of the Consolidation Coal Company and of James Ressler are to be taxed equally against Merchants' & Miners' Transportation Company and Consolidation Coastwise Company. The remaining taxable costs of these appeals are to be equally borne by said last two companies. Affirmed.

CHARLTON v. CHESAPEAKE & O. RY. CO. (Circuit Court of Appeals, Fourth Circuit. February 15, 1919.) No. 1672. In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddell, Jr., Judge. Action by Evelyn Charlton, administratrix of the estate of James H. Charlton, deceased, against the Chesapeake & Ohio Railway Company. Judgment for defendant and plaintiff brings error. Affirmed. Certiorari denied. 249 U. S. —, 39 Sup. Ct. 388, 63 L. Ed. —. J. Winston Read, of Newport News, Va., for plaintiff in error. William Leigh Williams, of Norfolk, Va., for defendant in error. Before PRITCHARD and KNAPP, Circuit Judges, and CONNOR, District Judge.

PER CURIAM. This case was before this court at the November term, 1917, and, upon full argument and careful consideration, for the reasons set forth in the opinion of Judge Pritchard, judgment for the present plaintiff in error was reversed (247 Fed. 34, 159 C. C. A. 252), and a petition for rehearing was denied February 8, 1918. Upon the second trial upon the same evidence introduced at the first, the District Judge directed a verdict for defendant, and to this the plaintiff excepted and assigned the giving such direction as error. Counsel for plaintiff in his brief does not suggest that the evidence in the second trial was in any respect different from the first, nor does he suggest any controlling authority upon the case since the decision was rendered. We can add nothing to the well-considered opinion of Judge Pritchard, nor perceive any aspect of the case not discussed and disposed of therein. The present writ of error appears to be an invitation to the court to reconsider and reverse the conclusions reached on the first writ of error. The judgment is affirmed.

DONOHUE et al. v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. March 4, 1919.) No. 3215. In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge. S. E. Murray, of Memphis, Tenn., for plaintiff in error. Wm. D. Kyser, U. S. Atty., of Memphis, Tenn., for the United States.

PER CURIAM. Judgment of District Court affirmed.

GALION IRON WORKS CO. v. OHIO CORRUGATED CULVERT CO. (Circuit Court of Appeals, Sixth Circuit. November 14, 1918.) No. 3231. In Error to the District Court of the United States for the Northern District of Ohio; D. C. Westenhaver, Judge. Harry Frease, of Canton, Ohio, W. J. Geer, of Galion, Ohio, C. P. Byrnes, of Pittsburgh, Pa., and Luther Day, of Cleveland, Ohio, for plaintiff in error. Wallace R. Lane, of Chicago, Ill., William L. Day, of Cleveland, Ohio, and C. J. Loftus, of Chicago, Ill., for defendant in error.

PER CURIAM. Dismissed on stipulation.

(266 F.)

GRAND RAPIDS & I. RY. CO. v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. May 15, 1918.) No. 3145. In Error to the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge. James H. Campbell, of Grand Rapids, Mich., for plaintiff in error. Myron H. Walker, U. S. Atty., of Grand Rapids, Mich., for the United States.

PER CURIAM. Judgment (239 Fed. 153) of District Court affirmed.

HAYS v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. March 4, 1919.) No. 3223. In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge. A. B. Galloway, of Memphis, Tenn., for plaintiff in error. Wm. D. Kyser, U. S. Atty., of Memphis, Tenn., for the United States.

PER CURIAM. Judgment of the District Court affirmed.

HIMYAR COAL CORPORATION v. LAWSON. (Circuit Court of Appeals, Sixth Circuit. June 4, 1918.) No. 3147. In Error to the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge. B. R. Jouett, of Winchester, Ky., for plaintiff in error. C. W. Napier, of Hazard, Ky., for defendant in error.

PER CURIAM. Dismissed on motion of counsel.

INTERNATIONAL HARVESTER COMPANY OF AMERICA v. BURLEIGH. (Circuit Court of Appeals, Second Circuit. February 13, 1919.) No. 128. In Error to the District Court of the United States for the Western District of New York. Action by Cecil A. Burleigh against the International Harvester Company of America for personal injuries. Judgment for plaintiff, and defendant brings error. Affirmed. E. W. Personius, of Elmira, N. Y., for plaintiff in error. Stowell & Ryon, of Corning, N. Y. (Herbert A. Heminway, of Corning, N. Y., of counsel), for defendant in error. Before ROGERS and MANTON, Circuit Judges, and LEARNED HAND, District Judge.

PER CURIAM. Judgment affirmed.

KOERBER v. HILBRETH. (Circuit Court of Appeals, Sixth Circuit. November 4, 1918.) No. 3242. Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge. Barthel, Flanders & Barthel, of Detroit, Mich., for appellant. Pagelsen & Spencer, of Detroit, Mich., for appellee.

PER CURIAM. Dismissed on motion.

MATHEWS v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. February 13, 1919.) No. 3219. In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge. John H. Poston, Jr., of Memphis, Tenn., for plaintiff in error. Wm. D. Kyser, U. S. Atty., of Memphis, Tenn., for the United States.

PER CURIAM. Judgment of District Court affirmed.

MILLER et al. v. PETROLEUM IRON WORKS CO. (Circuit Court of Appeals, Sixth Circuit. October 14, 1918.) No. 3177. In Error to the District Court of the United States for the Northern District of Ohio; D. C. Westenhaver, Judge. H. B. Gill, of Philadelphia, Pa., and G. P. Gillmer, of Warren, Ohio, for plaintiffs in error. Osborne Mitchell, of Sharon, Ohio, and T. I. Gillmer, of Warren, Ohio, for defendant in error.

PER CURIAM. Dismissed on motion of defendant in error.

MILLER v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. January 15, 1919.) No. 131. In Error to the District Court of the United States for the Eastern District of New York. Criminal prosecution by the United States against Lena Miller. Judgment of conviction, and defendant brings error. Affirmed. Paul Kahan, of Brooklyn, N. Y., for plaintiff in error. Melville J. France, U. S. Atty., of Brooklyn, N. Y. (Charles J. Buchner, Sp. Asst. U. S. Atty., of Brooklyn, N. Y., of counsel), for the United States. Before WARD, ROGERS, and MANTON, Circuit Judges.

PER CURIAM. Judgment affirmed.

PENNSYLVANIA CO. v. BALES. (Circuit Court of Appeals, Sixth Circuit. March 5, 1919.) No. 3237. In Error to the District Court of the United States for the Northern District of Ohio; D. C. Westenhaver, Judge. Squire, Sanders & Dempsey and T. M. Kirby, all of Cleveland, Ohio, for plaintiff in error. Anderson & Lamb and J. J. Tetlow, all of Youngstown, Ohio, for defendant in error.

PER CURIAM. Dismissed on motion of plaintiff in error.

PERKINS v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. January 14, 1919.) No. 3228. In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge. Abe Cohn, of Memphis, Tenn., for plaintiff in error. Wm. D. Kyser, U. S. Atty., of Memphis, Tenn., for the United States.

PER CURIAM. Dismissed on motion of plaintiff in error.

PERKINS v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit, January 14, 1919.) No. 3229. In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge. Abe Cohn, of Memphis, Tenn., for plaintiff in error. Wm. D. Kyser, U. S. Atty., of Memphis, Tenn., for the United States.

PER CURIAM. Dismissed on motion of plaintiff in error.

RUDOLF v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. January 15, 1919.) No. 121. In Error to the District Court of the United States for the Eastern District of New York. Criminal prosecution by the United States against John Rudolf. Judgment of conviction, and defendant brings error. Affirmed. A. S. Drescher, of Brooklyn (Isadore Oshlag, of Brooklyn, on the brief), for plaintiff in error. Melvin J. France, of Brooklyn, U. S. Atty., and Vine H. Smith, Asst. U. S. Atty., of New York City. Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Judgment affirmed.

SEARS v. CITY OF AKRON. (Circuit Court of Appeals, Sixth Circuit. April 11, 1918.) No. 2853. Appeal from the District Court of the United States for the Northern District of Ohio; D. C. Westenhaver, Judge. Carroll G. Walter and John L. Wells, both of New York City, for appellant. Scott Kenfield, City Atty., of Akron, Ohio, Tolles, Hogsett, Ginn & Morley, of Cleveland, Ohio, and Jonathan Taylor, of Akron, Ohio, for appellee.

PER CURIAM. Dismissed pursuant to stipulation.

SOUTHERN RY. CO. v. SHELTON. (Circuit Court of Appeals, Sixth Circuit. January 17, 1919.) No. 3261. In Error to the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge. L. D. Smith, of Knoxville, Tenn., for plaintiff in error. W. T. Kennerly, of Knoxville, Tenn., for defendant in error. For opinion below, see 255 Fed. 182.

PER CURIAM. Dismissed on motion of defendant in error.

STETSON v. TUTTLE, District Judge. (Circuit Court of Appeals, Sixth Circuit. August 8, 1918.) No. 3200. Petition for Writ of Mandamus. Frans. E. Lindquist, of Kansas City, Mo., and Lazarus S. Davidow, of Detroit, Mich., for petitioner.

PER CURIAM. Petition for mandamus denied.

TROY SUNSHADE CO. v. KILLITS, District Judge. (Circuit Court of Appeals, Sixth Circuit. October 14, 1918.) No. 3196. Petition for Writ of Prohibition. Allen & Allen, of Cincinnati, Ohio, for petitioner. Chester H. Braselton and Wilber Owen, both of Toledo, Ohio, opposed.

PER CURIAM. Dismissed on motion of counsel.

VILLAGE OF ALGER, OHIO, v. CHICAGO & E. R. CO. (Circuit Court of Appeals, Sixth Circuit. March 5, 1919.) No. 3170. Appeal from the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge. C. W. Faulkner, of Kenton, Ohio, for appellant. Frank S. Lewis, of Toledo, Ohio, for appellee.

PER CURIAM. Reversed and remanded to District Court for purpose of correcting record and entry of new decree.

WAGNER v. HOLLISTER, District Judge. (Circuit Court of Appeals, Sixth Circuit. November 14, 1918.) No. 3151. Petition for Writ of Mandamus. Toulmin & Toulmin and E. H. & W. B. Turner, all of Dayton, Ohio, for petitioner. Reeve Lewis, C. A. L. Massie, and Ralph L. Scott, all of New York City, opposed.

PER CURIAM. Remanded to the District Court for determination.

WEBB et al. v. UNITED STATES. (Circuit Court of Appeals, Sixth Circuit. May 8, 1919.) No. 3063. In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge. Ralph Davis, of Memphis, Tenn., for plaintiff in error. Wm. D. Kyser, U. S. Atty., of Memphis, Tenn., for the United States.

PER CURIAM. Judgment of District Court affirmed.

AUTOPIANO CO. v. OTTO HIGEL CO., Inc.

(Circuit Court of Appeals, Second Circuit. January 15, 1919.)

No. 142.

PATENTS ⇨328—INFRINGEMENT—NOTE SHEET GUIDE.

A decree holding valid and infringed O'Connor reissue patent, No. 13,398 (original No. 789,053), for a perforated note sheet guide for player pianos, affirmed.

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

Suit in equity by the Autopiano Company against the Otto Higel Company, Incorporated. Decree for complainant, and defendant appeals. Affirmed.

Otto Munk, of New York City (William F. Hall, of Syracuse, N. Y., of counsel), for appellant.

L. W. Southgate, of New York City, for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

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

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